Genesis Capital Group, LLC v Cole
2014 NY Slip Op 32784(U)
October 22, 2014
Supreme Court, New York County
Docket Number: 653218/2013
Judge: Ellen M. Coin
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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GENESIS CAPITAL GROUP, LLC and DINO DIONNE,

Plaintiffs,

-against-

IAN STUART COLE and THE NEW EAST INDIA CO., LLC,

Defendants.

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Index No. 653218/2013
Subm. Date: June 25, 2014
Motion Sequence No.: 002

ORDER AND DECISION

ELLEN M. COIN, A.J.S.C.:

This action is brought by plaintiffs Genesis Capital Group, LLC (Genesis) and Dino Dionne (Dionne) against defendants Ian Stuart Cole (Cole) and The New East India Co., LLC (New East India). Dionne currently is the sole member of Genesis and Cole the sole member of New East India. Plaintiffs' complaint contains eleven causes of action: breach of contract (monetary and equitable relief); bad faith conduct; breach of fiduciary duty; unjust enrichment; misrepresentation and fraud; defamation; conversion; tortious interference with prospective economic advantage and business relationship; and prima facie tort. Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) (documentary evidence) and (a) (7) (failure to state a cause of action). For the reasons stated below, defendants' motion to dismiss is granted to the extent set forth herein.

Background

The following facts are derived primarily from the complaint, which are assumed to be true for the purpose of this motion to dismiss. In December 2008, Dionne formed Genesis, a registered investment advisory company that became operational in June 2009. Complaint, ¶ 12. At one point, Genesis was composed of four members: Dionne, Cole, John Smith (Smith) and

Ekua Anyanful (Anyanful), each holding a 25% interest therein. *Id.*, ¶ 14. After the departure of Smith and Anyanful, the membership of Genesis was reduced to only two: Dionne and Cole. *Id.*, ¶ 15. On December 11, 2011, Dionne and Cole executed an Amended Operating Agreement for Genesis, wherein Dionne was the chief operating officer and Cole was the president, each holding a 50% interest. *Id.*, ¶ 16.

The complaint alleges that at a meeting held on November 1, 2012, Dionne expressed his concerns with respect to Cole's inadequate work performance and lack of accountability in the daily business and operation of Genesis. Complaint, ¶ 22. It also alleges that at the meeting the parties agreed to change their composite salaries such that Dionne and Cole would receive 65% and 35%, respectively. *Id.*, ¶ 24. Shortly after the meeting, without the knowledge and consent of Dionne, Cole allegedly withdrew $80,000 from Genesis' operating account and deposited same into his personal account, resulting in an overdraft of $67,000, which consequently caused Genesis to suffer an imminent shutdown of all its bank accounts, to the detriment of plaintiffs and clients. *Id.*, ¶¶ 25-27.

The complaint further alleges that in February 2013, Cole informed Dionne that he would leave Genesis on or before November 2013, due to his need to return to Great Britain, his home country, to raise his anticipated first-born child in a nicer environment than New York City. Complaint, ¶¶ 28-29. It is also alleges that Cole told Dionne that he was no longer interested in working in the financial sector, but rather wanted to become an attorney in Great Britain. *Id.*, ¶ 30. Cole also allegedly said that he would leave New York at the expiration of his apartment lease in November 2013. *Id.*, ¶ 31. Relying upon these alleged representations by Cole, plaintiffs conducted an independent valuation analysis for the possible sale of Cole's interest in

Genesis. *Id.*, ¶ 32.

In the following months, Cole became a father and, by June 2013, he stopped showing up in the office despite repeated requests by Dionne that he return to work until his departure for Great Britain, but Cole countered that he was sufficiently performing his work duties from home. Complaint, ¶ 32. Cole's alleged conduct adversely affected Genesis' productivity and profit. *Id.*, ¶ 33. In several emails, Dionne allegedly urged Cole to meet to discuss his withdrawal from Genesis and the distribution of his interest therein, but Cole failed to acknowledge the emails. *Id.*, ¶¶ 34-35. On August 14, 2013, Dionne requested, by certified mail to Cole, that Cole attend a board meeting that was to take place on August 20, 2013. *Id.*, ¶ 36. On the eve of the meeting, Cole tendered his resignation, which was to take effect immediately. *Id.*, ¶ 38. Cole's action constituted an involuntary withdrawal under the terms of the amended operating agreement, which requires 30 days' notice. *Id.*, ¶ 39. Cole did not attend the meeting. *Id.*, ¶ 40.

On or before May 1, 2013 and prior to tendering his resignation, Cole formed New East India, an entity of which Cole was, and still is, a member and its president. Complaint, ¶ 41. Despite his knowledge of Genesis' amended operating agreement, Cole wrongfully and maliciously induced Genesis' clients to terminate their relationship with Genesis and to retain the services of Cole and New East India. *Id.*, ¶ 41. In violation of the amended operating agreement, Cole and New East India solicited Genesis' clients and misinformed them that Genesis would not be in business, was financially unsound and lacked the capability to manage client accounts. *Id.*, ¶¶ 43-45. Cole communicated with various clients of Genesis, including Dionne's mother-in-law, a member of the New York Neurological Associates (NYNA), and other NYNA members who were clients of Genesis. *Id.*, ¶¶ 46-48. Cole's misrepresentation to clients and his slander

about Genesis' financial integrity caused approximately 80% of clients to terminate their relationship with Genesis, which profoundly reduced its earnings and profits and potentially could force it to dissolve. *Id.*, ¶¶ 51, 54. Cole's resignation also left Genesis with approximately $500,000 in unpaid liabilities for which he refuses to reimburse Genesis. *Id.*, ¶ 53. Cole has clandestinely and maliciously removed and destroyed office files, including board meeting minutes, client information and compliance folders, required by law to be retained for at least seven years. *Id.*, ¶ 56. Cole also allegedly engaged in self-dealing, violated the non-compete clause of Genesis' amended operating agreement, and failed to exercise and fulfill his fiduciary duty and good faith responsibilities to plaintiffs. *Id.*, ¶¶ 59-60.

Defendants Cole and New East India deny virtually all of the foregoing allegations and move to dismiss the complaint. Defendants submit documents that purport to refute plaintiffs' allegations made in the complaint. The parties' divergent and seemingly contradictory positions are discussed below.

Applicable Legal Standard

A motion brought pursuant to CPLR §3211(a)(1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-31 (1998), quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007)("[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law")(citations omitted).

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action

cognizable at law." *Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002) (internal quotation marks omitted). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration, particularly if the allegations are contradicted by documentary evidence. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (allegations consisting of bare legal conclusions or incredible facts that are contradicted by documentary evidence are not entitled to favorable treatment); *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Indeed, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2d Dept 2005) (internal quotation marks and citation omitted).

Discussion

Breach of Contract - Monetary Relief (first cause of action) and Injunctive Relief (second cause of action

The contract at issue is the Amended and Restated Operating Agreement for Genesis, dated as of December 11, 2011, by and between Dionne and Cole (Agreement). The complaint alleges, among other things, that pursuant to the Agreement, defendants are not permitted to solicit or compete for clients of Genesis for a period of 24 months following a member's

withdrawal from Genesis, but that defendants solicited clients prior to and subsequent to member Cole's withdrawal. Complaint, ¶ 61. It also alleges that Cole could withdraw from Genesis, but only upon the consent of a "super-majority of the members," and that his unilateral withdrawal breached the Agreement. *Id.*, ¶ 62.

The requisite elements of a breach of contract claim are: existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach. *Elisa Dreier Reporting Corp. v Global NAPS Networks, Inc.*, 84 AD3d 122, 127 (2d Dept 2011). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 (2011) (internal quotation marks and citation omitted).

As a threshold matter, plaintiffs neither allege, nor do they show, that there is a contract or similar agreement with defendant New East India. Therefore, the breach of contract claim, as against New East India, must be dismissed as a matter of law and fact.

Defendant Cole relies on the following two documents to argue that the Agreement is null and void and/or there is no more contract in existence: (1) the minutes of a corporate resolution, dated December 11, 2011, wherein it was stated, among other things, that "GCIS is a fictitious name/assumed name for Genesis Capital Group, LLC, hence GCIS Partnership and Operating agreement is null & void . . ." (Exh. F to Affidavit in Opposition of Dino Dionne, sworn to November 13, 2013) and (2) an email from Dionne to Cole, dated July 12, 2013, wherein he wrote, among other things, that "[a]s of December 2013, I declared our operating agreement as void and no longer valid." Cole argues that these are "documentary evidence" which show that

the Agreement is null and void, and the breach of contract claim must be dismissed pursuant to CPLR 3211 (a)(1). Exh. 3 to Affidavit in Opposition of Defendants to Mot. Seq. 001.

The corporate minutes state that GCIS is a registered Texas company. However, the Operating Agreement indicates that Genesis is a Delaware company. Other documents show that GCIS is an insurance company, whereas Genesis is an investment advisory company. Exhibit A to Compl.; Exh. 1 to Affirmation of Rocco Lamura, dated October 10, 2013. Importantly, even assuming GCIS were the same entity as Genesis and its operating agreement allegedly became null and void in December 2011, as argued by Cole, he affirmed that "[f]or the period on or about [the] end of December 2011 until on or about August 19, 2013, Dionne and I remained equal ownership members of Genesis." Cole affidavit in support of motion to dismiss, dated October 8, 2013, ¶ 7. Thus, even Cole presents varying allegationss as to when Genesis was dissolved or the Agreement became null and void. Indeed, Cole submits minutes of the Genesis members' meeting held on April 1, 2013, which indicated that Genesis was an operating entity at that time. Exh. 2 to Mot. Seq. no. 001.

The parties do not dispute the authenticity and veracity of Dionne's July 12, 2013 email. Indeed, during the October 2, 2013 hearing, Dionne's counsel conceded that Dionne might be "emotional and verbose" when he wrote the email, but argued that "the operating agreement requires certain procedures to break the contract" and that Cole failed to follow the procedures (section 10.1 of the Agreement requires a super-majority vote in order to dissolve Genesis). Transcript of 10/2/2013 hearing, at 10. Justice Oing found that the super-majority requirement was satisfied, because Cole stated that he wanted to withdraw from Genesis, and Dionne said in his email that the Agreement was null and void. *Id.* at 11 ("That's a hundred percent right there

saying let's terminate this"). Because both members of Genesis expressed the same intention, Justice Oing opined that the Agreement was terminated or voided. *Id.* at 14 ("So that 50 and 50 on both sides equal a hundred. So that the operating agreement is out.") Justice Oing also found that even though Dionne's email referenced December 2013 ("As of December 2013, I declared our operating agreement as void and no longer valid"), he reasoned that "it was actually December 2012 because December 2013 had not happened yet." *Id.* at 12. Based on this email, Justicee Oing vacated the TRO and denied plaintiffs' application (motion sequence no. 001) for a preliminary injunction, finding that plaintiffs did not establish "a likelihood of success" on the merits. *Id.* at 13-14.

Based on the foregoing, defendants now argue that "plaintiffs have failed to show a breach of contract because there is no existence of any contract between the parties." Defendants' moving brief, at 21. This argument is unpersuasive. Defendants do not (and cannot) argue that the Agreement is void ab initio. While the Agreement was deemed void or terminated at some point in the past, it cannot be said that "there is no existence of any contract between the parties." Indeed, as noted above, Cole conceded that Genesis was still an operating entity on April 1, 2013, when he signed the corporate minutes which reflected the members' resolutions on that date. Notably, the complaint alleges, among other things, that prior to and after Cole's withdrawal from Genesis, he solicited clients in violation of the non-compete clause of the Agreement that prohibits competition for a period of 24 months. Complaint, ¶ 64. The Agreement also states that such clause "shall survive any termination of this Agreement or the withdrawal of any Member or Manager for the period specified therein." Agreement, § 9.3 (e). Further, while plaintiffs' request for a preliminary injunction was denied, this court did not

preclude relief for monetary damages. The complaint alleges a breach of contract claim, but whether Cole violated the non-compete clause is disputed. Thus, dismissal of the breach of contract claim, as against Cole, is unwarranted. The motion to dismiss the second cause of action for injunctive is likewise denied.

Bad Faith Conduct and Breach of Fiduciary Duty (third and fourth causes of action)

The third and fourth causes of action of the complaint allege that defendants owe plaintiffs a duty of good faith and fair dealing under the Agreement, that defendants breached their fiduciary obligations by not complying with the terms of the Agreement and depriving them the benefit of their bargain; not managing Genesis with skill and care; engaging in self dealing; converting business assets and opportunities; as well as defaming and slandering the name and good will of plaintiffs. Complaint, ¶¶ 74-84.

As noted earlier, defendant New East India is not a party to the Agreement and it does not owe plaintiffs any obligation, contractual or fiduciary or otherwise. Thus, the third and fourth causes of action, as against New East India, must be dismissed as a matter of fact and law.

The elements of a cause of action alleging breach of fiduciary duty are: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 (2d Dept 2011) (internal quotation marks and citations omitted). A cause of action for breach of fiduciary duty must be pled with particularity, as required by CPLR 3016 (b). *Id.* In this action, it cannot be disputed that Cole was a member and manager of Genesis and owed a fiduciary duty to Genesis and Dionne, a co-member and co-manager. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005) (a fiduciary duty "exists between two persons when one of them is under a

duty to act for or to give advice for the benefit of another upon matters within the scope of the relation"). Yet, Cole argues that "plaintiffs and defendants were not bound by a written contractual relationship [since] the Amended Operating Agreement was declared null and void by plaintiffs." Defendants' moving brief at 24. Such an argument is unpersuasive. Even though the Agreement governing the operation and management of Genesis was declared void or terminated, the parties to the Agreement owed each other a fiduciary duty during the time the Agreement was in effect.

While the parties in this action dispute each other's factual allegations, the Court must accept the complaint's allegations as true for purposes of the instant motion to dismiss. Based on the complaint's allegations, plaintiffs have sufficiently stated a breach of fiduciary duty claim. *EBC I*, 5 NY3d at 22 (court allowed breach of fiduciary duty claim to proceed against defendant underwriter).

On the other hand, the bad faith conduct claim should be dismissed as duplicative of the breach of fiduciary duty, breach of contract and defamation claims.

Unjust Enrichment (fifth cause of action)

The complaint alleges that "defendants have been unjustly enriched in that the defendants improperly solicited the clients and accounts of the plaintiffs and the defendants have further transferred, misused and conveyed files and financial assets of the plaintiffs." Complaint, ¶ 86.

An unjust enrichment claim is a quasi-contractual remedy. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *Id.* As discussed, at some point in the past and prior to the Operating Agreement became void or

terminated, there was a valid contract between the Dionne, Cole and Genesis. In such regard, the unjust enrichment claim must be dismissed because "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." *EBC I*, 5 NY3d at 23.

Misrepresentation and Fraud (sixth cause of action)

The complaint alleges that Cole misrepresented to plaintiffs that he would soon leave the financial industry, sell his Genesis shares and end all relationship with Genesis' clients, and relying on such misrepresentation, plaintiffs gave Cole continued access to the office and client files. Complaint, ¶¶ 89-90. It also alleges that plaintiffs relied on the misrepresentation, did not know that defendants were soliciting Genesis' clients until a significant number departed Genesis and enrolled with defendants, and as a result, plaintiffs sustained damages due to the fraudulent misrepresentation. *Id.*, ¶¶ 91-98.

In an action alleging fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996); *Lemle v Lemle*, 92 AD3d 494, 499 (1st Dept 2012). In addition, pursuant to CPLR 3016 (b), a fraud claim "requires detailed and specific pleading" and the elements of fraud that must be specifically pleaded are "misrepresentation of material fact, falsity, knowledge, intent to deceive, reliance and damages." *Salles v Chase Manhattan Bank,* 300 AD2d 226, 235 (1st Dept 2002).

In his affidavit in support of the motion to dismiss, Cole denies all allegations of fraud or misrepresentation and presents his own version of the facts. Cole Aff., sworn to Oct. 8, 2013, ¶¶ 47-60, 75-80 and accompanying exhibits. Cole also contends that this fraud claim "is not adequately pleaded because there is no specificity as to the alleged misrepresentation, as it merely 'suggests' fraud on the part of Cole upon his departure from Genesis Capital." Defendants' moving brief at 28. Notably, "an essential element of fraud is justifiable reliance upon the representations made." *Lemle*, 92 AD3d at 499. Here, the complaint fails to set forth specific facts alleging "justifiable reliance," and the fraud claim, thus, is insufficiently stated. Yet, dismissal of this claim is not warranted at this juncture because CPLR 3211 (d) provides a court with the discretion to deny a motion to dismiss if it appears that "facts essential to justify opposition may exist but cannot then be stated." *Id.* (court permitted plaintiff to develop sufficient facts to establish reliance element); *Halmar Corp. & Defoe Corp. v Hudson Founds., Inc.*, 212 AD2d 505, 506 (2d Dept 1995) (same). However, this claim must be dismissed as against New East Asia, because no fraud or misrepresentation by it has been alleged.

Defamation (seventh cause of action)

The complaint alleges that false statements were made to Genesis' clients about its financial integrity and of the nature of Cole's departure, all without the authorization by plaintiffs. Complaint, ¶¶ 45-46, 101-102. It also alleges that the statements were made to destroy plaintiffs' name and goodwill, and thus, they have been damaged. *Id.*, 103-105.

The elements of a defamation claims are: "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Salvatore v*

Kumar, 45 AD3d 560, 563 (2d Dept 2007)(internal quotation marks and citations omitted). This claim must be dismissed as against New East Asia because no specific facts are alleged regarding what defamatory statements it made. As to Cole, he argues that "plaintiffs have failed to state what exact statements were made by Cole, to whom . . . did he make such statements, and whether such statement . . . caused plaintiffs to suffer any damage . . .." Defendants' moving brief at 29. Nonetheless, Cole concedes that "any statements alleged to have been made by Cole to Genesis Capital's clients are sufficient to sustain the cause of action." *Id.* at 30. As noted, the complaint alleges that Cole communicated with Genesis' clients, including Dionne's mother-in-law, that Genesis "will not continue in business . . . is financially unsound, and lack the capability to manage the clients' accounts . . .." Complaint, ¶¶ 45-46. Such allegations are sufficient to plead a defamation cause of action as against defendant Cole.

Conversion (eighth cause of action)

The complaint alleges that plaintiffs owned the rights to possess the client files but defendants removed them from Genesis. Complaint, ¶¶ 107-108. It also alleges that defendants unilaterally withdrew $80,000 of corporate funds without consent and deposited same into Cole's personal bank account. *Id.*, ¶ 109. It further alleges that despite plaintiffs' demand for the return of such items, defendants refused to do so and wrongfully detained and converted such items, and thus plaintiffs have suffered damages. *Id.*, ¶¶ 110-112.

The elements of a conversion cause of action are: (1) a plaintiff's possessory right in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's right. *Pappas v Tzolis*, 20 NY3d 228, 234 (2012). In his sworn affidavit, Cole explains in detail regarding the circumstances of his withdrawal of the $80,000, which appeared

to be consistent with Genesis' corporate resolutions of April 1, 2013. Cole Aff., ¶¶ 35-44; defendants' moving brief at 31. Cole also attaches documentary exhibits to substantiate his explanations. Cole Aff., Exhs. 2, 4 and 9. In their opposition papers, plaintiffs fail to address Cole's rebuttal statements, nor do they present any contrary evidence that would support the complaint's allegations of misappropriation of corporate funds. Cole also argues that the complaint's allegations of destroying or removing corporate files are false. Among other things, Cole explains that "Dionne and his spouse had full control, access and monitoring rights of all files of Genesis Capital, electronic system, surveillance and other file protective and back-up system which was in place in the company." Defendants' moving brief at 31-32; Cole Aff., ¶¶ 97-102 and accompanying exhibits. Plaintiffs fail to rebut or address Cole's statements, and do not present any contrary evidence. Accordingly, the eighth cause of action should be dismissed.

Tortious Interference with Prospective Economic Advantage and Tortious Interference With Business Relationships (ninth and tenth causes of action)

The ninth and tenth causes of action are essentially based on the same allegations, namely: defendants intentionally and improperly solicited clients of Genesis in violation of the Operating Agreement, which tortiously interfered with plaintiffs' expectancy of economic benefit and business relationship with such clients, and caused plaintiffs' loss of profits. Complaint, ¶¶ 115-127.

Under New York law, to plead a tortious interference with prospective economic advantage or business relations claim, a plaintiff must allege the following: (1) a business relation between itself and a third party; (2) defendant interfered with that relationship; (3) defendant acted with the sole purpose of harming the plaintiff or used improper or illegal means

that amounted to a crime or independent tort; and (4) such acts injured plaintiff's relations with the third party. *Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 323 (1st Dept 2007) (citing, *inter alia*, *Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004); *Jacobs v Continuum Health Partners*, 7 AD3d 312, 313 (1st Dept 2004).

In this case, plaintiffs do not allege that they have or had binding contractual relationships with clients; hence, the instant claims only allege tortious interference with prospective economic advantage and business relationships, not contractual relationships. Notably, it was emphasized both in *Carvel* and *Schorr* that, where a suit is based on interference with a "nonbinding relationship" between the plaintiff and the third party, the plaintiff must show that the defendant's conduct was "not lawful," and the conduct "must amount to a crime or an independent tort." *Carvel*, 3 NY3d at 190; *Schorr*, 44 AD3d at 319, 324. An exception to this rule is where the defendant's conduct is "for the *sole* purpose of inflicting intentional harm on plaintiffs" *Carvel*, 3 NY3d at 190 (emphasis added; internal quotations marks and citation omitted). If the defendant's motive in interfering with a nonbinding relationship is to preserve economic self-interest, it is a defense to the tortious interference claim. *Id.*

Here, defendants argue that "any client that followed Cole did so based on their free will and consent, and without Cole's solicitation and/or intent to try to take them away from Genesis." Defendants' moving brief at 34. They also argue that most of the clients who joined New East India "were clients of Cole before they joined Genesis" and "Cole and these clients had established strong social and professional bond for years." *Id.* In their opposition papers, plaintiffs do not rebut the foregoing arguments, and they also do not address defendants' argument that any interference by defendants was to preserve economic self interest. Notably,

plaintiffs themselves also acknowledge that these claims are based upon defendants' improper client solicitation "in violation of the Amended Operating Agreement" (complaint, ¶ 116), which, as discussed above, contains a non-compete clause forbidding defendants from competing for Genesis' clients. In such regard, these tort claims (ninth and tenth causes of action) are duplicative of the breach of contract claim (first cause of action) and should be dismissed, because they are based largely on the same alleged facts. Indeed, it is settled law that a breach of contract claim does not generally give rise to a tort claim unless the defendant "breached a duty of care independent of any purported contractual obligation." *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 (2d Dept 2005).

Prima Facie Tort (eleventh cause of action)

The complaint alleges that the defendants' conduct was malicious and intended to inflict harm on plaintiffs, and that they suffered special damages because defendants improperly replaced or substituted plaintiffs as the representatives for numerous clients, destroyed office files and damaged plaintiffs' reputation and goodwill. Complaint, ¶ 130. It further alleges that the defendants have "no excuse or justification for their actions" and that their actions "were nothing short of disinterested malevolence, intended only to destroy and harm plaintiffs." *Id.*, ¶ 131-132.

The elements of a prima facie tort claim include "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal." *Smallwood v. Lupoli*, 107 AD3d 782, 785 (2d Dept 2013). Additionally, a prima facie tort claim must allege that defendant's intent was "motivated solely by malice" or "disinterested malevolence." *Diorio v Ossining Union Free School District*, 96

AD3d 710, 712 (2d Dept 2012).

Here, the complaint alleges the elements of a prima facie tort claim. However, the allegations are composed primarily of bare legal conclusions that are not supported by specific facts. In a motion to dismiss for failure to state a cause of action, "bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference." *Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 (2d Dept 2008). In fact, in Dionne's email to Cole, dated July 12, 2013, he wrote: "With much love and affection for you, I am so sorry that you forced me to end our personal relationship on such note. It's truly sad and I sincerely hope that you will come to your senses and come on to continue together after 4 ½ insanely hard years for the firm . . .." Exhibit 3 to defendants' opposition to plaintiffs' application for preliminary injunction (motion sequence no. 001). Moreover, an element of a prima facie tort claim is that the plaintiff "suffered specific and measurable loss, which requires an allegation of special damages" *Diorio*, 96 AD3d at 712. Here, plaintiffs allege special damages, but without identifying any measurable or specific loss casually related to the alleged tortious acts. *Bass Oil and Chem. LLC v Bass,* 43 Misc 3d 1217 (A), 2014 NY Slip Op 50684 (U), *8 (Sup Ct, Kings County 2014). Also, plaintiffs fail to address this claim in their opposition papers, despite defendants' contention that it should be dismissed, for the reasons stated in their moving papers. Thus, this cause of action is dismissed.

Conclusion

Based upon all of the foregoing, it is hereby

ORDERED that the motion of defendant Ian Stuart Cole to dismiss the complaint is granted to the extent of dismissing the third, fifth, eighth, ninth, tenth and eleventh causes of

action of the complaint; and it is further

ORDERED that the motion of defendant The New East India Co., LLC to dismiss the complaint is granted in all respects and the complaint is dismissed in its entirety as against this defendant, with costs and disbursements to this defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of this defendant; and it is further

ORDERED that the Clerk shall sever and continue the remainder of the action; and it is further

ORDERED that defendant Ian Stuart Cole is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: Oct. 22, 2014

ENTER:

Ellen M. Coin, A. J.S.C.