

**Front, Inc. v Khalil**

2012 NY Slip Op 31404(U)

May 23, 2012

Supreme Court, New York County

Docket Number: 111597/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

FRONT, INC.,

INDEX No. 111597/11

Plaintiff,

-against-

**FILED**

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 001 & 002

PHILIP KHALIL, et al.,

MAY 25 2012

Defendants.

MOTION CAL No. \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 5, 6

Answering Affidavits- Exhibits \_\_\_\_\_ 2, 3, 7, 8

Replying Affidavits \_\_\_\_\_ 4, 9

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

**FILED**

MAY 25 2012

Dated: 5/23/12

Donna M. Mills  
NEW YORK  
COUNTY CLERK'S OFFICE  
J.S.C.

Check one:  FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 58

-----X  
FRONT, INC.,

Plaintiff,

-against-

Index No. 111597/11

PHILIP KHALIL, JAMES O'CALLAGHAN, and  
ECKERSLEY O'CALLAGHAN STRUCTURAL DESIGN,

Defendants.

-----X

PHILIP KHALIL,

Third-Party Plaintiff,

-against-

JEFFREY A. KIMMEL and MEISTER SEELIG &  
FEIN LLP,

Third-Party Defendants.

-----X

FILED

MAY 25 2012

CLERK OF THE COURT  
COUNTY OF NEW YORK

DONNA MILLS, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants James O'Callaghan (O'Callaghan) and Eckersley O'Callaghan Ltd. (EOC UK, sued here as Eckersley O'Callaghan Structural Design) (collectively, the UK defendants), move to dismiss, pursuant to CPLR 3211 (a) (7) and (a) (8), on the ground of lack of personal jurisdiction. These defendants and defendant Philip Khalil (Khalil) also move to dismiss pursuant to CPLR 3211 (a) (5) and (a) (7) and 3016 (b) for failure to state a cause of action and/or lack of specificity, and move to disqualify the law firm of Meister

Seelig & Fein LLP from representing plaintiff Front, Inc. (Front) on the ground that the law firm is a defendant in the third-party action and will inevitably be called as a witness.

In motion sequence number 002, third-party defendants Jeffrey A. Kimmel (Kimmel) and Meister Seelig & Fein LLP (the law firm) move to dismiss the third-party complaint, pursuant to CPLR 3211 (a) (7).

This action arises out of an employment arrangement between Khalil and Front. The complaint alleges that Front is a design and consulting firm in the architecture and engineering sector, and that Khalil was employed by Front as Director of Engineering from June 2003 through March 2011. Khalil, a citizen of the United Kingdom, applied for resident alien status while an employee of, and sponsored by, Front. The complaint alleges that, six months after Khalil obtained his resident alien status, he informed Front that he was resigning from the company and joining the English firm, EOC UK, which was establishing a company in New York City. Khalil indicated that his last day as a full-time employee of Front would be April 7, 2011, but that he would provide part-time support to Front until June 7, 2011.

The complaint further alleges that three days after Khalil tendered his written resignation, a Front engineer noticed an external hard drive storage device connected to Khalil's computer. Khalil was allegedly in the process of downloading the contents of his computer to the external hard drive, including trade secrets, and confidential and proprietary information.

According to Front, that information included, among other things, the file directory of every project on which Front had worked, architectural plans, engineering reports and building security design criteria. The complaint further alleges that some of those projects have national security requirements for which Front obtained security clearance for its staff, including Khalil.

The complaint alleges that after Front discovered that Khalil was attempting to download company information, on March 24, 2011, two Front partners met with Khalil and terminated his employment.

The complaint further alleges that throughout Khalil's employment, Front maintained a "no moonlighting" policy. In 2009, the policy was reduced to writing and included in an employment policy agreement that was signed by Khalil. That policy states:

FULL-TIME EMPLOYMENT at Front Inc. requires a full-time commitment. Employees shall not provide professional services, "moonlight," or "freelance" for their own private clients while employed fulltime at Front Inc. No person should utilize the firm's resources ... to conduct their own commercial business or to provide professional services outside the firm.

Verified Complaint ¶ 41.

The complaint alleges that, from the information downloaded to the external hard drive, Front discovered that, throughout his employment, Khalil had been "moonlighting," secretly working for Front's competitors, working on over 40 side projects, and

billing over 4,000 hours on those side projects, invoicing at least half a million dollars. The complaint alleges that, throughout his employment, Khalil performed substantial work for Front's competitor, defendant EOC UK, and that EOC UK even provided Khalil with an e-mail address and with remote access to its corporate network.

The complaint further alleges that Khalil diverted work for the Apple company away from Front and to EOC UK. According to the complaint, in 2008, Apple had solicited a service proposal from Front to perform work on several Apple stores, however Khalil diverted that work to EOC UK. According to the complaint, Khalil sent over 100 e-mails to EOC UK regarding the Apple store located on Broadway, in New York City.

On or about April 8, 2011, acting as Front's attorney, Kimmel wrote to Khalil, "to address (1) your recent attempt to steal Front's confidential and proprietary information and (2) the illegal competing side business that you conducted, using the Firm's resources, while a full-time employee of Front." Letter to Phil Khalil, dated April 8, 2011, at 1. Under the heading of "Illegal conduct" the letter stated, among other things, "your attempt to steal Front's confidential and proprietary information - i.e., its trade secrets - is a serious offense that is punishable by up to ten years in prison under the Economic Espionage Act of 1996 18 U.S.C.S. (sic) § 1832 ... ." *Id.* at 4. The letter further states: "[i]t should be noted that in carrying out the activities described above, you knowingly violated the

terms of your application and immigrant status. You have also violated several codes of conduct and ethics of the various boards of licensure and professional associations to which you are a member." *Id.*, n 1.

In the letter Front made the following specific demands that Khalil:

- 1) immediately cease and desist from using Front's confidential and proprietary information;
- 2) return all of Front's confidential and proprietary information to the Firm;
- 3) provide Front with a list of individuals and/or entities with whom you shared any, in part or whole, of Front's confidential and proprietary information;
- 4) cease and desist from soliciting any of Front's contacts including, but not limited to, its clients, referral sources, employees, collaborating consultants, contractors, and fabricators;
- 5) provide Front with an accounting of all work that you performed other than for and on behalf of Front while a Front employee;
- 6) provide Front with a list of all projected work at or through Eckersley O'Callaghan;
- 7) suspend work on all projects that were part of the side work you performed while at Front; and
- 8) provide Front with all the foregoing information and a sworn confirmation that you have fully complied with these demands no later than by 5:00 p.m. Eastern Time on April 14, 2011.

Should you fail to comply with the all (sic) of the above demands, Front will seek its full legal remedies, including, but not limited to, injunctive relief.

*Id.* at 6.

On April 12, 2011, Kimmel wrote to O'Callaghan, enclosing and referring to the letter to Khalil, and charging, among other things, that "Mr. Khalil conspired with Eckersley O'Callaghan to breach his fiduciary duty to Front and engaged in other illicit activities." Letter to James O'Callaghan, dated April 12, 2011. In that letter, Kimmel made demands of O'Callaghan that were

similar to those contained in the letter to Khalil.

On October 12, 2011, Front filed the complaint in this action, asserting eleven causes of action: 1) civil conspiracy as to all defendants; 2) breach of contract against Khalil; 3) breach of implied covenant of good faith and fair dealing against Khalil; 4) breach of fiduciary duty against Khalil; 5) tortious interference with business relations against O'Callaghan and EOC UK; 6) unfair competition (misappropriation of trade secrets) against all defendants; 7) common-law unfair competition as to all defendants; 8) aiding and abetting against O'Callaghan and EOC UK; 9) preliminary and permanent injunction against all defendants; 10) constructive trust as to all defendants; and 11) accounting as to all defendants.

**MOTION SEQUENCE NUMBER 001**

Personal Jurisdiction Over O'Callaghan and EOC UK

The UK defendants move to dismiss on the ground of lack of personal jurisdiction. O'Callaghan submits an affidavit in which he states that he lives and works in the United Kingdom, and in no time relevant to the allegations of the complaint did he live in New York, own or rent property in New York, or maintain an office or conduct business in New York. He further states that he is not a U.S. citizen, and does not have a visa that would permit him to work in the United States. Callaghan states that he is a director of EOC UK, which is a United Kingdom limited company, which performs structural engineering services and whose place of business is in London.

According to O'Callaghan, EOC UK has occasionally used the name Eckersley O'Callaghan Structural Design as a trade name in England, but there is no actual entity by that name.

O'Callaghan further states that EOC UK is, and has been, the designer of structural glass for Apple stores throughout the world, and that less than one percent of that work has involved the Apple stores in New York City. According to O'Callaghan, the contract between EOC UK and Apple for all Apple work was entered into in California, where Apple is located, and not in New York. Apple then used the EOC UK drawings for its projects in a given location.

O'Callaghan states that neither he, nor any EOC UK employee, is licensed in New York, and, therefore, no EOC UK employee has been the engineer of record for any work in New York.

Finally, O'Callaghan states that in recent months, after Khalil left Front, and the claims in this law suit occurred, a new company, Eckersley O'Callaghan & Partners, LLC, was formed in Delaware, and leased office space at 88 University Place, New York, New York. According to O'Callaghan, Khalil has an interest in that new company, but neither O'Callaghan, nor EOC UK, are members of the new company.

The UK defendants, therefore, move to dismiss the complaint based upon lack of personal jurisdiction.

Jurisdiction may be obtained over a non-domiciliary pursuant to CPLR 302 (a):

As to a cause of action arising from any of the

acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

Citing *Kreutter v McFadden Oil Corp.* (71 NY2d 460, 467 [1988]), the UK defendants argue that in order to invoke jurisdiction pursuant to CPLR 302, there must be a substantial relationship between the claim asserted and the activity that occurred in New York, and the businesses allegedly transacted must be "'sustained and substantial.'" *Fischbarg v Doucet*, 9 NY3d 375, 382 (2007) (citation omitted). They contend that there is no such substantial relationship between the claims asserted and any sustained and substantial activity in New York, since they neither regularly conduct or solicit business in New York and their engineering work used by the Apple store in New York was as a result of their contract made with a California company, Apple, and constitutes less than one percent of their work with that

company.

The UK defendants further contend that they have not committed any tortious act in New York and that, with respect to any alleged tortious act committed outside the state, plaintiff has, at best, suffered only indirect financial loss, which is insufficient to establish long-arm jurisdiction. *Precision Concepts v Bonsanti*, 172 AD2d 737, 739 (2d Dept 1991).

Front argues that the UK defendants fail to address the fact that Khalil was allegedly acting as their agent in New York, citing the decision in *Grove Press, Inc. v Angleton* (649 F2d 121, 122 (2d Cir 1981)), which states that New York Courts "have customarily interpreted the term 'agent' fairly broadly, especially in suits by injured third parties." The decision goes on to state, "[h]owever, before an agency relationship will be held to exist under section 302(a)(2), a showing must be made that the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal." *Id.*

Even assuming Khalil acted as an agent of EOC UK, there are no allegations that he acted as an agent for O'Callaghan in his personal capacity. Nor are there any allegations connecting O'Callaghan with New York or even suggesting his presence in New York, other than one e-mail submitted by Front, indicating that he was going to be in New York City on Monday October 11, 2010 and wanted to know if Khalil would be available "for a few beers." Affidavit of Marc Simmons, dated December 13, 2011, Exh.

K. The court further notes that that e-mail is in connection with a Visitors Centre project in Washington, D.C. That is hardly a sufficient basis for long-arm jurisdiction over O'Callaghan in his personal capacity, and his motion to dismiss is granted.

With respect to Front's claims that Khalil acted as EOC UK's agent, Front must still establish that, in that capacity, he regularly conducted business in the state or committed a tortious act in the state. Many of the projects on which Khalil allegedly worked for EOC UK were, however, outside of New York, such as the Washington, DC, Visitor's Centre project, and even outside of the United States, such as the Hong Kong Plaza (in Shanghai), and the Beirut project. Furthermore, even assuming Khalil gave EOC UK confidential information about projects in New York, Khalil's alleged action does not establish that the EOC UK did business in New York.

The court further notes that the complaint, itself, alleges that "Khalil ensured his projects for Eckersley O'Callaghan were covered during his vacations from Front employment." Complaint, ¶ 57. According to the e-mail submitted by Front, on at least one case, the communication between Khalil and EOC UK occurred when Khalil was on vacation in St. Lucia, and was not New York. Affidavit of Marc Simmons, Exh. B. Thus, the allegation regarding Khalil working during vacations, if anything, undermines Front's contention that Khalil was acting in New York as EOC UK's agent, sufficient to form a basis for long-arm

jurisdiction.

Front, however, also contends that EOC UK's design work for the Apple store on Broadway constitutes doing business in New York City for the purpose of long-arm jurisdiction. The complaint alleges that Apple had solicited a proposal from Front "to get Front under our umbrella for Apple" (Complaint, ¶ 61), and that Khalil's work on behalf of EOC UK interfered with that possibility. O'Callaghan asserts, however, that any work performed at Apple's New York store was based upon a contract with Apple's California-based company and constituted less than one percent of EOC UK's work for Apple, and, therefore, it could not be considered so substantial as to constitute "sustained and substantial" work in the State of New York. See *Fischbarg v Doucet*, 9 NY3d 375, *supra*. O'Callaghan further asserts that it was never the engineer of record on any New York project. Moreover, according to O'Callaghan, EOC UK has long contracted with Apple and has provided design services to Apple in connection with its glass staircases throughout the world. See Info Apple Store - Glass Staircases, Affirmation of Neil G. Marantz, dated November 1, 2011, Exh. C.

The court cannot determine, based on the conflicting affidavits submitted by the parties, whether the business conducted by EOC UK in connection with the New York City Apple store is sufficiently significant to form a basis for long-arm jurisdiction. Therefore, that matter will be referred to Special Referee to hear and report (see *Hollander v Harder Hall*, 13 AD2d

835, 836 [2d Dept 1961]) and the other aspects of EOC UK's motion to dismiss will be held in abeyance.

Khalil's Motion to Dismiss for Failure to State a Cause of Action

Khalil has also moved to dismiss individual causes of action, and the motion can be considered as to him. Since Khalil has conceded that Front has stated a claim with respect to its second and fourth causes of action for breach of contract and breach of fiduciary duty respectively, those claims will not be addressed here.

First Cause of Action: Civil Conspiracy

Citing *Hoefner v Orrick, Herrington & Sutcliffe LLP* (85 AD3d 457 [1<sup>st</sup> Dept 2011]), Khalil moves to dismiss the first cause of action on the basis that New York does not recognize an independent tort of civil conspiracy. Relying on the statement in *Salvatore v Kumar* (45 AD3d 560, 563-564 [2d Dept 2007]) that "[s]uch a claim stands or falls with the underlying tort," Front argues that because they have alleged that the UK defendants aided and abetted Khalil in breaching his fiduciary duties Khalil's motion to dismiss the conspiracy claim should be denied. However, as the Appellate Division, First Department explained in *Hoefner*, "[w]hile a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action." 85 AD3d at 458. Therefore, Front's first cause of action is dismissed.

Third Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing

Khalil contends that because the third cause of action does not expressly mention the written employment agreement signed by him in 2009, it must refer to the period before he signed the agreement. Citing *Murphy v American Home Prods. Corp.* (58 NY2d 293 [1983]), he argues that prior to signing the 2009 agreement, he was an at-will employee, and, therefore, had no implied obligation of good faith. As Front contends, however, the Court in *Murphy* was considering whether there was an implied obligation of good faith to continue employing a worker who had an at-will contract of employment, since the "long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." 58 NY2d at 300. Thus, it does not foreclose the reliance on an implied covenant of good faith in all situations of at-will employment. Nor do the allegations of the third cause of action restrict the claim to Khalil's pre-2009 conduct.

[An] implied obligation [of fair dealing] encompasses any promises which a reasonable person in [plaintiffs' position] would be justified in understanding was included in the parties' agreement. [T]he covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.

*ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 934 (3d Dept 2012) (internal quotation marks and citations omitted).

To the extent that Front alleges that Khalil directly violated the 2009 written agreement to refrain from moonlighting, the third cause of action is duplicative of the breach of contract cause of action. See *ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, --- AD3d ----, 2012 WL 1582783 (1st Dept 2012). The third cause of action, however, also alleges conduct by Khalil, which is not expressly prohibited by the written agreement, such as his disclosing and or planning to disclose trade secrets, and other propriety, competitively sensitive confidential information to competitors.

On a motion to dismiss pursuant to CPLR 3211, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). Front has, therefore, sufficiently stated a cause of action for violation of the implied covenant of good faith and fair dealing, and Khalil's motion to dismiss that cause of action is denied. Sixth Cause of Action: Unfair Competition (Misappropriation of Trade Secrets)

Khalil contends that the sixth cause of action must be dismissed because it is solely predicated on conclusory allegations of trade secrets. Although in its brief opposing Khalil's motion to dismiss, Front appears to be limiting that cause of action to misappropriation of trade secrets, the court notes that the allegations contained in the cause of action (as

opposed to the title of the cause of action) are not limited to the use of trade secrets, but rather include "misappropriating Front's proprietary and confidential information from Front and using it to solicit, persuade, attempt to persuade, do business with and/or perform services for potential clients of Front." Complaint ¶ 127. The cause of action goes on to allege that "[b]y diverting business away from Front and to themselves using Front's confidential and proprietary information, including its trade secrets, and its resources, Defendants have been allowed to engage in unfair competition against Front." *Id.*, ¶ 128. There would, therefore, appear to be a substantial overlap between the sixth and seventh causes of action.

With respect to Khalil's claim that the cause of action must be dismissed because the allegations relating to trade secrets are merely conclusory, the court concludes that the questions of whether the information allegedly taken by Khalil and shared with Front's competitors constituted trade secrets, confidential and/or propriety information and whether Front had established adequate protections for that information are ones to be decided by the trier of fact. See *Ashland Mgt. Inc. v Altair Inves. NA, LLC*, 59 AD3d 97, 103-104 (1<sup>st</sup> Dept 2008), *affd as mod* 14 NY3d 774 (2010). Therefore, Khalil's motion to dismiss the sixth cause of action is denied.

#### Seventh Cause of Action: Common-Law Unfair Competition

The complaint alleges that "Khalil had access to Front's confidential and proprietary information through a confidential

relationship with Front and as Front's fiduciary." Complaint ¶ 133. The complaint further alleges that defendants' actions in misappropriating Front's confidential and proprietary information was wanton, willful and malicious.

Quoting *Abe's Rooms, Inc. v Space Hunters, Inc.* (38 AD3d 690, 692 [2d Dept 2007]), Khalil contends that a cause of action for unfair competition requires that the plaintiff show "that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so." According to Khalil, Front has confused the tort of unfair competition with that of misappropriation of property. This court notes, however, that the Court of Appeals has indicated that there is a "misappropriation theory" of unfair competition using almost the same words used by the Appellate Division, Second Department, but broadening their reach somewhat, stating: "[t]he principle that one may not misappropriate the *results* of the skill, expenditures and labors of a competitor has ... often been implemented in [New York] courts (emphasis supplied, internal quotation marks and citation omitted)." *ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 477 (2007). Such a description of the tort could well encompass plaintiff's allegations that Khalil unfairly competed with Front by improperly using its confidential and proprietary information.

Citing *ITC Ltd. v Punchgini, Inc.* (9 NY3d 467, *supra*), Khalil contends that the "misappropriation" branch of unfair competition requires the bad faith taking of good will, which is

not alleged here. The decision in *ITC* is not as limited as Khalil suggest, however. Although the Court of Appeals did state that, in the context of litigation involving misappropriation of a foreign trademark, the appropriation of good will must be involved, the Court also stated more generally, that "[u]nder New York law, '[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property.'" 9 NY3d at 478 (internal citation omitted); see also *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 (4<sup>th</sup> Dept 1998) ("the gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets [emphasis supplied]); *DoubleClick Inc. v Henderson*, 1997 WL 731413, \*7, 1997 NY Misc LEXIS 577, \*19 (Sup Ct, NY 2007) ("A claim of unfair competition will lie where a former employee misappropriates and exploits confidential information belonging to her former employer in abuse of her relationship of trust").

Khalil's motion to dismiss the seventh cause of action is, therefore, denied.

Ninth Cause of Action: Preliminary and Permanent Injunction

In the ninth cause of action, the complaint alleges that Khalil violated the confidentiality provision of the employment agreement that he signed and used Front's trade secrets,

confidential information, and other proprietary information without permission. The complaint further alleges that the continued use of that information threatens Front with immediate irreparable harm, and, therefore, plaintiff seeks preliminary and permanent injunctive relief to prevent Khalil from further use of any such confidential business information or from directly or indirectly soliciting or attempting to solicit any of Front's customers who were not previously customers of EOC UK.

Again, Khalil contends that the cause of action is entirely premised on alleged "trade secrets," which are insufficiently identified, and, therefore, is fatally flawed. As previously discussed however, the complaint is not limited to trade secrets, but also alleges that Khalil improperly took and disclosed confidential and proprietary information, categories of information which are broader than trade secrets, and which have been adequately identified in the complaint.

Whether Front will ultimately be able to establish the basic prerequisites for obtaining preliminary or permanent injunctive relief remains to be seen, but it has alleged enough to successfully oppose a motion to dismiss the ninth cause of action.

#### Tenth Cause of Action: Constructive Trust

Khalil contends that, although a constructive trust may be imposed where property has been transferred to a fiduciary who is unjustly enriched by that transfer, here there is no allegation that property has been transferred. Therefore, according to

Khalil, a constructive trust may not be imposed. Where, however, a corporate plaintiff can establish a diversion of corporate opportunities, a constructive trust can be imposed in favor of the plaintiff over the property acquired. *Poling Transp. Corp. v A & P Tanker Corp.*, 84 AD2d 796, 797 (2d Dept 1981). Here, the complaint contains sufficient allegations concerning actions by Khalil improperly taking business opportunities from Front, to maintain this cause of action; thus, Khalil's motion to dismiss the tenth cause of action is denied.

#### Eleventh Cause of Action: Accounting

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1<sup>st</sup> Dept 1997) (citation omitted). Khalil argues that Front is not entitled to an accounting because it fails to identify any such property in Khalil's possession.

Front has, however, alleged that Khalil took confidential and proprietary information from Front which he then shared with Front's competitors, such as EOC UK, and which resulted in his obtaining business deals with those competitors which previously belonged to Front. Just as Front has stated a cause of action for a constructive trust, it has also stated a cause of action for accounting.

#### Disqualification of Front's Attorneys

Khalil moves to disqualify Kimmel and his law firm on the basis that they are third-party defendants and material witnesses in his third-party action against them for defamation. Under motion sequence number 002, *infra*, however, the court has granted third-party defendants' motion to dismiss the third party complaint. There is, therefore, no basis for disqualifying Kimmel and his law firm. Accordingly, Khalil's motion for disqualification is denied.

**MOTION SEQUENCE NUMBER 002**

On October 31, 2011, Khalil filed the third-party complaint against Kimmel and the law firm alleging that the letter that was addressed to him, a copy of which was sent to EOC UK, accused him of committing a crime and engaging unlawful activity. The third-party complaint asserts causes of action for libel per se, interfering with Khalil's prospective business relationship, and tortious interference with his business relationship.

In motion sequence number 002, Kimmel and the law firm move to dismiss the third-party complaint for failure to state a cause of action. While third-party defendants contend that no statement in the letter is defamatory, they contend that the letter was sent to Khalil and to EOC UK as part of their efforts on behalf of their client, Front, in preparation, and in an effort to obviate the need, for litigation, and as such, was absolutely privileged. Citing *Park Knoll Assoc. v Schmidt* (59 NY2d 205 [1983]), third-party defendants argue that absolute privilege attaches to statements made by attorneys in the course

of judicial proceedings and that the immunity attaches because the statements are "spoken in office." *Id.* at 210. Third-party defendants contend that the privilege applies to statements made prior to the commencement of litigation as well if they are relevant to the prospective litigation. See *Sexter & Warmflash, P.C. v Margrave*, 38 AD3d 163, 174 (1<sup>st</sup> Dept 2007); *Vodopia v Ziff-Davis Publ. Co.*, 243 AD2d 368 (1<sup>st</sup> Dept 1997); *Lieberman v Hoffman*, 239 AD2d 273, 273 (1<sup>st</sup> Dept 1997).

Quoting a case decided by the United States District Court for the Southern District of New York, Khalil argues that "New York law simply does not provide an absolute privilege for statements made prior to the institution of a judicial proceeding." *Block v First Blood Assoc.*, 691 F Supp 685, 699 (SD NY 1988). Khalil goes on to quote the Court of Appeals decision in *Park Knoll Assoc. v Schmidt* (59 NY2d at 209) as follows: "a lawyer has immunity for defamatory words spoken in a judicial proceeding but not for words spoken while representing a client in a nonjudicial proceeding ... [and] not for those made before the proceeding commences." The omitted language by Khalil, however, substantially alters the meaning of the quote. For the Court actually stated, "a witness is immune from suit for defamatory remarks pertinent to a judicial proceeding, but not for those made before the proceeding commences (citation omitted and emphasis supplied)." *Id.* The decision includes no such qualification regarding statements made by attorneys.

Khalil also provides the decision of the Supreme Court in

*Vodopia v Ziff-Davis Publ. Co.*, *supra*, to establish that the statements made in that litigation were actually made in the course of litigation, rather than in connection with threatened litigation, as indicated by the Appellate Division. See *Vodopia v Ziff-Davis Publ. Co.*, Sup Ct, NY County, August 16, 1996, Bransten, J., index No. 126854/95.

While it appears that the Appellate Division may well have erroneously believed that the letter in question in *Vodopia* was a pre-litigation letter, what is important for our purposes is the fact that the Appellate Division concluded that an absolute privilege attaches to a pre-litigation letter. That decision by the Appellate Division is consistent with its contemporaneous decision in *Lieberman v Hoffman* (239 AD2d 273, *supra*), and its more recent decision in *Sexter & Warmflash, P.C. v Margrave* (38 AD3d 163, *supra*). It is the decisions of the Appellate Division, First Department, not the decisions of the United States District Court for the Southern District of New York relied on by Khalil, to which this court must look for precedent.

While the letter sent by third-party defendants to Khalil and to EOC UK, may well have been rambling and inartful, it clearly relates to the litigation initiated by Front against Khalil, O'Callaghan and EOC UK. In fact, the demands made in the letters to Khalil and to O'Callaghan and EOC UK substantially reflect the causes of action and relief requested against those defendants in the first-party litigation. The fact that the litigation was not initiated until approximately six months after

the letters were sent does not alter the court's conclusion. For these reasons, the court concludes that the letter to Khalil is absolutely privileged, and thus the court does not need to reach the question of malice.

Accordingly, it is hereby

ORDERED on Motion Sequence Number 001 as follows:

1) the branch of the motion of defendant James O'Callaghan to dismiss the complaint for lack of personal jurisdiction is granted, and the complaint is dismissed in its entirety as against him with costs and disbursements to him as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of him; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED with respect to

2) the branch of the motion of defendant Eckersley O'Callaghan Ltd. (sued here as Eckersley O'Callaghan Structural Design) seeking dismissal of the complaint for lack of personal jurisdiction, the issue of whether Eckersley O'Callaghan Ltd. has conducted sufficient significant and substantial business in New York to provide a basis for long-arm jurisdiction pursuant to CPLR 302 (a) is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue;

and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED with respect to

1) the branch of defendant Philip Khalil's motion to dismiss the complaint for failure to state a cause of action, the motion is granted with respect to the first cause of action, and is otherwise denied; and

2) the branch of defendant Philip Khalil's motion to disqualify Jeffrey A. Kimmel and the law firm of Meister Seelig & Fein LLP as counsel is denied; and it is further

ORDERED on Motion Sequence 002 that the motion of third-party defendants Jeffrey A. Kimmel and the law firm of Meister Seelig & Fein LLP to dismiss the third-party complaint is granted and the third-party complaint is dismissed in its entirety as against said defendants, with costs and disbursements

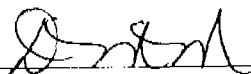
to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: 5/23/12

FILED

ENTER:

MAY 25 2012

  
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J.S.C. CLERK OF COURT

**DONNA M. MILLS, J.S.C.**