

DCODE v Paley

2011 NY Slip Op 33974(U)

November 28, 2011

Supreme Court, New York County

Docket Number: 105696/10

Judge: Barbara R. Kapnick

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

BARBARA R. KAPRICK

PRESENT: _____ J.S.C. Justice

PART 39

DCode

INDEX NO. 600504/10

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Josh Weiss Glass

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11/28/11

BARBARA R. KAPRICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X
DCODE, a division of CURIOUS HOLDINGS,
LLC,

Plaintiff,

-against-

JONATHAN PALEY, LIGHTSPEED HOLDINGS,
LLC, LIGHTSPEED FINANCIAL, INC., and
LIGHTSPEED TRADING, LLC,

Defendants.

DECISION/ORDER

Index No. 105696/10
Motion Seq. 001

-----X
DCODE, a division of CURIOUS HOLDINGS,
LLC,

Plaintiff,

-against-

JOSH WEISSGLASS,

Defendant.

Index No. 600504/10
Motion Seq. 001

-----X
BARBARA R. KAPNICK, J.:

The following decision shall be filed separately under Index Nos. 105696/10 and 600504/10. Pending before this Court are two motions to dismiss, pursuant to CPLR 3211(a)(1) and (7), in two related actions that are consolidated for decision.

Under Index No. 105696/10 (the "Paley Action"), plaintiff DCODE ("plaintiff" or "DCODE") asserts claims against defendants Jonathan Paley ("Paley"), Lightspeed Holdings, LLC, Lightspeed

Financial, Inc., and Lightspeed Trading, LLC (collectively, "Lightspeed", and with Paley, "defendants") for breach of contract against Paley (first cause of action); fraud against all the defendants (second cause of action); fraud in the inducement against all the defendants (third cause of action); tortious interference with contract against Paley (fourth cause of action); intentional interference with contract against Lightspeed (fifth cause of action); tortious interference with prospective advantage against Paley (sixth cause of action); conversion against Paley (seventh cause of action); misappropriation against Paley (eighth cause of action); unfair competition against Paley (ninth cause of action); diversion of corporate opportunity against Paley (tenth cause of action); breach of fiduciary duty and duty of loyalty against Paley (eleventh and twelfth causes of action); breach of contract against Lightspeed (thirteenth cause of action); breach of implied contract against Lightspeed (fourteenth cause of action); and unjust enrichment against Lightspeed (fifteenth cause of action).

These claims arise, largely, from allegations that Paley, while an employee of plaintiff, engaged in behavior that was in violation of his employment agreement, including soliciting clients and employees of plaintiff to leave DCODE and join Paley at a new

entity formed for the purpose of competing with plaintiff, once Paley's employment relationship with DCODE ended.

Under Index No. 600504/10 (the "Weissglass Action"), plaintiff asserts claims against Josh Weissglass ("Weissglass"), a former employee of DCODE, for breach of contract (first cause of action); fraud (second cause of action); intentional interference with contract (third cause of action); conversion (fourth cause of action); and misappropriation of trade secrets (fifth cause of action). Like the claims asserted in the Paley Action, these claims are based on allegations that Weissglass, in violation of his at-will employment agreement, solicited plaintiff's clients to move to a competing entity started by Paley, and converted plaintiff's property.

I. The Paley Action

Background

Curious Holdings, LLC ("Curious") is a full-service advertising and media production company. DCODE, a division of Curious, is responsible for creating internet advertising and making online media buys related thereto.

Pursuant to an Employment Agreement dated March 1, 2005, effective January 1, 2005 through December 31, 2009 (the

"Employment Agreement"), Paley was employed by plaintiff as a Partner for Curious and a Managing Director for DCODE (see Amended Complaint ¶ 11). Paley's duties, for which he was paid a salary of \$250,000.00 annually, included, among other things, serving as account executive on existing accounts, soliciting new business opportunities, supervising all staff working on accounts, hiring talent, attending weekly management meetings and leveraging his contacts and experience in any way which might benefit other Curious divisions (*id.*).

The Employment Agreement contains a provision restraining Paley from soliciting Curious' clients or employees for a period of six months from the last date of employment, if Paley terminates the Employment Agreement (*id.* ¶ 13). During the term of his employment, Paley executed agreements with several new clients on behalf of Curious, including with defendant Lightspeed (*id.* ¶ 23).

In January 2009, DCODE and Paley began negotiations to continue Paley's employment with plaintiff after the Employment Agreement expired (*id.* ¶ 16). Those negotiations continued through December 30, 2009, without the parties reaching agreement (*id.*). In April 2009, Paley was advised that plaintiff had no obligation to and would not reimburse Paley for the personal legal fees he had incurred in connection with the ongoing negotiations (*id.* ¶ 17).

Upon receiving this information, Paley became "enraged" and began, immediately, without DCODE's knowledge or consent, to take steps to leave the company (*id.*).

Toward this end, in April 2009, Paley allegedly began to solicit competitive advertising agencies to take on DCODE's business, advising such agencies that he would be able to bring with him all the business and clients of DCODE (*id.* ¶ 18). At the same time, Paley began to take substantial steps, utilizing plaintiff's resources and confidential information, to form a competitive business, later called The Vault, which Paley purportedly operated from plaintiff's offices, while he was still an employee of plaintiff (Amended Complaint ¶ 19). In addition, and also in April 2009, Paley allegedly solicited DCODE's employees to work for him at his new business (*id.* ¶ 21).

Plaintiff further alleges that in April 2009, as part of the planning for his departure, Paley conspired to provide services to clients of DCODE with the expectation that he would receive income from those services through his new entity, after his Employment Agreement expired (Amended Complaint ¶¶ 20,22). This alleged conspiracy included clients, vendors and employees of DCODE (*id.* ¶ 22).

In this connection, plaintiff claims that Paley entered into an agreement dated April 28, 2009 with Lightspeed (the "Lightspeed Agreement") (*id.* ¶ 23). Under the terms of the Lightspeed Agreement, plaintiff would provide media services to Lightspeed from April 2009 through January 2010, in exchange for Lightspeed's payment of \$1,200,000.00, to be paid in four equal payments of \$300,000.00 made each quarter in advance of plaintiff providing those services (*id.*). DCODE claims that it provided services to Lightspeed in accordance with their agreement, through December 31, 2009 (*id.* ¶ 24). DCODE further claims that Paley never provided the signed contract to plaintiff, and upon his departure from plaintiff's employ, Paley removed the original and all copies of the Lightspeed Agreement from the premises of DCODE (*id.* ¶ 25).

Plaintiff acknowledges that Lightspeed paid three of the four invoices of \$300,000.00 through October 2009 (*id.*). However, in November 2009, Paley instructed plaintiff's accounting department not to invoice Lightspeed for the final amount of \$300,000.00 that was allegedly due and owing under the Lightspeed Agreement (*id.* ¶ 32). Instead, on January 7, 2010, Paley, through his new company, The Vault, invoiced and received payment from Lightspeed in the amount of \$300,000.00, funds that plaintiff claims were due to DCODE in November 2009 pursuant to the Lightspeed Agreement (*id.* ¶ 46). Plaintiff alleges that Paley and Lightspeed intentionally

stalled payment on the last invoice until after Paley left DCODE, to defraud plaintiff (*id.*). Further, DCODE alleges that in January 2010, after Paley left DCODE's employ, Lightspeed renewed its contract, valued at \$1,000,000.00, for services that would be provided by Paley through his new venture (*id.* ¶ 50).

As further evidence of Paley's bad-faith conduct, plaintiff alleges that in June 2009, Paley purchased a personal computer and returned his office computer to DCODE (*id.* ¶ 29). Paley allegedly copied all of plaintiff's confidential records including all communications with clients, client projects and client contracts, onto his personal computer (*id.*). On December 7, 2009, Paley registered the domain name "thevaultnyc.com" (*id.* ¶ 33). On December 16, 2009, Paley and DCODE employee Weissglass exchanged an email detailing all the current projects under contract to DCODE, including the Lightspeed Agreement. The email, entitled "HAND OFF," is written to Paley from Weissglass using his thevaultnyc.com email address (*id.* ¶ 34). Throughout this period, Paley was repeatedly assuring DCODE that he wanted to continue his employment relationship with plaintiff (*id.* ¶ 35).

On December 31, 2009, the Employment Agreement expired. On January 7, 2010, although Paley was no longer employed by DCODE, Paley entered DCODE's premises with the apparent assistance of

Weissglass (*id.* ¶ 41). The same day, plaintiff discovered that its client and work files had been removed from the premises and file cabinets were empty; computers were removed or had been wiped clean and other property was missing (*id.* ¶ 43). Plaintiff surmises, based on the amount of material removed and the recorded history of employee entrances into its facility, that its records had been removed prior to December 19, 2009, by Paley and Weissglass (*id.*).

At the time that the Employment Agreement expired, plaintiff claims it told Paley he was not permitted to compete with or solicit clients for a period of six months (*id.* ¶ 39). Nevertheless, in January 2010, plaintiff discovered that Paley was servicing former clients of DCODE at his new company and was advising these clients that he had plaintiff's consent and authorization to transition all of DCODE's business to his new enterprise (*id.* ¶ 45).

DCODE claims that it never gave such consent to Paley. Rather, plaintiff contends that it has consistently taken the position, from the time Paley left its employ through the date it commenced this action, that Paley is not entitled to service plaintiff's clients (*id.* ¶ 40).

Procedural Background

On or about February 26 2010, DCODE commenced an action against Lightspeed, asserting six causes of action (the "Lightspeed Action", Index No. 600503/10). In the Lightspeed Action, plaintiff alleged (as it does in the Paley Action) that Lightspeed owed it \$300,000.00 pursuant to a contract, namely, the Lightspeed Agreement (see Index No. 600503/10, Complaint, ¶¶ 9-11). The case was assigned to Justice Melvin L. Schweitzer.

On February 26, 2010, DCODE commenced the Weissglass Action.

On April 29, 2010, DCODE commenced the Paley Action, asserting eleven causes of action against Paley.

In a Decision and Order dated May 24, 2010, Judge Schweitzer granted, without prejudice, Lightspeed's motion to dismiss the complaint in the Lightspeed Action, including claims for breach of contract, breach of implied contract, unjust enrichment, fraud in the inducement, intentional interference with contract and fraud. In dismissing the breach of contract claims, the Court noted that the only document before it, a 2009 Marketing Budget containing cost estimates, was not, by its terms, an enforceable contract:

The complaint cites as the contract "an agreement on or about April 28, 2009," which it does not attach to the complaint. The only document submitted to the court is the

document entitled Lightspeed Marketing Budget 2009 signed on April 29, 2009. The budget states that (i) "all costs are estimates; (ii) the estimate "is contingent upon final production calendar & deliverables list;" and (iii) the "[b]udget [is] pending final Media Plan." Lightspeed points out that these representations afforded Lightspeed the right to spend as much or as little on media services as it wanted and that, in fact, Lightspeed did spend, and pay DCODE \$900,000 in 2009 for media services.

The Court held that this document was "sufficient to refute DCODE's allegations that there was an agreement between the parties".

On June 7, 2010, relying on, *inter alia*, the fact that the dismissal of its claims in the Lightspeed Action was "without prejudice," DCODE filed its First Amended Complaint in the Paley action, adding Lightspeed as a defendant and asserting additional causes of action.

Discussion

A. First Cause of Action: Breach of Contract (against Paley)

Under this cause of action, plaintiff alleges that Paley breached his Employment Agreement by "soliciting Plaintiff Clients, providing services to Plaintiff Clients, soliciting Plaintiff Employees, competing with Plaintiff's business and providing false information to and on behalf of Plaintiff Vendors while employed by Plaintiff" (Amended Complaint ¶ 63).

The "essential elements of a cause of action to recover damages for breach of contract [are]: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

Pursuant to CPLR 3211 (a)(1), Paley contends that this claim must be dismissed because documentary evidence in the form of emails between Paley and Jan Korbelin ("Korbelin"), CEO of Curious, DCODE's parent company, sent in December 2009, demonstrate that DCODE "ordered Paley to take full responsibility of all existing and new business of DCODE".

Specifically, Paley claims that an email he received from Korbelin dated December 23, 2009 (the "December 23rd email"), authorized and required him to (i) take all existing business with him - including the "costs" associated with it; (ii) take responsibility for all new business; (iii) take any "employees related to DCODE" with him; and (iv) leave DCODE "in a clean status".

It is Paley's contention that this email establishes that Curious did not want any of DCODE's business past December 31, 2009

since it had no way of servicing the clients once Paley and Weissglass left plaintiff. In light of Korbelin's instructions, Paley argues that any allegation that he improperly solicited clients in breach of his Employment Agreement, or otherwise damaged plaintiff through his actions, necessarily fails as a matter of law.

However, regardless of whether the December 2009 email supports Paley's claim that he was authorized in December 2009 to assume all of DCODE's business, Paley's argument must fail. Here, plaintiff's claim is predicated on allegations that Paley's breach of his Employment Agreement began as early as April 2009, well before any of the December 2009 emails on which Paley bases his argument for dismissal (see e.g. Amended Complaint ¶¶ 18,19,21 and 30; also compare Employment Agreement ¶ 2 ["Your DCODE job responsibilities include . . . [s]oliciting new business opportunities"] with Amended Complaint ¶ 30 ["On or about June 2009 Defendant Paley ceased soliciting new business on behalf of Plaintiff and actively delayed new business opportunities to Plaintiff..."]).

Accordingly, plaintiff has at least stated a claim against Paley for breach of his Employment Agreement.

B. Second Cause of Action: Fraud (against Paley and Lightspeed)
Third Cause of Action: Fraud in the Inducement (against Paley and Lightspeed)

To state a claim for fraud, or fraudulent inducement, a plaintiff must allege "a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010] [fraud claim]); *Twin Holdings of Delaware LLC v CW Capital, LLC*, 26 Misc3d 1214[A] at *10 [Sup Ct, Nassau County 2010] [fraudulent inducement claim]).

Furthermore, "[w]here a cause of action ... is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). "Although there is certainly no requirement of 'unassailable proof' at the pleading stage, the complaint must 'allege the basic facts to establish the elements of the cause of action'" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citation omitted]). The basic facts to be alleged include "the individuals who made the misrepresentations, when they were made and the content of the misrepresentations." (*Barker v Time Warner Cable, Inc.*, 24 Misc 3d 1213[A] at *9, [Sup Ct, Nassau County 2009]).

Here, two groups of alleged misrepresentations form the core of DCODE's fraud claims against defendants. First, against Paley, plaintiff alleges:

From April 2009 through December 2009, Defendant repeatedly assured Plaintiff that Defendant wanted to remain working with the Plaintiff, that Defendant was using his best efforts to solicit and service business on behalf of Plaintiff, and that Defendant would exceed revenue projections. All of the statements were false and made intentionally to hide the fact that Defendant was surreptitiously stealing all of Plaintiff's business, booking fraudulent charges to the company, and conspiring with employees to leave the company as soon as the Agreement terminated, while pretending to be loyal to the company, with the specific intention of receiving the benefits of the Paley Agreement but avoiding the responsibilities owed to the Plaintiff pursuant to the Paley Agreement.

(Amended Complaint ¶ 35).

Second, and in connection with the Lightspeed Agreement, DCODE alleges that:

[a]ll statements and actions of [Paley and Lightspeed] in presenting the Lightspeed Agreement to Plaintiff were false, misleading and made with the intention to deceive Plaintiff.

(*id.* ¶ 27). Further, also in connection with the Lightspeed Agreement, plaintiff alleges that:

on or about January 19, 2010, Andrew Actman, an employee and agent of Defendant Lightspeed, in furtherance of the fraud against Plaintiff, falsely informed Plaintiff

that no agreement existed between Plaintiff and Defendant Lightspeed, admitted Plaintiff did not owe Defendant Lightspeed any work, and falsely claimed Defendant Lightspeed did not owe Plaintiff any monies.

(*id.* ¶ 52).

Defendants contend that these allegations fail to state a claim for fraud as a matter of law and do not meet the heightened pleading standard for fraud claims set forth in CPLR 3016(b).

1. Paragraph 35

Paley attacks the sufficiency of the fraud allegations contained in paragraph 35 by arguing, *inter alia*, that: (i) the statements he allegedly made are nothing more than non-actionable promises or predictions that relate to the future; (ii) plaintiff fails to allege that the statements were made with intent to deceive; and (iii) plaintiff fails to allege what actions it took in reliance on these statements, to its detriment.

In response, plaintiff observes, correctly, that the opening clause of paragraph 35 - which Paley quotes but does not address (defendants' memo, at 16-17) - alleges that "[f]rom April 2009 through December 2009, Defendant repeatedly assured Plaintiff that Defendant wanted to remain working with the Plaintiff," and that, at the very least, this statement concerns a present fact within Paley's knowledge. Further, and contrary to defendants' contention

otherwise, forward-looking statements made with a present intent to deceive can be the basis for a fraud claim (see *Lane v McCallion*, 166 AD2d 688, 690 [2d Dept 1990] ["Absent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable as fraud"], citing *Adams v Clark*, 239 NY 403, 411 [1925]). Accordingly, the alleged misrepresentation "that [Paley] was using his best efforts to solicit and service business on behalf of Plaintiff," is an actionable statement, when (as the Court concludes below), plaintiff has adequately alleged a present intent to deceive.

Paley also contends that plaintiff has failed to allege any factual circumstances showing that he knew that these statements were false when he made them, and thus, the alleged misrepresentations cannot serve as a basis for a fraud claim. In particular, Paley focuses on plaintiff's allegation that gross revenues had declined from 2008 to 2009 (Amended Complaint ¶ 49), arguing that this allegation, even if true, is too speculative (especially given the general economic downturn during that period) to support the conclusion that Paley knew that his statement that he would "exceed projected revenues," was false when he made it.

However, Paley fails to take into account plaintiff's other allegations, namely, that Paley misrepresented present facts and

his future intentions because of the non-compete/non-solicitation and forfeiture provisions in the Employment Agreement (Amended Complaint ¶ 36). These factual allegations sufficiently support an alleged intent by Paley to deceive plaintiff at the time the statements were made.

Nevertheless, plaintiff's fraud claims are legally deficient for another reason. Specifically, DCODE fails to adequately allege what actions it took, to its detriment, in reliance on these alleged misrepresentations. Nor does DCODE's citation (without discussion), to paragraphs 18, 19, 24, 30, 32 and 70 of the Complaint, rescue its fraud claims from this pleading defect. Tellingly, DCODE makes no effort to tie the allegations in those paragraphs to actions it took in reliance on Paley's purported misrepresentations. Indeed, an analysis of the cited paragraphs shows that they either: (i) describe Paley's - but not DCODE's - alleged actions (see Amended Complaint ¶¶ 18,19); (ii) relate to purported misrepresentations made in connection with the Lightspeed Agreement (*id.* ¶¶ 24,32) - which for the reasons discussed in the next section cannot sustain a fraud claim; (iii) relate to Paley's diversion of corporate opportunities (*id.* ¶ 30); or (iv) lack the requisite particularity required for fraud claims (*id.* ¶ 70).

Accordingly, plaintiff has not sufficiently stated a claim for fraud or fraudulent inducement based on the alleged misrepresentations contained in paragraph 35 of the Amended Complaint.

2. Paragraphs 27 and 52

Plaintiff also claims that actionable misrepresentations were made with respect to the formation of the Lightspeed Agreement: “[a]ll statements and actions of the Defendants in presenting the Lightspeed Agreement to Plaintiff were false, misleading and made with the intention to deceive Plaintiff” (Amended Complaint ¶ 27).

However, fatal to its fraud claims, DCODE never particularizes, as it must, what these “statements” were.

(see e.g. *Barker v Time Warner Cable, Inc.*, supra at *9 [finding fraud claim failed to meet heightened pleading standard, reasoning that “because the Plaintiff has claimed that the Defendants made misrepresentations to him which were allegedly fraudulent, the Plaintiff should be able to recount said misrepresentations”]).

In addition, and for the same reason that Judge Schweitzer dismissed the fraud claims in the Lightspeed Action, the alleged misstatement attributed to Andrew Actman (see Amended Complaint ¶ 52, supra) does not support a fraud claim against

Lightspeed ("A breach of contract claim - albeit a faulty one in this case - cannot be converted into a cause of action for fraud merely by alleging Lightspeed did not intend to fulfill its promises when it made them", *DCode v Lightspeed Holdings*, Index No. 600503/10, mot. seq. no. 001, May 24 2010 [Schweitzer, J.], citing [*Coppola v Applied Elec. Corp.*, 288 AD2d 41 [1st Dep't 2001]]). Consequently, to the extent DCODE's fraud claims concern misrepresentations made in connection with the "Lightspeed Agreement," plaintiff fails to state a claim for fraud.

Accordingly, plaintiff's fraud claims against both Paley and Lightspeed are dismissed.

C. Fourth Cause of Action: Tortious Interference with Contract (against Paley)

In its fourth cause of action, DCODE alleges that it "had valid contracts with clients, employees and vendors, including without limitation a contract with Lightspeed for \$1,200,000.00 with \$300,000.00 remaining to be paid thereon, and an employment agreement with Weissglass" (Amended Complaint ¶ 82). DCODE further alleges that Paley, (i) knowing these parties were subject to contracts with plaintiff, "intentionally solicited [these parties] to breach their respective contracts with Plaintiff without justification"; (ii) that these parties breached their contracts

with DCODE as a result of Paley's actions; and (iii) Paley "acted for the purpose of injuring the Plaintiff" (*id.* ¶¶ 83-86).

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996).

In support of dismissal of this claim, Paley argues that "DCODE has failed to allege the existence of a valid contract with Lightspeed or any other party".

Although DCODE does not address this argument directly, the Amended Complaint does contain an allegation that Paley physically removed all of plaintiff's client and work files from the premises and that computers were removed from DCODE's premises or had been wiped clean (Amended Complaint ¶ 43). As such, prior to discovery, it is premature to dismiss this claim on the ground that plaintiff has not adequately alleged the existence of contracts it claims were breached through Paley's actions.

Nevertheless, to the extent that this claim is based on Paley's interference with client contracts, including the Lightspeed Agreement - as opposed to his alleged interference with employee and vendor contracts - the claim must fail. This is because counsel for plaintiff conceded at oral argument that there were no written contracts between DCODE and its clients:

Mr. Mobargha: ...When Judge Schweitzer dismissed her entire lawsuit without oral argument, I expect when she re-files her amended complaint that she actually goes and searches for this agreement, if such an agreement exists, which it doesn't. Its's all basically budgets by clients on how much they're willing to spend on advertising.

The Court: You're telling me all these people worked without contracts?

Ms. Madama: *Without any written contracts"*

(Transcript, at 17:6-14) (emphasis supplied). This admission completely undercuts the inference created by DCODE's allegations that such contracts existed but were physically removed by Paley from plaintiff's premises (Amended Complaint ¶¶ 25, 43). Moreover, as Judge Schweitzer held in his decision, the Marketing Budget, which was the only document before the Court in the Lightspeed Action, is not an enforceable contract (*supra*). Accordingly, to the extent that this (or any other) claim is based on the

existence, in 2009, of client contracts, including the Lightspeed Agreement, the claim must necessarily fail.¹

Further, and to the extent that this claim is based on Paley's alleged interference with DCODE's employment agreement with Weissglass (Amended Complaint ¶ 82) - the claim also fails. The Weissglass employment agreement is an oral at-will employment agreement (*infra*, Part II), and cannot be the subject of a tortious interference claim, as a matter of law (see *American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998] ["Agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts"]).

In a separate argument, Paley asserts that once he was purportedly ordered by plaintiff to assume responsibility for all existing and new business of DCODE and its employees, he could not have "interfered" with any alleged contract. In making this argument, Paley places particular emphasis on plaintiff's statement, contained in the December 23, 2009 email, that Paley was to "take over Lightspeed within the parameters [Paley] contracted".

¹ There is no allegation in the Amended Complaint, nor does plaintiff contend, that an oral contract existed between DCODE and Lightspeed.

However, DCODE's tortious-interference claim rests on actions taken by Paley prior to the December 23, 2009 email (see e.g. Amended Complaint ¶¶ 21,22,34).

Accordingly, plaintiff has at least stated a claim for tortious interference with contract, with respect to plaintiff's contracts with its employees (other than Weissglass) and vendors, but not its clients.

D. Fifth Cause of Action: Intentional Interference with Contract (against Lightspeed)

This cause of action is based on DCODE's allegation that Lightspeed solicited Paley to breach his Employment Agreement in exchange for Paley directly providing services to Lightspeed, through his new venture, at a reduced fee and in exchange for entertainment perks (Amended Complaint ¶¶ 28,89-93).

However, plaintiff's allegations cannot support its claim. In this regard, DCODE fails to properly allege, as a necessary element of its intentional interference claim, Lightspeed's knowledge of DCODE's Employment Agreement with Paley. DCODE's only allegation in this connection is made in boilerplate fashion: "Defendant Lightspeed knew the Defendant Paley was subject to the Paley Agreement (i.e., the Employment Agreement between Paley and DCODE)" (Amended Complaint ¶ 91). Other than this, the Complaint is bereft

of a single factual allegation supporting Lightspeed's actual knowledge or awareness of the existence of the Employment Agreement (see *Burns Jackson Miller Summit & Spitzer v Lindner*, 88 AD2d 50, 72 [2d Dept 1982] *affd* 59 NY2d 314 [1983][dismissing interference claim where allegations were conclusory and observing that "even in its most liberal formulation, the relationships must be specified, as must the defendants' knowledge (of the contract) and the interference"]).

Accordingly, DCODE's claim for intentional interference with contract against Lightspeed is dismissed.

E. Sixth Cause of Action: Tortious Interference with Prospective Advantage (against Paley)

In its Sixth Cause of Action, DCODE alleges that it "had an opportunity to enter into new contracts with clients and prospective clients" and that "Paley used wrongful means to interfere with those opportunities, including advising prospective clients that DCODE would be closing and forwarding all its business to Defendant Paley" (Amended Complaint ¶¶ 95,96).

To adequately allege a claim for tortious interference with a prospective business advantage, plaintiff must allege "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business

relationship; (3) the defendants acted with the sole purpose of harming the plaintiff or used wrongful means; [and] (4) injury to the plaintiff's relationship with the third party" (*Art Capital Group, LLC v Getty Images, Inc.*, 24 Misc3d 1247[A] at *8 [Sup Ct, NY Co 2009]) citing *Carvel Corp. v Noonan*, 3 NY3d 182, 190-91 [2004]).

In addition, plaintiff must show that he or she would have "entered into an economic relationship but for defendant's wrongful conduct" (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266-267 [1st Dept 2002]; *Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 225 [3d Dept 1988][noting the "strict requirement that specific allegations [supporting but-for causation] be pleaded" to maintain a claim for tortious interference with prospective economic advantage]).

Here, plaintiff has failed to offer any specific allegation that would support its contention that, but for plaintiff's interference, it would have obtained the "new contracts". Indeed, at most, plaintiff refers to its prospective business relations as little more than "opportunities," without alleging, for example, what efforts it took to secure these new deals, or how, upon Paley's departure, it could have serviced these clients (see *Sutton & Edwards v Samuels*, 187 AD2d 501, 502-503 [2d Dept 1992] ["plaintiff must show more than a qualified probability that the

contract would have been completed except for the interference“]).

Accordingly, plaintiff fails to state a claim for tortious interference with prospective advantage against Paley.

F. Seventh Cause of Action: Conversion (against Paley)

DCODE next alleges that “Paley tortiously converted Plaintiff’s property, to which Plaintiff had an absolute right to possession without Plaintiff’s consent” (Amended Complaint ¶ 100). Specifically, DCODE alleges that, on January 7, 2010, it discovered:

Plaintiff’s client and work files, which Defendant Paley was responsible for maintaining had been removed from the premises of Plaintiff. All the computers were gone or wiped clean of information, all the file cabinets were empty, the supplies were missing, a television was missing, and a binding machine was gone. All that was left was a whiteboard with a message from Defendant Paley indicating he was angry with Plaintiff. Based on the amount of material removed and the recorded history of employee entrances into the facility during the holiday, it was apparent that the confidential proprietary records of the Plaintiff had been removed prior to December 19, 2009 by the employees of DCODE, to wit, Defendant Paley and Weissglass

(Amended Complaint ¶ 43).

The "[t]wo key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [internal citations omitted]).

Here, the allegations adequately state a claim for conversion. Indeed, Paley's only justification for his removal of files from DCODE's premises is based on the December 23rd email. In this regard, Paley contends that "DCODE authorized Paley to take these files when it required Paley to assume responsibility over all existing and new business" (defendants' memo, at 26). However, there is nothing in any of the December emails referencing DCODE's files, let alone giving Paley permission to remove files and other property from DCODE's premises. Accordingly, plaintiff has adequately stated a claim for conversion against Paley.

G. Eighth Cause of Action: Misappropriation of Trade Secrets
(against Paley)

In support of this claim, plaintiff alleges that "Paley through his employment with Plaintiff obtained access to Plaintiff's trade secrets, including without limitation, Plaintiff's contracts, contacts and client list" and that "Paley in bad faith and with malice used or published Plaintiff's trade secrets" (Amended Complaint ¶¶ 103-104).

In New York, in order to set forth a claim for misappropriation of trade secrets, a plaintiff must allege: (1) that it possess[ed] a trade secret, and (2) that defendant [used] that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means" (*Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc3d 285, 297 [Sup Ct, NY Co. 2004]).

In determining whether a trade secret exists in the first place, New York courts follow the Restatement (First) of Torts § 757, Comment b, and consider the following factors:

(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

(See also *Ashland Mgt v Janien*, 82 NY2d 395, 407 [1993]).

Here, DCODE simply alleges that its "contracts, contacts and client list" are trade secrets (Amended Complaint ¶ 103). Significantly, DCODE does not allege any of the factors set out in

the Restatement to support its claim that it possesses *protectible* trade secrets. For example, DCODE does not allege, as it must, that it employed any precautionary measures to preserve its alleged confidential and proprietary trade secrets (see *Precision Concepts v Bonsanti*, 172 AD2d 737, 738 [2d Dept 1991]). Accordingly, DCODE's claim for misappropriation of trade secrets must be dismissed.

H. Ninth Cause of Action: Unfair Competition (against Paley)

In this cause of action, plaintiff alleges that Paley used customer lists or customer information not readily ascertainable outside plaintiff's business, which he acquired from plaintiff, and that his use of that information was the proximate cause of DCODE's loss of business (Amended Complaint ¶¶ 109-111).

To sustain a claim for unfair competition, it must be alleged that the defendant "misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so" (*Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 [2d Dept 2007]). Paley argues that DCODE's pleading is legally insufficient because plaintiff has not alleged that Paley "attempted to capitalize on [DCODE's] name or reputation" (*id.* at 693).

However, this argument presupposes that DCODE's unfair competition claim is based on Paley's misappropriation of its good will. Here, the gravamen of DCODE's claim is that Paley used DCODE's confidential records to solicit business from plaintiff's clients while Paley was still employed by plaintiff. Contrary to Paley's contention, this allegation is sufficient to state a claim for unfair competition (see *Comprehensive Community Dev. Corp. v Lehach*, 223 AD2d 399, 399-400 [1st Dept 1996] [unfair competition claim legally sufficient where complaint "alleged that defendant engaged in unfair competition with plaintiff by misappropriation and exploitation of confidential information in abuse of her relationship of trust with plaintiff and improper use of this information to solicit plaintiff's patients for her own behalf"]).

Accordingly, DCODE has stated a claim for unfair competition.

- I. **Tenth Cause of Action: Diversion of Corporate Opportunity**
(against Paley)
- Eleventh Cause of Action: Breach of Fiduciary Duty** (against Paley)
- Twelfth Cause of Action: Breach of Duty of Loyalty** (against Paley)

In these causes of action, plaintiff alleges that Paley committed acts that were in violation of his duties of good faith and loyalty to plaintiff, including the diversion of corporate opportunities, belonging to DCODE.

"The doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation" (*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]). The elements of a claim for breach of fiduciary duty are "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]).

Paley argues that there can be no diversion of a corporate opportunity where there is consent. In this regard, Paley contends that he was authorized, as reflected in the December emails, to take clients and employees of DCODE with him upon his departure (defendants' memo, at 22). For much the same reason, Paley asserts that the breach of fiduciary duty claims must be dismissed.

However, the Complaint alleges faithless conduct by Paley prior to December 2009. For example, plaintiff alleges that in April 2009, Paley solicited competitive advertising agencies, "advising such agencies that he would be able to bring with him all the business and clients of the Plaintiff" (Amended Complaint ¶ 18). The Complaint also alleges that in April 2009, Paley (i) utilized Curious' resources and confidential information to surreptitiously organize and operate his own competitive venture

from DCODE's offices (*id.* ¶ 19; Ex B to the Amended Complaint); solicited certain other of plaintiff's employees to work for him at The Vault (AC ¶¶ 19,21); and ceased soliciting new business on behalf of DCODE and actively delayed new business opportunities for his own benefit (*id.* ¶ 30). As such, plaintiff has more than adequately alleged misconduct by Paley, prior to December 2009, that caused it to sustain damages. Thus, DCODE has sufficiently alleged its breach of fiduciary duty claims against Paley.

Still, it is worth addressing Paley's repeated assertion that the December 2009 emails authorized him to assume all of DCODE's business upon his departure.

To begin, there is nothing in the December 4th and 8th emails that can be construed as authorization for Paley to take over DCODE's business. If anything, these emails reveal Curious' increasing frustration with Paley's apparent refusal to provide it with information regarding DCODE's outstanding obligations and admonishing him to refrain from incurring any new obligations past the end of the year. The same is true of the December 11th email ["[o]nce again, you are not addressing the requests and withholding this key information which has been repeatedly asked of you...we clearly asked you not to incur any obligations past the end of the year and not to undertake actions which may harm the Company"]. Nor does the statement in the December 23rd email, that he will be

"taking over all costs associated with any work you are doing," provide Paley with conclusive support for his contention. When compared to the statement in the same email that "[n]ew business is your responsibility, both on liability and benefit side, as proposed by you," as well as what appears to be an agreement that Paley could take over a single client, Lightspeed, it cannot be said, at least not without discovery, that this statement should be understood as consent for Paley to assume DCODE's existing business. Finally, the December 23rd email does not purport to be a final agreement between the parties ("Here is the current situation as it stands and needs to be executed . . . Additionally, we need to solve the following issues: ...").

Accordingly, plaintiff has at this stage at least stated a claim for diversion of corporate opportunity, breach of fiduciary duty and breach of the duty of loyalty.

- J. Thirteenth Cause of Action: Breach of Contract** (against Lightspeed)
Fourteenth Cause of Action: Breach of Implied Contract (against Lightspeed)
Fifteenth Cause of Action: Unjust Enrichment (against Lightspeed)

All of these claims are asserted against defendant Lightspeed and relate to the Lightspeed Agreement (see ¶¶ Amended Complaint 23-25, 27, 50-52).

However, as discussed above (*supra*, section C), plaintiff has conceded that DCODE had no written contracts with its clients. Accordingly, the breach of contract claim must be dismissed.

Further, the breach of implied contract and unjust enrichment claims suffer from the same pleading defects identified by Justice Schweitzer in his Decision of May 24, 2010 (at 4-5), and are likewise dismissed.

II. The Weissglass Action:

A. First Cause of Action: Breach of Contract

In this cause of action, Plaintiff alleges that Weissglass breached his oral at-will employment agreement with DCODE (Complaint ¶ 7) "by soliciting Plaintiff Clients, providing services to Plaintiff Clients, competing with Plaintiff's business and providing false information to and on behalf of Plaintiff Vendors" (*id.* ¶ 17). In addition, plaintiff alleges that Weissglass engaged in certain of these actions while he was employed by DCODE (*id.* ¶ 8).

Accordingly, plaintiff has properly stated a claim for breach of contract against Weissglass.

B. Second Cause of Action: Fraud

In arguing for dismissal of this claim, Weissglass observes, correctly, that plaintiff does not allege a single element of its fraud claim. For example, while plaintiff alleges that Weissglass "made misrepresentations of material facts," plaintiff does not allege, anywhere in its Complaint, a single statement made by Weissglass. Accordingly, this claim is dismissed.

C. Third Cause of Action: Intentional Interference with Contract

To maintain a cause of action for tortious (or intentional) interference with contract, "a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Here, plaintiff's Complaint fails to allege that but for Weissglass' actions, DCODE's clients, vendors and employees would have continued their contract with plaintiff. Consequently, this cause of action is insufficiently plead, and is dismissed.

D. Fourth Cause of Action: Conversion

In support of its conversion claim, plaintiff alleges the following:

That on or about January 8, 2010, Plaintiff discovered that all of Plaintiff's client and work files, which [Weissglass] was

responsible for maintaining had been removed from the premises of the Company

(Complaint ¶ 11)

and

That on January 12, 2010 Plaintiff demanded that [Weissglass] return all missing property in his possession, and [Weissglass] never responded to Plaintiff's request, and never denied removing Plaintiff's property from the premises.

(*id.* ¶ 12).

Here, assuming the truth of the allegations in the Complaint and according plaintiff the benefit of all favorable inferences, DCODE has alleged that Weissglass wrongfully removed client and work files belonging to DCODE and has refused to acknowledge DCODE's request to return its property.

Accordingly, plaintiff has alleged the elements of a conversion claim (*see Colavito v New York Organ Donor Network, Inc., supra*) and thus had stated a claim for conversion against Weissglass.

E. Fifth Cause of Action: Misappropriation of Trade Secrets

Plaintiff's "misappropriation of trade secrets" claim against Weissglass suffers from the same pleading defects identified under the same cause of action asserted against Paley (*supra*, Part I, section G). Accordingly, the claim is dismissed.

The parties' request for sanctions, in both actions, is denied in the discretion of this Court.

Conclusion

Based on the foregoing, it is hereby:

ORDERED, that the motion to dismiss the First Amended Complaint, brought by defendants Jonathan Paley, Lightspeed Holdings, LLC, Lightspeed Financial, Inc., and Lightspeed Trading, LLC in the Paley Action (Index No. 600616/2010) is granted with respect to the Second, Third, Fifth, Sixth, Eighth, Thirteenth, Fourteenth and Fifteenth Causes of Action; and is denied with respect to the First, Fourth (in part, see supra), Seventh, Ninth, Tenth, Eleventh and Twelfth Causes of Action; and it is further

ORDERED, that the First Amended Complaint in the Paley Action is dismissed in its entirety as against defendants Lightspeed Holdings, LLC, Lightspeed Financial, Inc., and Lightspeed Trading, LLC, with prejudice and with costs and disbursements to said defendants to be taxed by the Clerk of the Court upon presentation of an appropriate Bill of Costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED, that the remaining causes of action in the Paley Action are severed and continued against Jonathan Paley; and it is further

ORDERED, that Jonathan Paley is directed to serve an answer to the remaining causes of action in the First Amended Complaint within 30 days after service of a copy of this order with notice of entry; and it is further


ORDERED, that defendant Josh Weissglass' motion to dismiss the complaint in the Weissglass Action (Index No. 600504/2010), is granted with respect to the Second, Third and Fifth causes of Action; and is denied with respect to the First and Fourth Causes of Action; and it is further

ORDERED, that defendant Josh Weissglass is directed to serve an answer to the Complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that counsel are directed to appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208, on February 8, 2012 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: November 28, 2011



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.