

<b>McLaughlin v DeFalco</b>
2012 NY Slip Op 31036(U)
April 11, 2012
Supreme Court, Nassau County
Docket Number: 21414/06
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
BRIAN MCLAUGHLIN, THOMAS CRITELLI  
and SECURECOM CONTRACTING, LTD.,

Plaintiffs,

-against-

TONY DEFALCO, DOMINIC DEFALCO,  
DEFALCO ASSOCIATES, LLC and  
DEFALCO ELECTRIC, LLC,

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 21414/06

MOTION DATE: March 8, 2012  
Motion Sequence # 011, 012

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affidavit in Further Support..... X
- Reply Affirmation..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

Motion by defendants Tony DeFalco, Dominic DeFalco, DeFalco Associates, LLC, and DeFalco Electric, LLC for summary judgment dismissing the complaint is **granted** in part and **denied** in part. Cross-motion by plaintiffs for summary judgment as to their first, third, and fifth causes of action is **denied**. Plaintiffs' motion to strike the answer is **denied**.

This is an action for breach of fiduciary duty against a minority shareholder in a close corporation. Plaintiff Brian McLaughlin is the owner of a corporation known as The Securecom Group, Ltd., which was engaged in the business of installing alarm and security systems.

In 2001, McLaughlin and plaintiff Thomas Critelli agreed to form a corporation with a similar name, Securecom Contracting, Ltd., with defendant Tony DeFalco to engage in the electrical contracting business. McLaughlin, Critelli, and DeFalco are each 1/3 shareholders in Securecom Contracting, Ltd. The parties entered into a shareholder agreement on May 13, 2003.

According to the shareholder agreement, Tony DeFalco was to be employed by Securecom Contracting on a full time basis and receive compensation including benefits not to exceed \$100,000 per year. The agreement provided that if the directors (shareholders) unanimously authorized an increase in DeFalco's compensation in excess of \$100,000, McLaughlin and Critelli were to share in the excess compensation on an equal basis.

On December 6, 2005, Tony DeFalco created defendant DeFalco Electric, LLC, allegedly for the purpose of competing with Securecom Contracting. The following day, DeFalco sent plaintiffs written notice that he intended to withdraw from the business effective December 31, 2006. In the letter, DeFalco expressed hope that a "fair valuation" could be agreed upon for his equity interest and urged plaintiffs to have their lawyer contact his attorney.

Plaintiffs then commenced the present action, naming also defendant Dominick DeFalco, who was employed by Securecom Contracting as a foreman until he was terminated on December 11, 2006. In the first cause of action, plaintiffs allege that defendants converted Securecom's New York City electrical license and used Securecom's credit card and funds to purchase items for DeFalco Electric. In the second cause of action, plaintiffs seek recovery of Securecom Contracting's inventory, computer software, and equipment, which were allegedly taken by defendants. In the third cause of action, plaintiffs allege that defendant Tony DeFalco breached his fiduciary duty to plaintiffs by engaging in a business in competition with Securecom Contracting. In the fourth cause of action, plaintiffs seek a permanent injunction enjoining defendants from soliciting Securecom Contracting's customers and disseminating false information about the company. In the fifth cause of action, plaintiffs allege that defendant Tony DeFalco breached the provision in Securecom Contracting's shareholder agreement requiring him to devote full time efforts to the

company. In the sixth cause of action, plaintiffs allege that defendants tortiously interfered with Securecom Contracting's wireless phone contracts with Verizon by transferring eight lines to DeFalco Electric. In the seventh cause of action, plaintiffs allege that defendants interfered with Securecom's contract to perform electrical work at the Bellini-Neznick Residence by representing that Securecom was unable to complete the work. In the eighth cause of action, plaintiffs allege that defendants interfered with Securecom's contract with Park South Tenant's Corp. In the ninth cause of action, plaintiffs allege that defendants interfered with Securecom's contract with Michael and Maria Mum at 300 East 4<sup>th</sup> Street in Manhattan. In the tenth cause of action, plaintiffs allege that defendants have tortiously interfered with other unspecified contracts of Securecom. In the eleventh cause of action, plaintiffs seek a permanent injunction against unspecified tortious interference with Securecom's contracts. In the twelfth cause of action, plaintiffs allege that defendant Tony DeFalco falsely represented that he was a loyal employee and would devote his full time and energy to Securecom. The thirteenth cause of action is redundant of the eighth cause of action. The fourteenth cause of action is redundant of the ninth cause of action.

In defendants' answer, they assert a counterclaim for judicial dissolution of Securecom Contracting. Defendants also seek a declaratory judgment that certain actions taken by plaintiffs at a special meeting of shareholders held on January 31, 2007 are void and of no effect.

Defendants are moving for summary judgment dismissing the complaint. Plaintiffs cross move for summary judgment with respect to their first, third, and fifth causes of action. Alternatively, plaintiffs' move to strike the answer for failure of defendants to provide discovery. On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

It was not a breach of the duty of loyalty for Tony DeFalco to form a company in preparation for competing with Securecom prior to leaving Securecom's employ. Since

there was no covenant not-to-compete in the shareholder agreement, DeFalco was free to engage in a competing business after December 31, 2006. However, defendants were not free to tortiously interfere with Securecom's existing contracts.

The court concludes that there are contested material factual issues with respect to whether defendants began to compete with Securecom prior to December 31, 2006, whether defendants wrongfully misappropriated any of Securecom's funds or other property, and whether defendants tortiously interfered with Securecom's contracts. Accordingly, defendants' motion for summary judgment is **denied** as to plaintiffs' first, second, third, fifth, sixth, seventh, eighth, and ninth causes of action.

However, the court concludes that plaintiffs have an adequate remedy at law and that plaintiffs' claim for misrepresentation relates to their claim for breach of contract. As noted, certain of plaintiffs' claims for tortious interference are redundant. Accordingly, defendants' motion for summary judgment dismissing the complaint is **granted** as to plaintiff's fourth, tenth, eleventh, twelfth, thirteenth, and fourteenth causes of action.

Plaintiffs' cross-motion for summary judgment as to the first, third and fifth causes of action is **denied**. Plaintiffs' motion to strike the answer is **denied**. The deposition of Tony DeFalco, if not previously conducted, shall take place in the courthouse at 9:30 am on April 24, 2012 and shall continue day to day until completed. The deposition of Dominic DeFalco, if not previously conducted, shall take place immediately after the deposition of Tony DeFalco and shall continue day to day until completed. These depositions may not be adjourned without the prior written approval of the court.

So ordered.

Dated APR 11 2012

  
J.S.C.

**ENTERED**

APR 13 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE