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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Aalco Transportation & Storage, Inc.,

Plaintiff,

-against-

Joseph DeGuara and
Bel-Air Consulting & Design, LLC,

Defendants.

- and -

Jeffrey S. Krevat,

Additional Defendant
on the Counterclaims.

Index No.: 17287/2010

Motion Sequence No.: 008; MOT.D
Motion Date: 10/26/12
Submitted: 1/30/13

Motion Sequence No.: 009; MOT.D
Motion Date: 11/28/12
Submitted: 1/30/13

Motion Sequence No.: 010; MOT.D
Motion Date: 1/30/13
Submitted: 1/30/13

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Clerk of the Court

Upon the following papers numbered 1 to 93 read upon these motions for summary judgment; motion to compel disclosure: Notice of Motion and supporting papers, 1 - 30; 31 - 47; 48 - 86; Answering Affidavits and supporting papers, 87 - 88; 89 - 91; Replying Affidavits and supporting papers, 92 - 93; Other, defendants' memorandum of law (#008); plaintiff's memorandum of law (#008); defendants' reply memorandum of law (#008); plaintiff's memorandum of law (#010); plaintiff's reply memorandum of law (#010), it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212, granting summary judgment (i) dismissing the complaint, and (ii) in their favor for the relief demanded in their fifth, sixth, and eleventh counterclaims, is granted to the extent of granting summary judgment dismissing the plaintiff's third cause of action against defendant Bel-Air Consulting & Design, LLC, and is otherwise denied; and it is further

ORDERED that the motion by the plaintiff for an order (i) pursuant to CPLR 3214 (b), vacating the automatic stay and continuing discovery, and (ii) pursuant to CPLR 3124, compelling the defendants to produce documents demanded in the plaintiff's second supplemental notice of discovery and inspection, is granted to the extent of directing the parties and their attorneys to appear at the courthouse located at One Court Street, Riverhead, New York for a compliance conference on **Wednesday, May 1, 2013 at 9:30 a.m.**, and is otherwise denied; and it is further

ORDERED that the motion by the plaintiff and the additional counterclaim defendant for an order pursuant to CPLR 3211 (b) and 3212 granting summary judgment (i) in its favor for the relief demanded in its first, second, and third causes of action, (ii) dismissing the defendants' first through eleventh counterclaims, and (iii) dismissing each of the defendants' affirmative defenses, is granted to the extent of granting summary judgment dismissing the defendants' second, third, fourth, fifth, sixth, eighth, tenth, and eleventh counterclaims, so much of the defendants' ninth counterclaim as pleads the same conduct and measure of damages pleaded in the defendants' seventh and eighth counterclaims, and the defendants' second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and thirteenth affirmative defenses, and is otherwise denied.

This is an action to recover damages allegedly sustained when defendant Joseph DeGuara, a former employee of the plaintiff, misappropriated the plaintiff's proprietary and confidential information which he wrongfully used to solicit and divert a business opportunity from the plaintiff.

The plaintiff is in the business of providing labor, equipment, engineering strategies, and transportation and storage services in the crane and rigging industry. Jeffrey S. Krevat is the plaintiff's owner and president.

In 2003, the plaintiff hired DeGuara as an employee. According to the defendants, at and prior to the time DeGuara was hired, Krevat told DeGuara that he wanted DeGuara to "learn the business" in anticipation that DeGuara would eventually purchase the plaintiff from Krevat. Thus, while DeGuara's primary area of responsibility was sales, he also managed operations for the plaintiff. By using his prior experience in the electrical contracting and electrical equipment industry, DeGuara claims to have significantly grown the plaintiff's business throughout the course of his employment.

According to the defendants, sometime in late 2007, Krevat indicated that DeGuara "was ready to purchase the business" and instructed DeGuara to develop a purchase plan. In response to the offer, DeGuara hired an attorney and an accountant to assist with the development of a proposal. Several rounds of negotiations followed. The defendants claim, however, that in or about March 2008, Krevat abruptly broke off negotiations. The plaintiff claims that no sale took place because Krevat and DeGuara never came to mutually agreeable terms, including a valuation of the business.

On May 5, 2008, DeGuara entered into an agreement with the plaintiff whereby the plaintiff agreed to pay DeGuara a bonus equal to "twenty-five (25%) percent of the net earning of AALCO for the year 2008," and DeGuara agreed to a restrictive covenant providing that, for the calendar year ending December 31, 2009, "he will not become an employee, a partner, shareholder or an agent for any company that is in competition with AALCO, or will be in competition with AALCO." The agreement further provided that, in the event DeGuara breached the restrictive covenant, the plaintiff would be entitled to a return of the bonus together with all damages which it incurred by reason of the breach. The plaintiff subsequently paid DeGuara a bonus in two installments totaling $203,300, a figure which the defendants claim was more than 50% lower than anticipated based on the parties' previous discussions regarding the plaintiff's 2007 net earnings; the plaintiff, for its part, claims that the bonus amount was computed on the basis of the net income reported in its 2008 tax return. At DeGuara's direction, the plaintiff made the bonus payments to defendant Bel-Air Consulting & Design, LLC ("Bel-Air"), a company formed by DeGuara specifically for the purpose of receiving those payments.

In May 2009, according to the defendants, Krevat offered DeGuara another opportunity to craft a proposal to purchase the plaintiff, and DeGuara again retained an attorney and an accountant to assist with the development of a purchase proposal. The defendants claim that when "significant questions" arose in the course of the accountant's review of the plaintiff's financial data regarding its revenues and expenses and whether those amounts were accurately reported in its tax returns for the previous three years, DeGuara asked Krevat for supporting documentation but Krevat's accountant refused the request. Shortly thereafter, and despite nearly six months of negotiations, Krevat again "abruptly" withdrew his offer.

Sometime in 2009, DeGuara, on behalf of the plaintiff, entered into negotiations with R.B. Samuels, Inc., an electrical contractor, concerning a project involving the hoisting of four electrical transformers into a building under construction at 111 Eighth Avenue, New York, New York ("the Taconic job"). In or about September 2009, DeGuara prepared and submitted a price quote for the

job and, as the project was taking shape throughout the fall of 2009, he continued to discuss the job with Tony Kolb, an employee of R.B. Samuels, and to refine the plaintiff's proposal. As of December 31, 2009, the project had not been finalized and the rigging job which DeGuara and Kolb were discussing had not yet been awarded.

On January 5, 2010, DeGuara resigned from his employment with the plaintiff. The plaintiff claims that, upon his departure, Deguara took the plaintiff's written and electronic records with him, including information regarding ongoing jobs and bids and a log he kept detailing every job he worked on for the plaintiff. Shortly thereafter, he prepared and submitted a price quote for the Taconic job, either on his own personal behalf or on behalf of Bel-Air, which was ultimately accepted by R.B. Samuels. According to the plaintiff, that bid was submitted no more than 14 hours after DeGuara resigned and left the plaintiff's premises, and included certain information pertaining to the operations of Brothers & Company, Inc., a competing rigging company, which had no independent knowledge of the Taconic job and was not a participating bidder but had nevertheless "teamed up" with the defendants to submit the bid. The plaintiff also claims that by January 15, 2010, when the final bid was awarded, DeGuara was "already holding himself out as a vice-president of Brothers." This action followed.

The plaintiff alleges four causes of action in its complaint. The first and second seek damages for breach of contract on the theory that the defendants' misappropriation of the plaintiff's proprietary and confidential information for use in soliciting and procuring the rigging job with R.B. Samuels constitutes a violation of the restrictive covenant contained in the May 5, 2008 agreement. By its first cause of action, the plaintiff seeks the return of the $203,300 bonus paid to the defendants; by its second cause of action, the plaintiff seeks compensatory and consequential damages incurred by reason of the alleged breach, including loss of profits, legal fees, and the costs of collecting the bonus. The third cause of action is for breach of the duty of good faith and loyalty. The fourth is for conversion of proprietary information.

The defendants, in their answer, plead 11 counterclaims against the plaintiff and against Krevat as an additional party. The first is for breach of contract, alleging that the plaintiff and Krevat failed to pay DeGuara the compensation and benefits owed under the parties' May 5, 2008 agreement. The second is also for breach of contract, stemming from Krevat's failure to negotiate in good faith regarding the proposed purchase of the business. The third is for breach of the duty of good faith and fair dealing with respect to both the May 5, 2008 agreement and the proposed purchase of the business. The fourth, which appears to be based on a quasi-contractual theory, is to recover for the services performed and efforts made by DeGuara on the plaintiff's behalf. The fifth alleges a violation of Labor Law § 191 based on the failure to pay the full amount of the bonus due under the May 5, 2008 agreement. The sixth is for liquidated damages under Labor Law § 198. The seventh and eighth appear to be based in fraud, on the theory that Krevat falsely represented his intention to offer an opportunity to purchase the plaintiff's business in order to induce DeGuara to learn and develop the business. The ninth, in addition to repeating the material allegations set forth in the seventh and eighth counterclaims, pleads that Krevat falsely represented the plaintiff's 2008 earnings to DeGuara and engaged in a scheme of tax evasion in order to avoid paying the full amount

of bonus due under the May 5, 2008 agreement, and seeks both compensatory and punitive damages. The tenth pleads that the plaintiff and Krevat converted the unpaid amount of the bonus for their own use. The eleventh is for an accounting.

The parties now separately move, *inter alia*, for summary judgment.

Based on the sharply conflicting affidavits, deposition testimony, and other evidence presented, the court finds the record rife with factual questions–including whether, during the period that the restrictive covenant was in force, DeGuara acted as an agent for a company which was to be in competition with the plaintiff, whether DeGuara used confidential or proprietary information obtained during the course of his employment to usurp a business opportunity properly belonging to the plaintiff, whether DeGuara removed written and electronic records from the plaintiff's office to the exclusion of the plaintiff's rights, and whether the bonus paid to DeGuara represented 25% of the plaintiff's actual net earnings for the year 2008–all of which preclude generally the granting of summary judgment as to any of various theories of liability underlying the complaint and the defendants' first counterclaim. However, since Bel-Air is not an employee of the plaintiff and did not owe the plaintiff a duty of loyalty (*see* ***Qosina Corp. v C & N Packaging***, 96 AD3d 1032, 948 NYS2d 308 [2012]), summary judgment is granted to the limited extent of dismissing the third cause of action against Bel-Air.

Summary judgment is also granted dismissing the second counterclaim, as it is premised on the existence of a "contract"–*i.e.*, the proposed purchase of the business–which is nothing more than an agreement to agree and, consequently, unenforceable as a matter of law (*see* ***Joseph Martin, Jr., Delicatessen v Schumacher***, 52 NY2d 105, 436 NYS2d 247 [1981]; ***Miranco Contr. v Perel***, 29 AD3d 873, 816 NYS2d 516 [2006]). To the extent that the third counterclaim is predicated on a claimed breach of the duty of good faith and fair dealing with respect to that "contract," it is dismissed as well, as is the remaining portion of that counterclaim, which essentially pleads that the plaintiff and Krevat did not act in good faith in performing their obligations under the May 5, 2008 agreement and is, therefore, duplicative of the first counterclaim (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]).

Summary judgment is likewise granted dismissing the fourth counterclaim, seeking recovery in quantum meruit, since the existence of a written agreement governing the subject matter of the parties' dispute is undisputed (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]).

As to the fifth and sixth counterclaims, the court finds that the payment of DeGuara's bonus does not fall within the statutory protection of Labor Law article 6; rather, it is evident upon review of the terms of the May 5, 2008 agreement that the bonus is not a "wage" within the meaning of Labor Law § 190 (1) because it was not predicated on DeGuara's own personal productivity but on the plaintiff's financial success (*see* ***Truelove v Northeast Capital & Advisory***, 95 NY2d 220, 715 NYS2d 366 [2000]; ***Duffy v RMSCO, Inc.***, 34 AD3d 1285, 825 NYS2d 861 [2006]). Accordingly, summary judgment dismissing the fifth and sixth counterclaims is granted, and the defendants'

motion for summary judgment in their favor with respect to the those counterclaims is correspondingly denied.

As to the seventh counterclaim, the court finds it adequately pleaded and, further, that there remain issues of fact, sufficient to defeat summary judgment, whether Krevat falsely represented his intention to sell the business to DeGuara and, if so, whether and to what extent the defendants were damaged thereby. Both the eighth counterclaim and that portion of the ninth counterclaim which pleads the same conduct and measure of damages are dismissed as redundant.

Summary judgment is denied with respect to the remaining portion of the ninth counterclaim, alleging that Krevat falsely represented the plaintiff's 2008 earnings to DeGuara and engaged in a scheme of tax evasion in order to avoid paying the full amount of bonus due under the May 5, 2008 agreement. The court finds that such conduct states a valid cause of action for breach of the duty of good faith and fair dealing, which 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" (***Jaffe v Paramount Communications***, 222 AD2d 17, 22-23, 644 NYS2d 43, 47 [1996]). The court further finds that the evidentiary submissions fail to negate a triable issue of fact as to whether Krevat participated in such conduct.

The tenth counterclaim fails as a matter of law; a claim to recover damages for conversion cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability (*see* ***Wolf v National Council of Young Israel***, 264 AD2d 416, 694 NYS2d 424 [1999]).

Summary judgment is granted dismissing the eleventh counterclaim as well, and the defendants' request for summary judgment in their favor with respect to that counterclaim is, again, correspondingly denied. "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" (***Palazzo v Palazzo***, 121 AD2d 261, 265, 503 NYS2d 381, 384 [1986]). Since the May 5, 2008 agreement provided that DeGuara would share only in the plaintiff's net earnings and not in any losses, no fiduciary relationship was created that would entitle the defendants to an accounting (*see* ***Vitale v Steinberg***, 307 AD2d 107, 764 NYS2d 236 [2003]). "An employer-employee relationship providing for the division of profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses" (*id.* at 108, 764 NYS2d at 237).

Insofar as the plaintiff's motion is addressed to the affirmative defenses, it is considered under CPLR 3211 (b) and, as such, is granted to the extent of (i) dismissing the second, third, fourth, fifth, sixth, and eleventh affirmative defenses, all of which merely plead conclusions of law without any supporting facts (*see* ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2008]), (ii) dismissing the seventh, eighth, ninth, and tenth affirmative defenses, as there is no merit to the claim that the plaintiff failed to plead the complaint with the requisite particularity, and (iii) dismissing the thirteenth affirmative defense, as the claim that the causes of action against Bel-Air

"are patently devoid of merit" is clearly covered by the denials in the defendants' answer and is superfluous, while the further claim that those causes of action somehow "contravene the scope" of a prior court order is itself without merit. As to the first and twelfth affirmative defenses, while the court recognizes that no motion lies to dismiss a defense of failure to state a cause of action (*see* ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2008]), the defense has essentially been rendered academic by the foregoing determination of that branch of the defendants' motion which is for summary judgment dismissing the complaint. And while dismissal of the second, third, fourth, fifth, sixth, and eleventh affirmative defenses is necessarily without prejudice to the defendants' right to replead those defenses in proper form (*see* ***Moran Enters. v Hurst***, 96 AD3d 914, 947 NYS2d 538 [2012])–the plaintiff having failed to demonstrate their lack of merit as a matter of law (*see* ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2010])–it appears to the court that most if not all of those defenses are inapplicable to this matter, and the defendants, consequently, are advised to be circumspect in deciding whether to replead.

Finally, since service of a motion for summary judgment, as here, suspends all disclosure proceedings, including motions to compel disclosure, until such time as the "dispositive" motion is decided (CPLR 3214 [b]), the plaintiff's separate motion relating to disclosure is granted only to extent of directing the parties and their attorneys to appear for a compliance conference at which the issues raised by the plaintiff may be addressed. As to the plaintiff's request for an order vacating the automatic stay and continuing discovery, it is academic, as the stay expires upon issuance of this order (*see id.*).

The court directs that the claims as to which summary judgment was granted are hereby severed and that any remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 4/11/2013

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**