

**Vasomedical, Inc. v Barron**

2014 NY Slip Op 32751(U)

January 1, 2014

Sup Ct, Nassau County

Docket Number: 000186/13

Judge: Vito M. Destefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

VASOMEDICAL, INC. and VASO DIAGNOSTICS,  
INC., d/b/a VASOHEALTHCARE SALES  
PROFESSIONALS,

Plaintiffs,

-against-

BRENT BARRON, MARGARET WALKER,  
and CHARLES HUGHES,

Defendants.

Decision and Order

MOTION SUBMITTED:

MOTION SEQUENCE: 2  
INDEX NO.: 000 186 / 13

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
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In an action to recover damages for, *inter alia*, breach of fiduciary duty, the Defendants move for an order pursuant to CPLR 3211(a)(7) and 3016(b) dismissing the Plaintiffs' first amended complaint.

**Factual Background**

On May 19, 2010, Plaintiff Vaso Diagnostics, Inc., d/b/a Vaso Healthcare Sales Professionals ("Vaso"), executed a three-year, commission-driven contract with General Electric Healthcare ("GE"), pursuant to which Vaso was to serve as GE's exclusive representative "for the promotion and marketing of, and solicitation of orders for, the sale of" certain medical imaging products (Ex. "A" to Motion at ¶¶ 21-22; Contract annexed to Reply Memorandum of

Law at ¶ 2.1).

Pursuant to the GE contract, which was effective July 1, 2010 through June 30, 2013, Vaso was entitled to an

agreed upon percentage of all gross sales of GE Healthcare products generated by Plaintiffs in a given calendar year. The commission structure was such that the percentage of gross sales Plaintiffs were entitled to receive as and for their commission was dependent upon the amount of sales Plaintiffs generated during the calendar year. If they hit an agreed-upon minimum amount of sales in that year, they would be entitled to an agreed upon percentage of these sales. If they surpassed this minimum amount of sales and hit the next agreed upon level of sales, their commission percentage would also increase with the increased percentage applied retroactively to all sales for that calendar year (Memorandum of Law in Opposition at pp 4-5; Ex. "A" to Motion at ¶¶ 22-26).<sup>1</sup>

Several weeks prior to the execution of the GE contract – and in order to enhance the likelihood of securing the lucrative GE deal – Vaso hired a large group of experienced sales individuals – including Defendants Brent Barron, Margaret Walker and Charles Hughes, who were later appointed to the positions of, respectively, President and Chief Operating Officer ("COO") of Vaso, Director of Product Business Lines, and Vice President of Sales (Ex. "A" to Motion at ¶ 28). Although the agreement was profitable and successfully performed during the first 18 months,<sup>2</sup> the Plaintiffs contend that thereafter, the Defendants allegedly began to perpetrate a self-serving scheme to misappropriate the GE contract for themselves – the so-called "disintegration plan" (Ex. "A" to Motion at ¶¶ 30, 35).

In substance, the relevant portions of the disintegration plan allegedly called for the Defendants to generate a termination event under the GE contract by, *inter alia*, creating discord among Vaso's employees and by later encouraging core management personnel to resign *en*

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<sup>1</sup> According to Vaso, it was important to establish the appropriate sales target for a given year which Vaso's commissions would be based for that year because these percentages were tied to sales and because sales varied from year to year based upon fluctuating market conditions, the sales target was also designed to fluctuate from year to year. Thus, "negotiating an appropriate sale target was of material importance and value to [Vaso]" (Memorandum of Law in Opposition at p 5).

<sup>2</sup> From the commencement of the GE contract in July 2010, through December 31, 2011, the Vaso sales force was "highly successful and generated sufficient gross sales of GE Healthcare products to entitle Plaintiffs, without accounting for increases based upon modalities, to receive commissions at the highest percentage or commission rate previously agreed upon by Plaintiffs and GE Healthcare for that year" (Ex. "A" to Motion at ¶ 30).

*masse* – after which they would then join the Defendants in a competing entity, expressly created to acquire and misappropriate the GE contract (Ex. “A” to Motion at ¶¶ 33(a)-(f), 34).<sup>3</sup> The Plaintiffs further allege that as part of the disintegration plan – and with intent to harm Vaso – the Defendants “bypassed” the parent company’s (Plaintiff Vasomedical, Inc.<sup>4</sup>) Board of Directors in early 2012, and then without authorization, negotiated a new and unrealistically high commission sales target tier and locked Vaso into a far less profitable arrangement. That commissions agreement later had the effect of “dramatically lowering commissions . . . revenues for the year” – as compared to a projected sales tier which Plaintiffs claim might otherwise have been negotiated (Ex. “A” to Motion at ¶ 35).

According to the Plaintiffs, in April of 2012, Defendants finally “pulled the trigger” on the disintegration strategy (Ex. “A” to Motion at ¶ 35). Specifically, and at this point, Barron announced his immediate resignation (with no prior notice), and then informed GE that he had resigned from Vaso. Walker and Hughes resigned approximately five weeks later, but prior to that, they declined to cooperate with Vasomedical’s so-called “Plan B”, *i.e.*, its plan to meet with and reassure GE that Barron’s departure would not compromise Vaso’s ability to perform the contract (Ex. “A” to Motion at ¶ 35). Later, Barron allegedly pressured and berated non-parties Brian Scott and Chris Not when they declined to cooperate with the disintegration plan by similarly tendering their resignations.<sup>5</sup> According to the Plaintiffs, during this period the Defendants continued to contact key Vaso employees/managers and encouraged them not to cooperate with Vaso’s management and/or to resign and join them. Moreover, the Plaintiffs assert that the Defendants and William Dempsey – a Vaso Board member and director who was allegedly acting with the Defendants – together created a new (undescribed) entity, whose purpose was to compete with Vaso and misappropriate its GE contract and business (Ex. “A” to Motion at ¶¶ 35(q), 37).

Ultimately, however, and despite the Defendants’ alleged wrongdoing, the disintegration scheme failed to achieve its stated or ultimate objectives. Specifically, although the Defendants resigned from their positions in 2012, there are no allegations in the complaint: claiming that mass employee resignations occurred; that GE attempted to invoke a contract-based termination provision; or that Vaso’s contractual relationship with GE was otherwise terminated or not

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<sup>3</sup> The GE contract contained an early termination provision which permitted GE to terminate the contract upon the happening of certain occurrences, including a material change in Vaso’s management (Ex. “A” to Motion at ¶ 27).

<sup>4</sup> Plaintiff Vasomedical, Inc (“Vasomedical”) was the parent company of its wholly owned subsidiary Vaso.

<sup>5</sup> Scott, who was Vaso’s Director of Financial Services, and Kot, who was Vaso’s Director of Operations, were both part of Vaso’s “core team” (Ex. “A” to Motion at ¶¶ 28-29).

renewed.

### Procedural History

In 2013, the Plaintiffs commenced the instant action against Barron, Hughes and Walker. The complaint, as subsequently amended, contains four causes of action sounding in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with business relations, and a claim predicated upon the faithless employee doctrine (Ex. "A" to Motion at ¶¶ 39-85).

The complaint also contains a separately captioned, dedicated damages section which specifically identifies the injuries flowing from the Defendants' alleged misconduct as follows: 1) the loss of millions of dollars in sales commissions flowing from the unauthorized commission provision negotiated by Barron, which allegedly prevented the Plaintiffs themselves from entering into a "far more economically beneficial sales target with GE Healthcare"; and 2) the necessity of Plaintiffs having been "forced to pay millions of dollars in retention bonuses [and additional perquisites] to its personnel in order to counter the long-term effects of Defendants' on-going campaign to alienate these employees from Vasomedical management over a nearly two (2) year period", none of which Plaintiffs would have been forced to provide had the Defendants not interfered (Ex. "A" to Motion at ¶¶ 45, 72, 86-87).

The Defendants now move to dismiss the complaint arguing, *inter alia*, that the Plaintiffs' complaint fails to state a cause of action and/or is not pleaded with the requisite particularity within the meaning of CPLR 3016[b].

For the reasons that follow, the motion is denied except to the extent indicated below.

### The Court's Determination

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2d Dept 2010]). "In considering such a motion, the court must 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.* at 1181). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Id.*).

#### *Breach of Fiduciary Duty (First Cause of Action)*

In order to recover damages for breach of fiduciary duty, a plaintiff must establish: the

existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Rut v Young Adult Institute, Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *Robert I. Gluck, M.D., LLC v Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167 [2d Dept 2010]). A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b) (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]; *Chiu v Man Choi Chiu*, 71 AD3d 621, 623 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 898 [2d Dept 2009]).

Upon liberally construing and crediting the complaint's non-conclusory averments, the court agrees that the Plaintiffs have adequately – and with sufficient particularity “at this CPLR 3211 motion stage” (*Held v Kaufman*, 91 NY2d 425, 433 [1998]), identified the existence of a fiduciary duty owed to Vaso as well as a breach of that duty.

Specifically, Plaintiffs have alleged, *inter alia*, that as high-ranking corporate officers and/or directors (in Barron's case), the Defendants owed a heightened duty of care to Vaso (Ex. “A” to Motion at ¶¶ 35-39, 52[f]). Contrary to the Defendants' contention, Defendants were more than simple, at-will employees; rather, they were high-ranking officers who occupied key leadership and control positions in Vaso. In this regard, the law in New York is clear, namely, that “officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty” to it (*Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 102 AD3d 1033, 1038 [3d Dept 2013]; *Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422, 423 [1<sup>st</sup> Dept 2010]).

Moreover, the numerous allegations in the complaint, which are pleaded with the requisite particularity, set forth sufficient facts that the Defendants breached their fiduciary duties owing to Vaso.

Nevertheless, actionable damage “directly and proximately caused by the defendant's misconduct” must be established in order to recover on a breach of fiduciary duty claim (*Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 188-189 [1<sup>st</sup> Dept 2000]; *see also Robert I. Gluck, M.D., LLC v Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167, 1168 [2d Dept 2010]). At bar, and as previously recounted, the complaint's damages section identifies and relies upon two specific injury-generating events: (1) the Defendants' allegedly unauthorized negotiation of the new commission tier in early 2012 (Ex. “A” to Motion at ¶¶ 35(I), 54, 87-88); and (2) the payment of employee retention bonuses and other benefits which, the Plaintiffs claim, allegedly represented the only way they could fortify employee morale and prevent additional resignations (Ex. “A” to Motion at ¶¶ 45, 53, 80, 87-88).

In *Gibbs v Breed, Abbott & Morgan* (271 AD2d at 188-89, *supra* [citations omitted] [emphasis added]):

The calculation of damages in cases such as this is difficult. “[B]reaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.” This is because the purpose of this type of action “is not merely to compensate the plaintiff for wrongs committed . . . [but also] ‘to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates’”. However, the proponent of a claim for a breach of fiduciary duty must, at a minimum, establish that the offending parties’ actions were “a substantial factor” in causing an identifiable loss.

*A reasonable assessment of lost profits has been deemed an appropriate measure of damages in cases where there was evidence that the fiduciary improperly solicited clients to move with him or her or where the fiduciary’s acts could otherwise be connected to a subsequent loss of business.*

While the complaint’s factual averments are less than definitively clear in explaining why GE would necessarily have agreed to a substantially different commission tier, generating “millions” of dollars in additional profits had the plaintiffs themselves conducted the negotiations, at this pre-answer stage of the proceedings, the court affords the Plaintiffs the benefit of every possible favorable inference relevant to the causal nexus, if any, between Barron’s claimed negotiation misconduct and the alleged loss of future profits (*see id.*). Specifically, and crediting the allegations of the complaint, the Plaintiffs have alleged, among other things, that the Defendants’ misconduct with respect to the commission negotiations was undertaken deliberately with the intent to inflict harm – claims from which it can be inferred that the Plaintiffs would have been capable of obtaining a superior agreement with GE.

However, the payment of “retention” bonuses or other employee benefits does not constitute an actionable injury proximately or directly flowing from the Defendants’ alleged fiduciary misconduct (*see Willberry Corp. v Schwartz*, 29 AD3d 899 [2d Dept 2007]; *Laub v Faessel*, 297 AD2d 28 [1<sup>st</sup> Dept 2002]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d at 188-189, *supra*). the Plaintiffs’ damages theory is that the Defendants’ disruptive conduct caused, *inter alia*, “negative [employee] feelings” and discontent (Ex. “A” to Motion at ¶¶ 35; 87). The complaint then alleges that “the only way the plaintiffs could retain their relationship with its staff” and “counter the long-term effects” of the Defendants’ misconduct, was to pay the bonuses and benefits (Ex. “A” to Motion at ¶¶ 35, 45, 53, 87).

The claim that there may have been negative employee feelings, and/or that the Plaintiffs were subjectively concerned that their employees might resign, does not establish that the payment of “retention” benefits constitutes a recoverable species of damages “directly”

attributable to the Defendants' misconduct. Rather, upon the facts alleged, the costs associated with the employee benefits were not directly caused by the Defendants' actions; they were the discretionary and internal product of the Plaintiffs' own, subjective business judgment that the bonuses would buttress morale and minimize any potential employee resignations. This species of alleged injury bears only an indirect nexus to the purported wrongdoing identified in the amended complaint.<sup>6</sup>

*Aiding and Abetting Breach of Fiduciary Duty (Second Cause of Action)*

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011], quoting *Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). “A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator” (*Kaufman v Cohen*, 307 AD2d at 126, *supra* [internal quotation marks omitted]).<sup>7</sup>

The second cause of action asserts that the Defendants aided and abetted each other's breach of fiduciary duty, as well as the duties owed to the Plaintiffs by non-party William Dempsey, a Vaso board member and director (*see* Ex. “A” to Motion at ¶¶ 46-55).<sup>8</sup> The foregoing claim is based on, *inter alia*, the same conspiracy and damage claims alleged as against the three main Defendants. The complaint alleges in this respect that all three “Defendants acted in concert with one another in furtherance of their scheme to negatively impact Plaintiffs' relationship with GE Healthcare, including their scheme to steal GE Healthcare's business for themselves” – which resulted in damages specifically flowing from the Defendants' commission

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<sup>6</sup> It is notable in this respect that the complaint does not allege with particularity, that a wave of employee resignations was impending or imminent; that the involved employees affirmatively threatened to resign absent additional compensation because of the Defendants' conduct – or that any additional, key resignations actually occurred in the wake of the Defendants' departure.

<sup>7</sup> Although a plaintiff is not required to plead that the aider and abettor in a breach of fiduciary duty claim had an intention to harm, there must be an allegation that the defendant had actual knowledge of the breach of duty (*Goldson v Walker*, 65 AD3d 1084 [2d Dept 2009]; *Kaufman v Cohen*, 307 AD2d at 125, *supra*). Moreover, the aider and abettor must “substantially assist” the fiduciary in the acts of misconduct. “Substantial assistance” is pleaded when the complaint alleges that a defendant affirmatively assisted or helped, thereby enabling the breach of fiduciary duty to occur.

<sup>8</sup> The Plaintiffs assert that the Defendants and William Dempsey together created a new entity whose purpose was to compete with Vaso and misappropriate its GE contract and business (Ex. “A” to Motion at ¶¶ 35(q), 37)

tier negotiations and the payment of employee retention bonuses and benefits (Ex. "A" to Motion at ¶¶ 50-51, 54).

In support of their motion to dismiss the second cause of action, the Defendants rely on the assertion that since the main fiduciary duty claims are defective and fail to allege recoverable damage, the aiding and abetting claim must also fall as a matter of course (Memorandum of Law in Support of Motion at p 18). The court finds that the amended complaint adequately pleads an aiding and abetting breach of fiduciary duty claim. (To the extent that the second cause of action predicates its damage recovery upon the Plaintiffs' payment of retention and employee benefits, those damages, as noted earlier, are not the direct and proximate result of Defendants' misconduct and, as such, are not recoverable.)

#### *Faithless Servant Doctrine (Third Cause of Action)*

The third cause of action is based on the faithless employee doctrine and alleges, *inter alia*, that by virtue of the Defendants' disloyalty and misconduct, the Plaintiffs are thereby entitled to recover from each Defendant "any and all compensation each of them received during their employment," which the complaint alleges to be in excess of \$2 million (Ex. "A" to Motion at ¶¶ 60-65).

"[T]he 'faithless servant doctrine,' provides that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally disentitled to recover compensation, whether commissions or salary" (52 NYJur 2d Employment Relations § 148; *In re Blumenthal*, 32 AD3d 767 [1st Dept 2006]).

It is well settled that employees owe a duty of undivided, unqualified loyalty to their employer and may not act in any manner contrary to the employer's interests (*Western Electric Co. v Brenner*, 41 NY2d 291, 295 [1977]; *Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d 1032, 1033 [2d Dept 2012]). In general, "[a]n employee 'forfeits his right to compensation for services rendered by him if he proves disloyal'" (*Visual Arts Foundation, Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]; *Coastal Sheet Metal Corp. v Vassallo, supra*, 75 AD3d 422, 423 [1st Dept 2010]; *William Floyd Union Free School Dist. v Wright*, 61 AD3d 856, 859 [2d Dept 2009]) and lost profits are also recoverable upon proof that the requisite, faithless conduct has occurred (*Epstein Engineering P.C. v Cataldo*, 101 AD3d 552 [1st Dept 2012]; *Maritime Fish Prods. v. World-Wide Fish Prods.*, 100 AD2d 81, 91 [1st Dept 1984]; see also *Western Electric Co. v Brenner*, 41 NY2d at 295, *supra*).

Here, the complaint alleges, *inter alia*, that over a substantial period of time, the Defendants – while serving as high-ranking corporate officers and employees – allegedly engaged in a scheme to undermine Vaso's relationship with its employees and its parent entity

(Vasomedical) – all with the alleged objective of destroying Vaso’s ability to perform the GE contract; stripping Vaso of its key employees and then misappropriating its lucrative GE contract. In considering the instant motion, accepting the facts alleged in the complaint as true, and according the Plaintiffs the benefit of every possible favorable inference, the court concludes that the facts state a claim grounded upon an alleged breach of the faithless servant doctrine (*Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d at 1033, *supra* [on a motion to dismiss pursuant to CPLR 3211(a)(7), plaintiff need only plead allegations from which damages attributable to a defendant’s alleged breach might be reasonably inferred]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

#### *Tortious Interference with Business Relations (Fourth Cause of Action)*

With respect to the fourth cause of action, tortious interference with business relations (Ex. “A” to Motion at ¶¶ 66-85), “applies to those situations where a third party would have entered into or extended a contractual relationship with a plaintiff but for the intentional and wrongful acts of the defendant” (*M.J. & K Co., Inc. v Matthew Bender and Co., Inc.*, 220 AD2d 488, 490 [2d Dept 1995]; *see also WFB Telecommunications, Inc. v NYNEX Corp.*, 188 AD2d 257, 257 [2d Dept 1992]). To make out a claim of tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff’s business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper (*Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d at 1032, *supra*). At bar, the facts as alleged in the complaint establish that the Defendants’ actions were motivated, at least in part, by economic self interest. “Since they cannot be characterized as ‘solely malicious,’ the plaintiffs had to allege facts demonstrating that the means employed by the defendants were wrongful. ‘Wrongful means’ include ‘fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties’” (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575 [2d Dept 2008] [citations omitted]).

As noted, each of the three Defendants owed a fiduciary duty to Vaso (*see discussion supra* at p 5). Since the complaint alleges facts demonstrating that the means employed by the Defendants were wrongful insofar as they violated the duty of fidelity each owed to Vaso, the complaint states a cause of action alleging wrongful interference with business relations (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]; *Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d at 1034, *supra*; *Out of Box Promotions, LLC v Koschitzki*, 55 AD3d at 578, *supra*; *BGW Development Corp. v Mount Kisco Lodge No. 1552 of Benevolent & Protective Order of Elks of U.S. of Am.*, 247 AD2d 565 [2d Dept 1998]).

Last, and for the reasons discussed previously with respect to the Plaintiffs’ fiduciary duty claims, the court similarly finds that the Plaintiffs’ damages claim relating to the “retention”

bonuses does not give rise to an actionable damages claim grounded upon a tortious interference theory of recovery.


**Conclusion**

Accordingly, based on the foregoing, it is hereby

Ordered that the Defendants' motion is denied except for that branch of the motion seeking dismissal of the Plaintiffs' damages claim as set forth in paragraph 87 of the first amended complaint, which is dismissed.

This constitutes the decision and order of the court.

Dated: January 2, 2014

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
JAN 10 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE