Achieve It Solutions, Inc. v Lewis
2014 NY Slip Op 32541(U)
September 29, 2014
Supreme Court, Suffolk County
Docket Number: 019655-2012
Judge: Emily Pines

[* 1]

SHORT FORM ORDER

INDEX NUMBER: 019655-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 05-20-2014; 06-23-2014
Motion Submit Date: 07-15-2014
Motion Sequence No.: 002 MOTD
003 MOTD

[ ] Final
[X] Non Final

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ACHIEVE IT SOLUTIONS, INC.,

Plaintiff,

- against -

JOSEPH LEWIS, B1 ADVANCED, LLC, B1 FIXED ASSETS, LLC and DIAGNOSTIC IMAGING GROUP, LLC,

Defendants.

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Defendants Joseph Lewis ("Lewis"), B1 Advanced LLC ("B1 Advanced") and B1 Fixed Assets LLC ("B1 Fixed Assets") move, by Notice of Motion (motion sequence # 002), pursuant to CPLR § 3211 (a) (1) and (7) or 3211 (c) for an Order dismissing the Second, Third, Fourth and Fifth causes of action asserted by Plaintiff, Achieve IT Solutions LLC ("Achieve IT") against them and, pursuant to CPLR §3212 for Summary Judgment,

dismissing the entire complaint against them; or, in the alternative, for an Order limiting the damages that can be asserted against them to a fixed amount as per a particular contract. The remaining Defendant, Diagnostic Imaging Group, LLC ("DIG") also moves, by Notice of Motion (motion sequence # 003), for an Order pursuant to CPLR § 3211 (a) (1) and (7) or 3211 (c), dismissing the First, Second, Third and Fourth causes of action asserted by the Plaintiff against it and, pursuant to CPLR §3212 for Summary Judgment dismissing the entire complaint against that entity. Achieve IT opposes both motions arguing that issues of fact remain requiring that this case proceed to trial.

This action arises as a result of a series of "agreements" entered into by the various parties to this litigation in 2007, 2008 and 2009 resulting in Plaintiff's claim that the Defendants violated or caused the violation of these agreements, committed fraudulent acts and conspired to accomplish the same.

According to the individual Defendant, Joseph Lewis, the managing member of Defendants B1 Advanced and B1 Fixed Assets, he is the designer of a computer program which works in conjunction with a computer accounting program, known as SAP Business One ("SAP"). SAP, according to Lewis, handles accounting, sales, inventory and financial information for small businesses and allows for what he terms "add-on" programs which improve and extend SAP's functioning. Mr. Lewis formed B1 Fixed Assets in order to

license his new program (called "B1-FAM") and to enter into agreements with companies wishing to take orders and install the new program. Lewis set forth that he was initially contacted by one Timothy Singleton, an owner of what is currently the Plaintiff, Achieve IT, so that he could manage installation and implementation of the SAP program for various businesses. This business relationship, relating to SAP spawned two "agreements". The first, dated 8/28/07, is called "'Independent Contractor Agreement' between Achieve IT Solutions, LLC and Joe Lewis". It states that the Plaintiff wishes to engage Lewis as an independent consultant and contractor to advise Plaintiff and to assist Achieve IT in the implementation of SAP for Plaintiff's clients. The agreement contains certain non disclosure provisions and states at its close as follows:

"No Commitment. This Agreement and the fact that the parties are in discussion do not indicate the existence of a business relationship and do not bind the parties to enter into a business relationship of any kind. No business relationship will exist unless and until each party signs a separate written agreement that defines the relationship. The fact that the parties are in discussion and the nature of the discussions will be considered Confidential Information of both parties subject to this Agreement."

On January 9, 2008, a second "agreement" was reached, termed "Independent Contractor Agreement between Achieve IT Solutions, LLC and Joe Lewis/B1 Advanced LLC". The 2008 agreement stated that Achieve IT wished to engage Joe Lewis as an independent consultant in the position of project manager to assist Achieve IT in implementing the SAP program at their clients. This agreement contained the following clause:

"Mr. Lewis shall not, during the Agreement and for a period of two years immediately following termination of this Agreement, either directly or indirectly, call on, solicit, or take away, or attempt to call on, solicit, or take away, any of the customers or clients of Achieve IT Solutions on whom Mr. Lewis called or became acquainted with during the terms of this Agreement, either for their own benefit, or for the benefit of any other person, firm corporation or organization."

The 2008 Agreement was signed as follows:

"Achieve IT Solutions, LLC a New York corporation 373 Nesconset Highway Hauppauge, NY 11788	B1 Advanced LLC 30 Colony Road Westport, CT 06880
By:	By:
Name:	Name:
Title:	Title:

Timothy Singleton and Joseph Lewis each signed as President of their respective entities.

According to Lewis and Joseph Weber, the Vice President of Defendant DIG, DIG is a company that provides medical diagnostic imaging services for the public. In 2008, DIG wanted to upgrade its software and entered into a contract on August 27, 2008 with Achieve IT for the licensing and installation of the SAP program. Weber testified at his deposition that this program was to have a "go live" date, meaning that it would be functional, as of January 1, 2009. Although Achieve IT initially brought in a different project manager for this purpose, as DIG was unhappy with his progress, on November 1, 2008, Achieve IT assigned Lewis as project manager for the installation of SAP. Weber and Lewis both assert that the SAP program went live on the set date of January 1, 2009. Weber also avers that DIG never had any knowledge or inkling of any contracts between Lewis or any of his

entities and Achieve IT until the events shortly before this litigation was commenced.

Lewis states that he created the B1 FAM program, which is a robust fixed asset management application that can be used with SAP, and that Timothy Singleton of Achieve IT wanted to utilize his program for the DIG contract. Thus, a third agreement was entered into on January 8, 2009 concerning the licensing and installation of the B1 FAM application. The 2009 contract was entered into between B 1 Fixed Assets and Achieve IT. Under the 2009 agreement, Timothy Singleton and Joseph Lewis again both signed as CEO and President, respectively, of their entities. The 2009 contract permitted Achieve IT to obtain customers for installation of B 1 Fixed Asset's B1-FAM program and set forth how Achieve IT was to be paid (50% on its sales of the licenses and 10% on its sales of an annual maintenance program). The 2009 agreement contains no restrictive covenant comparable to that in the 2008 contract. In addition it provides that customers had the right to refuse to permit Achieve IT to provide services as follows:

"The parties acknowledge that Customers will from time to time require implementation and other services related to B1-FAM . . . If any Customer requests B1 Fixed Assets to provide any Related Services, B1 Fixed Assets will refer the Customer to [Achieve It] for such Related Services. If Customer is unwilling to use . . . .[Achieve IT] to perform such Related Services, B1 Fixed Assets will notify . . .[Achieve IT] and conduct the Related Services themselves at a rate determined by B1 Fixed Assets and the Customer. Nothing herein precludes B1 Fixed Assets from performing Related Services for any Customer, but B1 Fixed Assets agrees to follow the foregoing procedures before doing so."

In addition, the 2009 agreement gave B1 Fixed Assets the right to establish pricing; to accept or reject orders and make conditions on all sales of the B1 FAM product. In addition, the same agreement limits liability and damages upon breach by either B1 Fixed Assets or Achieve IT. Thus, as per B1 Fixed Assets, the Plaintiff's damages for the Defendant's breach of the 2009 agreement are limited to the "service fees paid by the customer to B1 Fixed Assets, in the three periods immediately proceeding the payment period

in which the event giving rise to such losses or damages occurs. . ." B1 Fixed Asset's damages for Achieve IT's breach are likewise limited the "the total amount of commissions paid by B1 Fixed Assets to [Achieve IT] in the 12 month period preceding the event giving rise to such losses or damages". According to Lewis, despite Achieve IT charging DIG for the fixed asset application and the B1 FAM license and maintenance, Plaintiff failed to pay B 1 Fixed Assets any monies for the same after DIG paid.

According to Lewis and Weber, although DIG paid the Achieve IT invoices in a timely manner, Plaintiff, in April 2009, stopped the installation of the B1 FAM application for DIG. Thereafter, Lewis claims he had numerous conversations with Singleton of Achieve IT about extending Plaintiff's credit terms with DIG; and that DIG was unhappy with the disruption of its service. Lewis stated that Singleton basically refused to talk with DIG or consider his suggestions. Lewis affirms that he then told Singleton that DIG would work with his firm. Although Singleton assertedly did not like that option, Lewis claims he had the right to do so and began to bill DIG directly for his firms services relating to the B1 FAM installation on August 7, 2009. He states that although the work on the B1 FAM and SAP "occasionally bled over on work on the SAP...", that he was able to separate the two and billed Plaintiff for work solely on SAP. This is agreed to by Weber.

According to Lewis, on March 7, 2012, Singleton sent a letter to Weber of DIG stating that Lewis was an "unapproved programmer" for the B1 FAM program and that such "could void any warranties from both SAP and Achieve IT Solutions". On March 28, 2012, Plaintiff's counsel sent a letter to DIG asserting that the installation of the B1 FAM application voided any limited warranty; however, Lewis asserts that such is false as pursuant to the DIG contract, the warranty was limited to the extent of the warranty provided by the manufacturer [SAP], which was for "six months following delivery" and had already expired. Thus, it is Lewis' contention that the actions of Achieve IT were designed to stop DIG from using the B1 FAM application in violation of B1 Fixed Assets' 2009 contract with

Plaintiff.

Timothy Singleton, the President/Manager of Achieve IT, submitted an affidavit in opposition to every assertion of Weber and Lewis. He set forth that as early as May 2010, Weber asked his permission to have Lewis bill DIG directly and that he advised him such was not an option because Lewis had an agreement with his company. Yet, it was not until February 2012, according to Singleton, that he learned that Lewis was billing DIG directly for the programming work from as early as August, 2009. An email string in May of 2010 between Singleton and Weber also assertedly demonstrates that Weber was informed that Achieve IT was paying Lewis $125 per hour and billing DIG at $185 per hour, demonstrating that Achieve IT was making a profit on the work and that Lewis was, therefore, an independent Project Manager.

Singleton also counters that Weber's and Lewis' statements that the work performed by Lewis directly for DIG was fixed asset work connected with B1 FAM is contradicted by invoices making clear that Lewis was performing work on both programs. Singleton avers that the statements that they entered into their surreptitious agreement based upon Achieve IT's constant suspension of its work for DIG is untrue. Again, he sets forth that invoices exist demonstrating that work was being performed for DIG at the behest of Achieve IT through July 2009, right up to the point that Lewis and Weber began their alleged illicit scheme.

According to Singleton, even after he emailed Weber that he specifically instructed that DIG honor Achieve IT's contract with Lewis in March 2012, Lewis continued to work directly for DIG until August 2012. In addition, Singleton swears that he had a telephone conversation with Weber in March 2012 in which Weber actually apologized for doing an

"end run" around the Lewis-Achieve IT agreement.

Singleton also states that Lewis was less than forthright with him by telling him during this 2 ½ year period that not much work was going on at DIG at the same time that he was billing DIG directly for a total of one million dollars. He claims that Lewis' statements that he was only performing B1 FAM as opposed to SAP work directly for DIG is also belied by the fact that Lewis continued to bill Achieve IT for services performed at DIG through May 2011.

Achieve IT's counsel also pointed out inaccuracies in the Defendants' claims based upon various statements made at depositions. He quoted Lewis as admitting that the SAP work was not substantially complete in July 2009 and that he did work on the SAP program between 2009 and 2012. He refers to statements made by Lewis identifying specific work performed with Achieve IT employees and yet billed by Lewis directly to DIG. He reiterates his client's assertion that Lewis' emails in May 2011 that work for DIG was slowing down demonstrate an attempt to keep from Plaintiff the fact that Lewis and Weber were keeping Achieve IT out of the picture surreptitiously. Counsel for Achieve IT also refers to invoices which contradict the claim that Singleton somehow terminated services for DIG in the Spring of 2009 as they assertedly demonstrate that Lewis was working full time on the DIG project at this time through Achieve IT.

Finally, counsel for Achieve IT states that Lewis admitted at his deposition that he was aware that the friction that existed between Achieve IT and DIG in 2009 was due to the fact that DIG was not paying its invoices in a timely fashion.

In Reply papers, counsel for B1 Advanced, B1 Fixed Assets and Lewis argues that Singleton admitted in his deposition that the work of Lewis as Project Manger under the

2008 contract merged with his work under the 2009 contract and that, therefore, it is impermissible to argue, as Plaintiff does, that the terms of the 2009 contract do not apply to the work Lewis was performing for DIG once the 2009 agreement was entered into.

SUMMARY JUDGMENT /MOTION TO DISMISS

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

> The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual

> allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

A motion to dismiss under CPLR 3211 (a) may, after adequate notice to all the parties, be treated as one for summary judgment under CPLR 3211 (c). The difference between the two lies in what the court must review in deciding the subject motion. Thus, while a motion to dismiss is based upon the pleadings, where the parties lay bare their proof and submit extensive affidavits, documents and numerous deposition transcripts, thereby permitting claimants to have sufficient opportunity to make an appropriate record, they have essentially charted the summary judgment course. Since the papers in support and in opposition to the subject motions search the record and look to the sufficiency of the underlying evidence (*see*, *Friedman v Connecticut General Life Ins. Co.*, 30 AD 3d 349 [1st Dep't 2006]; *Del Castillo v Bayley Seton Hosp.*, 232 AD 2d 602 [2d Dep't 1996]; *see also, Ubaydah v State Farm Mut. Ins. Co.*, 8 AD 3d 984 [4th Dep't 2004]; *Flores v Las Americas Communications, Inc.*, 218 AD 2d 595 [1st Dep't 1995]), the Court believes that it should do the same in reaching its determination.

In the case at bar, Defendant DIG has moved to dismiss the causes of action asserted against it by Achieve IT which allege: 1) tortious interference with contract; 2) prima facie tort; 3) aiding and abetting fraud; and 4) aiding and abetting breach of fiduciary duty. DIG has moved under CPLR 3211(c) in the alternative; and has moved to dismiss the entire claim, including the one for conspiracy under CPLR 3212. Defendants Lewis, B1 Advanced and B1 Fixed Assets have moved to dismiss the following causes of action asserted against them: 1) fraud; 2) breach of fiduciary duty; 3) breach of the covenant of good faith and fair dealing; and 4) prima facie tort. The same Defendants have moved, in the alternative under CPLR 3211 (c) and, like the DIG Defendant, have moved to dismiss the entire claim, including the

one separate cause of action for conspiracy as well as for breach of contract under CPLR 3212.

The Court finds that the substantial papers submitted by all parties, including literally hundreds of pages of documents and deposition testimony require the court to search the record to make its determinations; accordingly , the court will consider the motions under CPLR 3212.

CONTRACT AND TORT

The elements of a cause of action for breach of contract are (1) formation of a contract between the parties; (2)performance by the claimant; (3) the other party's failure to perform; and (4) resulting damage (*Palmetto Partners LP v AJW Qualified Partners LLC*, 83 AD 3d 804 [2d Dep't 2011]; *JP Morgan Chase v J. H. Electric of New York Inc*, 69 AD 3d 802 [2d Dep't 2010]).

A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1982]; *D'Ambrosio v Engel*, 292 AD2d 564 [2d Dept 2002]).

A fraud claim is not properly stated where the complaint merely asserts a general allegation that defendant entered into a contract while lacking the intent to perform it (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Moreover, a fraud claim will not

lie when perusal of the claim reveals that the only claim of fraud relates to a breach of contract (*McMorrow v Angelopoulos*, 113 Ad 3d 736 [2d Dep't 2014]). However, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (*WIT Holding Corp. Klein*, 282 AD2d 527 [2d Dept 2001]). Where a fraud claim is based on an alleged breach of a contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (*Fromowitz v W. Park Assocs., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]).

Likewise, where a breach of fiduciary duty claim derives from alleged breaches of the parties' contract, and is based upon a breach of those very contractual relations, it is considered duplicative of the contract claim (*Celle v Barclays Bank P.L.C.*, 48 AD 3d 301 [1st Dep't 2008]).

A claim for prima facie tort requires demonstration of: 1) the intentional infliction of harm; 2) resulting in special damages; 3) without excuse or justification; and 4) by an act or series of acts which are otherwise legal (*AREP Fifity-Seventy Ave LLC v PMGP Assoc. LP*, 115 AD 3d 402 [2d Dep't 2014]). Essentially, the claimant in such an action must assert that disinterested malevolence constituted the sole motivation for the conduct giving rise to the action (*Epifani v Johnson*, 65 AD 3d 224 [2d Dep't 2009]).

The affidavits, documents and depositions provided in support and in opposition to these motions demonstrate that the issue before the Court centers around the parties' contracts and the alleged breaches thereof. While the Plaintiff may claim and indeed prove intentional and even malevolent conduct by Defendants, such was clearly, as alleged, for the purpose of violating the terms of the parties' agreements and securing financial advantage thereby. There is no fraud claim that is outside of or collateral to the assertions of breach. The same is true for the claim of breach of fiduciary duty as such is based on the allegations that B1 Advanced, B1 Fixed assets, and Lewis, through their secretive negotiations and work with DIG, violated the terms of the parties' agreements. Accordingly, those defendants have made a prima facie showing of entitlement to Summary Judgment dismissing such claims and the Plaintiff's numerous allegations of wrongdoing do not create any issues of fact, since they support and are centered around alleged breaches of contract. Thus, the motions on behalf of B 1 Advanced, B 1 Fixed Assets and Lewis for Summary Judgment dismissing the Plaintiffs claims against them for fraud, breach of fiduciary duty and prima facie tort is granted and the motion on behalf of DIG for Summary Judgment dismissing Plaintiff's claims against it for prima facie tort is granted.

Claims for aiding and abetting a breach of fiduciary duty require the claimant to prove that a fiduciary duty owed to the Plaintiff was breached; where, as in this case, such claim is dismissed as subsumed within a breach of contract action, the claim for aiding and abetting the same must be dismissed (*see Baron v Galasso*, 83 AD 3d 626 [2d Dep't 2011]).

Likewise, a claim for aiding and abetting fraud cannot stand absent a valid cause of action for fraud itself (*see, Oster v Krischner*, 77 AD 3d 51 [1st Dep't 2010]). Thus, the claims against DIG for aiding and abetting breach of fiduciary duty and aiding and abetting fraud are dismissed pursuant to CPLR 3212 as each is based in its entirety on the underlying claims against the other Defendants, which have been dismissed.

Since there is no cause of action in New York for the substantive tort of conspiracy, there can be no cause of action for conspiracy to breach a contract (*North Shore Bottling Co., Inc. v C. Schmidt and Sons, Inc.*, 22 NY2d 171 [1968]). All Defendants are granted Summary Judgment dismissing the conspiracy claim against them.

Every contract contains a covenant of good faith and fair dealing, which is considered breached when a party to the contract acts in a manner that deprives the other of the benefit of the bargain (*See, Aventine Inv Mgt v Canadian Imperial Bank of Commerce*, 265 AD 2d 513 [2d Dep't 1999]). However, such a claim is really contained within the ambit of one for breach of contract where, as in this case, the numerous allegations of the claimant are contained in the description of both (*see*, *Refreshment Mannagement Services v Complete Office Supply Warehouse Corp*, 89 AD 3d 913, 933 NYS 2d 312 [2d Dep't 2011]). Thus, the motion for Summary Judgment dismissing the claim for breach of the covenant of good faith and fair dealing against Defendants B 1 Advanced,

B 1 Fixed Assets and Lewis is granted.

The elements of the tort of interference with contract are as follows: 1) the existence of a valid contract, 2) the defendant's knowledge of the contract, 3) defendant's intentional procuring of the breach; and 4) damages *(White Plains Coat and Apron Co, Inc v Cintas Corp*, 8 NY 3d 422 [2007]; *Lama Holding Co v Smith Barney Inc*, 88 NY 2d 413 [Dep't 1996]).

Clearly, in this case, the Plaintiff has set forth numerous facts to support its allegations that B 1 Fixed Assets and B 1 Advanced breached at least the 2008, if not also the 2009 contract with it. While these Defendants may aver that they followed the proper procedures and that only the 2009 agreement was in play between them and DIG, this is contradicted by both deposition testimony and exhibits produced during discovery in Plaintiff's view. Clearly, questions of fact exist concerning the issue of whether any of the contracts involved between the parties were breached. In the same vein, while Defendant DIG asserts that it could not have interfered with the agreement between Plaintiff and the other Defendants because it was unaware of the restrictive elements of the same, such is contradicted by the Plaintiff's proffered evidence also prohibiting Summary Judgment on that claim.

INDIVIDUAL LIABILITY

"'A corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally' (*Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022; *see Salzman Sign Co. v Beck*, 10 NY2d 63, 65; *Yellow Book Sales & Distrib. Co., Inc. v Mantini,* 85 AD3d 1019, 1021). 'There must be clear and explicit

evidence of the agent's intention to substitute or superadd his [or her] personal liability for, or to, that of his [or her] principal'" (*Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d at 1022 [internal quotation marks omitted]; *see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4; *Star Video Entertainment v J & I Video Distrib.*, 268 AD2d 423, 423-424).

An agent who signs an "agreement" on behalf of a disclosed principal will not be held responsible for its performance unless there is clear and explicit evidence of the agent's "intention to substitute or superadd his personal liability for, or to, that of his principal" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6 [1964]).

In this case, the sole agreement signed by Lewis as an individual was that of 2007. As set forth above, such expressly provided that the parties were still negotiating the terms of their business relationship. It was no more than an agreement to agree. Although the 2008 agreement referred to both Lewis and the B1 Advanced entity, that agreement was signed by Lewis in his capacity solely, like Singleton, as an officer of B1 Advanced. Accordingly, in the Court's view, there can be no direct liability, absent a piercing of the corporate veil which is not part of this action, against Lewis and the motion for Summary Judgment, dismissing the complaint against him is hereby granted.

PUNITIVE DAMAGES

Punitive damages are not recoverable in a breach of contract action in which no public rights are alleged to be involved (*Rocanova v Equitable Life Assur. Socy. of the United States*, 83 NY2d 603 [1994]; *2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 699 [1st Dept 2011]). The matter before the Court is among the parties as set forth and involves both allegations of breach of the parties' contracts and tortious interference with contract, both of which shall proceed to trial.

Accordingly, the motion on behalf of Defendants Lewis, B 1 Advanced and B 1 Fixed

Assets for Summary Judgment dismissing the complaint against them by Achieve IT is granted to the extent that all claims against Lewis are dismissed; and the Second, Third, Fourth and Fifth causes of action against B 1 Advanced and B 1 Fixed Assets is dismissed. The motion on behalf of Defendant DIG for Summary Judgment dismissing the complaint by Achieve IT is granted to the extent that the Second, Third and Fourth causes of action against that entity are dismissed. The cause of action for conspiracy against all named Defendants is also dismissed pursuant to CPLR 3212. The motion for Summary Judgment dismissing the First Cause of action for breach of contract against B 1 Advanced and B 1 Fixed Assets is denied and the motion for Summary Judgment dismissing the cause of action for tortious interference with contract against DIG is likewise denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: September 29, 2014
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.