SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS PART 53
Justice

Index Number : 651926/2013
GREYSTONE FUNDING CORPORATION
vs.
KUTNER, EPHRAIM
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 11/6/2013

CHARLES E. RAMOS, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GREYSTONE FUNDING CORP.,

Plaintiff,

Index No.
651926/13

-against-

EPHRAIM KUTNER, JONATHAN KUTNER, and
HARBORVIEW CAPITAL PARTNERS, LLC,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

Motion sequence 003 in this action and motion sequence 002 in the related action *Kutner v. Greystone Funding*, index number 652210/2013 (the "Related Action"), are herein consolidated for disposition.

In motion sequence 003, the defendants Ephraim Kutner ("Ephraim"), Jonathan Kutner ("Jon", together with Ephraim, the "Kutners"), and Harborview Capital Business Partners, LLC ("Harborview", together with the Kutners, the "Kutner Defendants") move pursuant to CPLR 3211 for dismissal of the plaintiff Greystone Funding Corp.'s ("Greystone") complaint.

In motion sequence 002 of the Related Action, Greystone moves pursuant to 22 NYCRR § 216.1 for an order directing that Exhibit F to the Affirmation of Steven Engel filed in connection with motion sequence 001 of the Related Action ("Exhibit F") be sealed.

Background

Briefly, as alleged in the complaint, Greystone is a

mortgage lender, that specializes in FHA lending. The Kutners are both former employees of Greystone.

On January 1, 2010, Greystone and Ephraim executed a letter agreement (the "Agreement") that established the terms and conditions of his employment at Greystone. The Agreement provided that his employment began on January 1, 2011 and would continue for a period of two years, until January 1, 2013.

Ephraim was a senior originator and supervised a team of Greystone employees in Lawrence, NY. Jon was employed as a project manager for Ephraim. Both Ephraim and Jon agreed in a writing to keep certain information disclosed during their employment confidential.

To that end, the Agreement provided that Ephraim would be subject to a "Restricted Period" wherein he would, *inter alia*, not compete against Greystone or solicit Greystone's clients (Engel Aff., Ex. D, § 5 [c]). The Agreement defines the "Restricted Period" as "the duration of [Ephraim's] employment with [Greystone] and the two-year period following the date such employment" (*id.*).

Greystone alleges that, in late 2012, as the expiration of the Agreement was nearing, Ephraim solicited Greystone personnel to work with him at a mortgage lending business that he would operate after the Agreement expired. Greystone alleges upon information and belief that the Kutners formed and were actively

operating a mortgage banking business through Harborview. Greystone alleges that it terminated Ephraim's employment on April 15, 2013.

Since his departure from Greystone, Ephraim allegedly has, *inter alia*, directly or indirectly through others, pursued lending transactions for himself or Harborview in direct competition with Greystone, communicated with Greystone clients and prospective borrowers, and cancelled meetings on behalf of Greystone without its authorization.

On May 30, 2013, Greystone commenced this action alleging causes of action for breach of the Agreement, tortious interference, unfair competition, unjust enrichment, and an accounting.

On July 15, 2013, the Kutner Defendants moved pursuant to CPLR 3211 to dismiss the complaint.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

The Kutner Defendants move to dismiss on the basis that the documentary evidence conclusively demonstrates that Greystone

terminated his employment before the expiration of the Agreement and that as a result, Greystone terminated Ephraim's restrictive covenants as well.

They allege that in late 2012, Ephraim expressed concerns about continuing his employment at Greystone. In an effort to resolve their differences, Greystone and Ephraim agreed to a series of brief extensions through March 27, 2013.

On February 27, 2013, Ephraim provided written notice that he would not be renewing the Agreement and expressed his desire to "continue on an at will basis" (Engel Aff., Ex. C).[1]

On March 1, 2013, Greystone responded that if Ephraim was intent on not renewing the Agreement, then Greystone would be "hereby forced to terminate your employment, effective immediately" (*id.*). In light of the correspondence, it is evident that Greystone terminated Ephraim as of March 1, 2013.

Ephraim asserts his obligations pursuant to the Agreement were also terminated.

Greystone offers no explanation for its allegation that it terminated Ephraim on April 15, 2013, in light of the fact that its letter was sent on March 1, 2013 and the extensions were until March 27, 2013. April 15, 2013 cannot be considered the effective date of Ephraim's termination (*contra* Complaint, ¶ 18).

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[1] "Ex. C" refers to the Kutner Defendants Corrected Exhibit C (NYSCEF Doc. 59).

In the event Ephraim was terminated without cause the Agreement provided that the "Restricted Period" would not be effective "beyond the date your employment terminates if your employment is terminated without Cause by [Greystone]" (Engel Aff., Ex. D, § 5 [c]). As a result, Ephraim's obligations arising from the restrictive covenants of the Agreement were terminated on March 1, 2013.

It is well established in cases of discharge without cause, "powerful considerations of public policy militate against sanctioning the loss of a man's livelihood" (*Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 86 [1979]). "Where the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests..." (*id.*).

This Court is compelled to hold that when Greystone terminated the Agreement without cause, it necessarily invoked the provision that terminated the restrictive cotenant. (Engel Aff., Ex. C; Trans., Aug. 26, 2013, 21:7-14). Upon being informed of Ephraim's intention to not renew the Agreement, Greystone could have allowed the Agreement to expire automatically after the last extension to March 27, 2013, thereby preserving the restrictive covenants it now seeks to enforce against Ephraim. This it did not do.

Instead, there is clear evidence in the record that

establishes that on March 1, 2013, Greystone terminated the Agreement "effective immediately" (*id.*).

In fact, on March 14, 2013, Greystone CEO Stephen Rosenberg sent an email to the Kutners confirming that Ephraim was working without a contract to wind up certain transactions pending at the time the Agreement was terminated (Engel Aff., Ex. F ["To my understanding you are currently working with no contract which is not acceptable to me"]).

Consequently, the termination of the Agreement by Greystone also relieved Ephraim of any obligations arising from the restrictive covenants (*Post* at 86).

Therefore, the first cause of action for breach of contract and the fifth cause of action for tortious interference with contract in the complaint are dismissed because the unrefuted documentary evidence establishes that Greystone terminated Ephraim's employment without causes and thus, it cannot seek to enforce the restrictive covenants.

Furthermore, the second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of the first cause of action.

Moreover, the remaining causes of action for breach of duty, faithless servant, tortious interference with prospective economic advantage, unfair competition, unjust enrichment, and an accounting are all dismissed on the basis that the vague and

conclusory allegations contained in the complaint fail to plead the essential elements of the respective causes of action.

Lastly, this Court finds that Greystone demonstrates that Exhibit F contains proprietary information that warrants sealing.

"Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records" (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010]). "However, the right of access is not absolute" (*Danco Labs., Ltd. v Chem. Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Dept 2000]).

To that extent, 22 NYCRR § 216.1 provides that:

> "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties" (*Mosallem* at 349).

"Although the term 'good cause' is not defined, a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action" (*id.*). "A finding of 'good cause' presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant" (*id.*).

Exhibit F conclusively contains impressions and contemporaneous notes that could harm Greystone's competitive

advantage by having access to a large compilation of their business leads and their internal and contemporaneous impressions.

"In the business context, we have allowed for sealing where trade secrets are involved, or where the release of documents could threaten a business's competitive advantage" (*id.* at 350). "Proprietary information, in the nature of current or future business strategies which are closely guarded by a private corporation, is akin to a trade secret, which, if disclosed, would give a competitor an unearned advantage" (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 503 [2d Dept 2007]).

Accordingly it is,

ORDERED that the defendants Ephraim Kutner, Jonathan Kutner, and Harborview Capital Partners, LLC's motion to dismiss is granted in its entirety thereby dismissing the plaintiff Greystone Funding Corporation's complaint, and it is further

ORDERED that the motion to seal in *Kutner v. Greystone Funding*, index number 652210/2013 is granted.

This constitutes the decision and order of the Court.

Date: November 6, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS