

CSI Group, LLP v Harper
2013 NY Slip Op 33349(U)
May 14, 2013
Sup Ct, Richmond County
Docket Number: 100146/13
Judge: Joseph J. Maltese
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:100146/13
Motion No.:001,002**

**CSI GROUP, LLP, and
HARPER ASSOCIATES, LLC,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**MARTIN W. HARPER,
MARTIN HARPER ASSOCIATES,
BROADWAY WEALTH MANAGEMENT, LLC d/b/a
BROADWAY ASSET MANAGEMENT,
THERESA MAISANO,
H.A. SERVICES, INC., and
TM SERVICES, INC.,**

Defendants

The following items were considered in the review of the following order to show cause of a preliminary injunction; and motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause with Attorney's Affirmation	1
Answering Affidavit and Affirmation	2,3
Memorandum of Law in Opposition	4
Notice of Motion with Affidavits	5
Memorandum of Law in Support	6
Affirmation in Opposition to Motion	7
Memorandum of Law in Reply	8
Sur-Reply Affirmation	9
Memorandum of Law in Sur-Reply	10
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on the Order to Show Cause and Motion is as follows:

The plaintiffs move by order to show cause for a preliminary injunction restraining the defendants from withdrawing funds out of the Harper Associates, LLC account; trading or representing themselves as Harper Associates, LLC, and providing an immediate accounting. The order to show cause is denied. The defendants move to dismiss the plaintiff's complaint. The motion is also denied.

Facts

In 2007 the defendant Martin Harper, sold his practice to the plaintiff . At that time Harper had approximately 800 individual tax preparation clients, 50 business tax preparation clients and 80 financial management clients. Harper's practice also had approximately \$40,000,000 in assets under management. On October 16, 2007 Harper sold his practice to the plaintiff. Peter Greco of CSI drafted the purchase agreement. The purchase agreement contained the following non-compete clauses:

17. For so long as the Purchaser is not in default under this Agreement and for a period of five years from the Closing Date, the Seller shall not perform any tax, financial and/or accounting services in any capacity except for the Purchaser. Notwithstanding the forgoing, the Seller shall have the right to perform tax, accounting and financial services for its own use, its own corporation, for its friends and family members.

18. For so long as the Purchaser is not in default under this Agreement and for a period of five (5) years from the Closing Date, the Seller shall not directly or indirectly, induce or influence any tax client to patronize any accounting firm, accountant, tax preparer or financial firm other than the Purchaser herein.

In late September 2012, Harper decided that he would not continue to work for the plaintiff after the expiration of his contract. Harper asserts that the plaintiff refused to pay him fees of approximately \$28,727 owed to him under the purchase agreement, that were payable on October 15, 2012 and November 15, 2012. On or about November 20, 2012, after the expiration of the non-compete clause, Harper moved into a temporary office and began performing tax preparation services and investment advisory services in January 2013.

The plaintiff moves by order to show cause alleging a breach of the non-compete clause. However, the plaintiff has submitted no evidence to substantiate these claims beyond several e-mails exchanged with Harper's counsel. Moreover, the plaintiff's order to show cause is not accompanied by an affidavit by an individual with personal knowledge of the facts.

The defendants move to dismiss the plaintiff's complaint pre-discovery pursuant to CPLR § 3211(a)(7) arguing that the complaint fails to state a cause of action. The plaintiff's complaint alleges thirteen causes of action: breach of contract; breach of the implied duty of good faith and fair dealing; fraud; negligent misrepresentation; misappropriation; tortious interference with contractual relations; breach of the duty of honesty; breach of the duty of loyalty; unfair competition; compel accounting; business defamation; conversion; and unjust enrichment.

Discussion

This court cannot consider the plaintiff's order to show cause as it is not supported by an affidavit or affirmation with personal knowledge of the facts. An attorney's affirmation alone is without any evidentiary significance.¹ Consequently, the order to show cause is denied.

In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, interpret the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its cause of action is not part of the calculus.² Consequently, given the broad construction given to a plaintiff's complaint, the defendants motion to dismiss must be denied at this time. The arguments asserted in the defendant's motion may be reasserted at the close of discovery.

Accordingly, it is hereby:

ORDERED, that the plaintiff's order to show cause is denied; and it is further

ORDERED, that the defendant's motion to dismiss is denied; and it is further

¹ See, *European Granite and Marble Group, Inc. v. McNaughton*, 102 AD3d 732 [2d Dep't. 2013].

² *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005].

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Tuesday, June 25, 2013 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: May 14, 2013

Joseph J. Maltese
Justice of the Supreme Court