SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JIN LEE,

Plaintiff,

Index No. 600919/09

-against-

MANCHESTER REAL ESTATE AND CONSTRUCTION, LLC,

Defendant.

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Joan Madden, J.:

Defendant Manchester Real Estate and Construction, LLC (Manchester), moves for an order (1) granting it leave to reargue and renew its motion for summary judgment and, (2) upon reargument and renewal, granting it summary judgment on its counterclaim to recover compensation paid to its former employee, plaintiff Jin Lee, and dismissing plaintiff's claim for payment of certain bonus payments. Plaintiff opposes the motion.

Background

In this action, plaintiff seeks employment compensation allegedly owed to her, a real estate management company where she was employed from August 2002 through February 2008, as Chief Investment Officer (CIO). Manchester has asserted a counterclaim to recover compensation previously paid to plaintiff based on allegations that plaintiff breach her fiduciary duties by competing with Manchester.

Manchester is primarily in the business of servicing real

estate debt on properties of considerable value. It is uncontested, however, that Manchester is also, to some extent, in the business of buying properties for investment purposes.

In her role as CIO, part of plaintiff's job was to evaluate business opportunities offered to Manchester, which came to her attention solely as CIO of Manchester.

Plaintiff and Manchester entered into an employment agreement dated July 30, 2002 ("Employment Agreement"). Under the Employment Agreement, plaintiff was to receive a base salary of $185,000 per annum, along with:

> 10% of any collected gross profit earned on deals initiated by Manchester after start date, after a 12% preferred return on equity to N. Richard Kalikow and affiliates. These payments will be distributed on a quarterly basis. ... Additionally, you shall be eligible to co-invest in the firm's proprietary transactions up to 10% of the equity and/or participate in the equity of the firm after your first anniversary of employment with Manchester.

Employment Agreement at 1. The Employment Agreement further provides that, in the event of plaintiff's termination, she was to:

> (a) continue to receive, as they are received by Manchester, 10% of any collected cash income earned on deals initiated by Manchester from your start date to your termination date, or (b) receive a lump sum payment, in an amount to be mutually determined by you and Manchester, for any such collected cash income due to you after the date of termination.

Id.

The Employment Agreement did not contain any restriction on

plaintiff's ability to compete with Manchester during her period of Employment.

In order to facilitate plaintiff's right to co-invest under the Employment Agreement, Manchester's principal, N. Richard Kalikow (Kalikow) incorporated two entities, Alpha Capital LLC and Alpha Manhattan LLC (the Alpha LLC's). Plaintiff was a member of the Alpha LLC's, along with Kalikow and others, and, according to plaintiff, all Manchester's deals were funded by the Alpha LLC's.

Section 6.4 of the Alpha LLC's operating agreements provides that all members may "engage, directly or indirectly, in any other business venture or ventures of any nature and description, independently or with others, including, without limitation, the real estate business in all its respects (whether or not competing with, relating to, or in any manner connected with, the business of (the Alpha LLC's) ... ." Lee avers that the Alpha LLC'S were "affiliates of Manchester/Kalikow." Lee Affidavit, at 5.

It is undisputed that, while employed by Manchester, plaintiff, starting in 2006, forwarded numerous emails to her husband, Robair Reichenstein (Reichenstein), which contained offers which had been sent to Manchester by real estate brokers to purchase various properties. It is alleged by Manchester that plaintiff incorporated a company, Royalton Capital, Inc.

(Royalton), in September 2007, with its principal place of business at the address plaintiff shares with Reichenstein, apparently for the purpose of purchasing investment properties. However, plaintiff claims that Reichenstein, and not she, incorporated Royalton, and that she only took over Royalton in 2008, after she left Manchester, in order to pursue her own business.

According to Kalikow, plaintiff never informed him that she was forwarding offers to purchase real property, received by her in her capacity as Manchester's CIO, to Royalton and Reichenstein. Reichenstein never closed on any opportunity forwarded to him by plaintiff, although the emails between plaintiff and Reichenstein indicate that the couple seriously considered investing in some of the properties.

At the same time, plaintiff maintains that she often spoke to Kalikow, and informed him that Reichenstein's company was searching for properties, and that Kalikow never informed her that this was a problem. In addition, there is evidence that at one point, Reichenstein approached Kalikow seeking to have Kalikow co-invest with Reichenstein in an opportunity which had been originally sent to Manchester, but which had been forwarded by plaintiff to her husband. There is also evidence that Reichenstein approached Kalikow on several occasions about various deals, none of which came to fruition.

Manchester assert that plaintiff unfairly competed against Manchester from 2006 through 2008, by co-opting investment opportunities which Manchester would have considered had the opportunities been presented to it, rather than being intercepted and surreptitiously forwarded to Reichenstein.

Plaintiff, on the other hand, maintains that the investment opportunities forwarded by her did not constitute corporate opportunities belonging to Manchester as they were based on public information and, in any event, were not the type of investment that plaintiff was to acquire for Manchester. In fact, plaintiff maintains that there was nothing secretive or disloyal about providing the investment opportunities to Royalton since Manchester's business was primarily to lend money to purchaser's of real estate, which was what Royalton was seeking, she was actually discharging her corporate duty rather than breaching it by bringing Reichenstein and Kalikow together.

In addition, plaintiff asserts that she was not restricted in the opportunities that she was permitted to pursue and notes that the Employment Agreement did not include a non-compete provisions and that the Alpha LLC's operating agreements expressly permitted her to engage in business ventures, even if in competition with Manchester.

Following the completion of discovery, Manchester moved for summary judgment on its counterclaim to recover compensation

previously paid to plaintiff, and for partial summary judgment dismissing that part of plaintiff's complaint seeking bonus payments. Plaintiff cross moved for summary judgment on her single claim for breach of contract and to strike Manchester's affirmative defenses.

By decision and order dated January 30, 2013 ("the original decision"), the court denied Manchester's motion for summary judgment on its counterclaim and to dismiss plaintiff's claim, and denied plaintiff's cross motion, except for striking Manchester's affirmative defenses.

In denying Manchester's motion, the court found triable issues of fact existed as to whether the properties identified by plaintiff in the emails to Reichenstein were diverted corporate opportunities. In reaching this conclusion, the court relied primarily on the "tangible expectancy" test propounded by the First Department in *Alexander & Alexander of N.Y. v Fritzen* (147 AD2d 241 [1st Dept 1989]. As noted in the original decision, while discussing several tests utilized by the courts to determine the issue of what constitutes a corporate opportunity, the *Alexander* Court settled mainly on the concepts of the employer's "expectancy, tangible or otherwise" in the business diverted, as well as the finding that "such business was essential or necessary to [the corporation's] success ... ." *Alexander,* at 249; *see also Matter of Greenberg (Madison Cabinets*

& Interiors), 206 AD2d 963, 964 (4th Dept 1994)(defining corporate opportunity as "any property, information or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to the existence or logically and naturally adaptable to its business").

After applying this test, the court found factual questions as to whether the property at issue was a corporate opportunity. The court wrote that:

> it cannot be said as a matter of law that Manchester had an interest or tangible expectancy in the properties identified in the emails sent by plaintiff to her husband. While the record shows that Manchester dealt in equity as well as debt transactions, plaintiff maintains that the properties were not of the kind that in which Manchester would invest. In this connection, plaintiff provides evidence that the equity deals bid on by Manchester were for large properties in which its bid was for at least $100 million and in one case $2.5 billion, whereas the highest asking price of the deals sent by plaintiff to Reichenstein was $18 million. Plaintiff states that for the smaller investments like the ones she sent to Reichenstein, Manchester wanted another investor, to purchase the properties, while it loaned a portion of the investment money. Furthermore, while not dispositive, it is relevant that the offers were sent to other members in the industry, or even to Reichenstein.

Original Decision, at 11-12.

Manchester's position that it was entitled to summary judgment was based largely on *Maritime Fish Products, Inc. v*

World-Wide Fish Products, Inc. (100 AD2d 81 [1st Dept 1984])(*Maritime Fish*), an employee disloyalty action, in which the First Department found that the complaint was improperly dismissed after a non-jury trial, as the record showed that the employee engaged in five secret transactions involving the sale of dried fish, the product the employer sold.

However, as the court noted, the determination of that action was made after trial and not on a motion for summary judgment. The court further noted that whether a corporation has an interest or "tangible expectancy" in an allegedly diverted opportunity is a fact specific inquiry generally made after trial. *See 30 FPS Productions, Inc. v Livolsi*, 68 AD3d at 1102 (court erred in granting summary judgment as triable issue of fact existed as to whether employee made improper use of plaintiff's time, facilities or proprietary secrets); *Burg v. Horn*, 380 F2d 897, 901 (2d Cir. 1967)(director's duty to offer opportunities to the corporation depends on the particular facts of the case).

Alternatively, the court found that even assuming that it could be said as a matter of law that the properties at issue were corporate opportunities of Manchester, issues of fact existed as to whether Manchester acquiesced and/or consented to plaintiff's conduct. In this connection, the court noted that the Employment Agreement did not contain a non-compete provision,

and that under the provisions of the Alpha LLC's operating agreements, plaintiff was allowed to compete with in the real estate business irrespective of whether such competition was in any way connected with the Alpha LLC's, whose affiliates, according to plaintiff, included Manchester and Kalikow.

Motion to Reargue

Manchester argues that reargument should be granted as the court misapprehended the law with respect to the corporate opportunity doctrine and that, upon reargument, this court should find as a matter of law that plaintiff diverted Manchester's corporate opportunities and that Manchester is entitled to summary judgment on its counterclaim and dismissing plaintiff's claim.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided"(*William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 [1992]).

For the reasons below, the court grants reargument to explicate the legal principles underlying the original decision

in light of Manchester's arguments. However, upon reargument, except for clarifying that the Alpha LLC operating agreements do not expressly allow plaintiff to compete with Manchester, the court adheres to its original decision and denies Manchester's motion for summary judgment.

Manchester first argues that the court incorrectly applied the "tangible expectancy" and other tests described in *Alexander*, to this action. Manchester argues that these tests are only relevant where the diverted opportunities were "not of the same nature as the business conducted by [the] ...employer" (*Id.*, at 10), and have no application to this case, as the diverted opportunities, were in Manchester's line of business which includes purchasing properties for investment purposes.

Manchester asserts that, under these circumstances, the tangible expectancy test is satisfied and "the fact that the competing business undertaken presented itself in the form of a corporate opportunity which the corporation was financially unable or for other reasons unwilling to undertake should be no excuse for an officer undertaking it individually[1]" *Id.*, at 247.

This argument is unavailing. Although the *Alexander* Court

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[1]While the unwillingness or inability of employer to act on a corporate opportunity is not a defense to an action against an employee for breach of his duty of undivided loyalty (*see Bankers Trust Co. v. Bernstein*, 169 AD2d 400 (1st Dept 1991), this analysis does not dispense with the requirement that there be a corporate opportunity to begin with.

found that the business of selling life insurance was not part of the business in which the employer was involved, as the employer's business was in the field of property/casualty insurance, this finding was only one of several factors that led the court to conclude that under the tangible expectancy test, defendants did not divert the employer's corporate opportunities. Moreover, nothing in *Alexander* supports Manchester's position that the tangible expectancy analysis and other tests discussed in *Alexander* apply only when the corporate opportunity is in a different line of business from that of the employee.

Otherwise put, a finding that the properties referred to Reichenstein by the plaintiff were in the same line of business as Manchester does not mean that the properties at issue were corporate opportunities or that plaintiff breached her duties of loyalty as a matter of law. Instead, the court must consider the circumstances at issue, including "whether a duty to offer the corporation all opportunities within its 'line of business' may be fairly implied." Burg *v. Horn,* 380 F2d at 900. *See also, Howard v. Carr,* 222 AD2d 843 (3d Dept 1995)(whether there has been a breach of loyalty to the corporation must be measured by the circumstances at issue).

Here, the original decision correctly found that plaintiff proffered evidence sufficient to raise a triable issue of fact as to whether plaintiff diverted corporate opportunities or breached

any duty by offering the properties to Reichenstein. This evidence included, *inter alia*, the relatively small size of the business deals referred to Reichenstein as compared to the equity deals bid on by Manchester; that for the smaller investments like the ones plaintiff sent to Reichenstein, Manchester wanted another investor to purchase the properties, while it loaned a portion of the investment money; and that offers for the deals were not sent exclusively to Manchester.

Furthermore, the court also properly considered evidence as to the nature of plaintiff's relationship with Manchester, including that the Employment Agreement had no non-compete provision. While Manchester asserts that the court erred in considering this factor as an employee owes an absolute duty of loyalty irrespective of the terms of her employment, this assertion ignores that the application of corporate opportunity doctrine takes into account the expectations of the employer regarding its employee's activities. *Alexander & Alexander of N.Y. v Fritzen,* 147 AD2d at 248 (stating that a corporate opportunity would not exist where "at the beginning of the employment...the parties understood, or it is reasonable to conclude that the parties understood, that the employee...would simultaneously pursue other interests"); *Grammas v. Charla*, 53 AD2d 660, 660-661 (2d Dept 1976)(holding that no corporate opportunity was diverted as the employment agreement between the

parties "did not require the latter to give [the plaintiff] his full and undivided attention. It was never contemplated that [the defendant] would refrain from outside activities....").

Likewise, the court properly considered that, under the provisions of the Alpha LLC's operating agreements, plaintiff and her family were allowed to compete within the real estate business irrespective of whether such competition was in any way connected with the Alpha LLC's. While Manchester correctly points out that it did not sign the agreements and that, contrary to the implication in the original decision, the agreements do not expressly permit plaintiff to compete against Manchester, the agreements nonetheless evidence an intent to allow plaintiff to pursue real estate business outside her employment with Manchester.[2]

Manchester also argues that the court misapprehended the law in finding that issues of fact existed as to whether Manchester acquiesced or consented to plaintiff's conduct. In this connection, Manchester argues that the First Department requires that the employer's "express consent and approval" before an employee will be permitted to compete with her employer. *Maritime Fish Products, Inc. v World-Wide Fish Products, Inc.*, 100 AD2d at 89.

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[2]Moreover, as noted by plaintiff, in this action Manchester seeks the return of funds paid to plaintiff under the Alpha, LLC operating agreements.

Although *Maritime Fish* states that express consent and approval is required before an employee is permitted to compete with an employer, the First Department has held that evidence that an employer acquiesced or implicitly consented to an employee's acquisition of a corporate opportunity provides a defense to a breach of duty claim against an employee. *See Blake v. Blake*, 225 AD2d 337 (1st Dept 1996)(shareholder was estopped from asserting that sale of property constituted a usurpation of corporate opportunity when he had knowledge of the transaction and failed to object to it); *Ackerman v. 305 E. 40 Owners Corp.*, 189 AD2d 665 (1st Dept 1993)(denying defendant cooperative corporation's motion to dismiss based on defense that plaintiff director usurped corporate opportunity, where complaint alleged that corporation knew about plaintiff's acquisition and did not object to acquisition); *Miller Mft. Co. v. Zeiler*, 72 AD2d 338, 342 (1st Dept 1980)(finding that corporate opportunity was not wrongfully diverted in light of corporation's "knowledge, consent and acquiescence").

Moreover, as the court found in the original decision, the record raises issues of fact as to whether Manchester (and Kalikow) knew about and acquiesced in the business of Royalton, based on evidence that plaintiff informed and discussed with Kalikow potential real estate investments that her husband was exploring, and that Reichenstein approached Kalikow about at

least three real estate deals.

Finally, while, as Manchester argues, a lack of utmost good faith and loyalty on the part of an employee may provide a basis for a claim in the absence of the diversion of a corporate opportunity (*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d at 250), it cannot be concluded, as a matter of law, that plaintiff breached any duty of good faith and loyalty by referring the properties to Reichenstein, or by other conduct during her employment with Manchester.

Motion to Renew

Manchester moves for renewal based on a letter from plaintiff's Delaware counsel, Kenneth J. Nachbar, Esq. made in connection with plaintiff's request to inspect the books and records of the Alpha LLC's. The Alpha LLC's counsel requested that plaintiff enter into a confidentiality agreement that prevented plaintiff from using any of the documents related to the inspection in this litigation. In response, Mr. Nachbar objected writing in a letter dated November 16, 2012 ("the Nachbar letter"), that "[plaintiff's] rights as a member of the [Alpha LLC's] have nothing to do with whatever rights she may have as an employee of Manchester."

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made,

were unknown to the movant and were, therefore not brought to the court's attention. *Tishman Constr. Corp. of New York v. City of New York*, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).

Here, the Nachman letter does not provide a basis for granting renewal. As noted by plaintiff, her rights to inspect documents as a member of an LLC are distinct from any discovery rights she may have in this action. In any event, the statement in the Nachman letter does not support Manchester's position that it is entitled to a grant of summary judgment.

Conclusion

In view of the above, it is

ORDERED that the motion to reargue is granted and upon reargument, except for clarifying that the Alpha LLC operating agreements do not expressly allow plaintiff to compete with Manchester, the court adheres to its original decision and denies Manchester's motion for summary judgment; and it is further

ORDERED that the motion to renew is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

Dated: March 12, 2014

J.S.C.
HON. JOAN A. MADDEN
J.S.C.