JAKKS Pac., Inc. v Wicked Cool Toys, LLC
2017 NY Slip Op 30200(U)
January 31, 2017
Supreme Court, New York County
Docket Number: 159812/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45
--X
JAKKS PACIFIC, INC.,

Plaintiff,

-against-

WICKED COOL TOYS, LLC and JEREMY PADAWER,

Defendants.
--X

Decision and Order

Index No. 159812/2015

Mot. Seq. 004 & 007

Hon. Anil C. Singh, J.:

In this action for, *inter alia*, tortious interference with contract, tortious interference with prospective economic advantage, unfair competition and breach of fiduciary duty, JAKKS Pacific, Inc. ("JAKKS" or "plaintiff") moves for partial summary judgment pursuant to CPLR 3212 as against Jeremy Padawer ("Padawer") and Wicked Cool Toys, LLC ("WCT" and together with Padawer, "defendants"") (mot. seq. 004). Defendants' move for summary judgment pursuant to CPLR 3212 as against JAKKS (mot. seq. 007). The parties oppose each other's motions. These motions have been consolidated for purposes of this decision.

Facts

JAKKS and WCT are competitors in the toy industry. Cabbage Patch Kids ("CPK") is a globally recognized brand and for the preceding ten years, JAKKS had

operated as the exclusive CPK licensee for Original Appalachian Artworks, Inc. ("OAA"), the CPK license holder. In May 2014, the CPK license was awarded by OAA to WCT, whose co-president Padawer, previously served as a JAKKS executive. JAKKS alleges that Padawer on multiple occasions disparaged JAKKS to OAA and formed JAKKS competitor, WCT, while still employed by JAKKS. See Compl. ¶¶ 21-26, 35, 38.

In a related action, JAKKS and OAA each claimed that the other had breached the underlying exclusive license, for reasons that are not pertinent to this decision. Pursuant to the license agreement, the parties entered into an arbitration in Georgia. See License Agreement ¶XXX; XXIX (the license is "governed by and construed in accordance with the laws of the State of Georgia."). WCT was not a party to the arbitration as it was not a party to the underlying license agreement. WCT sought to intervene in the arbitration and was denied by a Special Arbitrator. See Robins Affirmation, Exh. C, Sec. IV. On January 26, 2016, the arbitrator declared that, among other things, OAA had not breached the license agreement. See Arbitration Decision and Award, dated January 28, 2016 at 44-45. JAKKS alleges that this decision by the arbitrator was made in error and has since moved to vacate the arbitrators finding. This decision is allegedly pending sub judice before the United States District Court for the Northern District of Georgia. See Case No. 1:14-cv-02861-MHS.

Analysis

Legal Standard

The standard for summary judgment is well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact in the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Despite sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. Id. Summary judgment is a drastic remedy and should only be granted if the moving part has sufficiently established that it is warranted as matter of law. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all inferences in favor of the non-moving party and should not pass on the issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992) (citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989)). The court's role is "issue finding, rather than issue determination." Sillman v. Twentieth Century Fox- Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

JAKKS Motion for Partial Summary Judgment

JAKKS motion for partial summary judgment is denied. JAKKS motion rests on the proposition that Padawer's bad acts breached his fiduciary and good faith duties to JAKKS. JAKKS alleges that this is illustrated in two ways, the first is Padawer's co-founding of WCT while employed by JAKKS and the second is Padawer's disparagement of JAKKS to OAA while still employed by JAKKS. It is undisputed by either party that "an employee is to be loyal to his or her employer and is prohibited from acting in any manner inconsistent with his or her agency or trust and is at all times bound to exercise the utmost good faith and loyalty in performance of his or her duties." Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 295 (1997); City of Binghamton v. Whalen, 141 A.D.3d 145 (3d Dept 2016).

Padawer's Alleged Co-Founding of WCT While Employed by JAKKS

JAKKS alleges that Padawer breached his fiduciary duty when he allegedly co-founded WCT and WCT (HK), which are direct competitors of JAKKS in the toy industry. JAKKS highlights the cases of Duane Jones Co. v. Burke, 306 N.Y.172, 188 (1954), Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc., 100 A.D.2d 81, 88 (1st Dept 1984), and Foley v. D'Agostino, 211 A.D.2d 60 (1st Dept 1960) for the proposition that an employee may not engage in a business which competes directly with his employer's because it is a breach of the duty of loyalty

and good faith that the employee owed to the corporation. This court agrees with JAKKS analysis of the case law. However, JAKKS fails to make a showing that the facts, as alleged in this case warrant summary judgment.

JAKKS has not adequately alleged that Padawer co-founded WCT and WCT (HK) at the time that Padawer was employed with JAKKS. JAKKS alleges that Padawer co-founded WCT on June 11, 2012, more than nine months before leaving JAKKS on March 21, 2013. JAKKS points to the WCT Operating Agreement, which states that "the Members formed a limited liability company under the Delaware Limited Liability Company Act...by filing the Company's Certificate of Organization...effective June 11, 2012." WCT Operating Agreement §1.1. Padawer is then listed as an initial member as defined in the WCT Operating Agreement. Id. §2.1; Exh. A-1. Additionally, JAKKS contends that according to the Certificate of Incorporation, Padawer co-founded WCT (HK), which acted as WCT's overseas affiliate in August 2012.

However, there is an issue of fact as to the time frame of Padawer's involvement in WCT and WCT (HK). Regarding WCT (HK)'s Certificate of Incorporation defendants contend that the incorporation form, which predates the unsigned certificate of incorporation is executed by Mr. Poon and Mr. Rinzler, who were both the original co-founders of WCT and not Padawer. Additionally, defendants have produced a declaration of trust, after the certificate of incorporation

was issued that shows that Mr. Poon and Mr. Rinzler, and not Padawer own shares in WCT (HK). See Rinzler Aff. Ex. D. Finally, defendants have produced the WCT (HK) Interest Purchase Agreement entered into and executed on January 1, 2014 by Padawer and stating that WCT (HK) is issuing shares to Padawer and thereby representing ownership effective as of the date of execution. See Rinzler Aff. Ex. O. This admissible evidence presented by defendants is more than sufficient to deny JAKKS claims as it relates to WCT (HK). See Zuckerman, 49 N.Y.2d at 560.

Regarding WCT, defendants' produce multiple documents that raise a triable issue of fact as to whether Padawer was a founding member. First is an August 16, 2013 email between Padawer and Mr. Rinzler discussing proposed amendments to the WCT Operating Agreement and Interest Purchase Agreement that would vest Padawer with an interest in WCT. See Rinzler Aff. Ex. J. Next is the Amended and Restated Operating Agreement for WCT executed on December 23, 2013 by and among Mr. Rinzler, Mr. Poon and Padawer, and effective April 1, 2013. See Rinzler Aff. Ex. M. JAKKS alleges that Padawer was a "secret co-founder" of WCT, and that the WCT Amended and Restated Operating Agreement identifies Padawer as an "Initial Member." See Pl. Reply Memo., pp. 2-6.

A question of fact exists as to whether Padawer was an initial member of the original operating agreement signed in 2012. The Amended and Restated Operating Agreement amends and restates the 2012 operating agreement to include Padawer.

Although the Amended and Restated Operating Agreement does define Padawer as an Initial Member, it is at best unclear as to whether Padawer was a founding member in 2012, before his employment with JAKKS ended. Defendants' contentions are only buttressed by a September 4, 2013 WCT Proposed Ownership chart that shows Padawer had no initial ownership in the company, Padawer's Interest Purchase Agreement with WCT, signed after Padawer left JAKKS, and a Padawer's 83(b) election of shares form to the IRS, dated January 8, 2014 indicating that Padawer's membership in WCT started on that date. See Rinzler Aff. Ex. L, N, R. As there is sufficient evidence presented by defendants to raise a triable issue of fact, JAKKS claims as it relates to WCT are denied.

JAKKS also suggests that Padawer created a domain name for WCT before he left his employment with JAKKS, which shows that he was a co-founder of WCT during his employment with JAKKS. See Plaintiffs Memo, p. 6. Defendants' have provided evidence that the domain name was first registered in 2007 by an unrelated third party working at Carweek and that Mr. Padawer did not purchase the domain name until May 2014. See Padawer Ex. A, B, C, and D. This is enough to raise a triable issue of fact.

Finally, as it relates to Padawer's alleged co-founding of WCT while employed at JAKKS, plaintiff contends that multiple publications have stated that Padawer was a co-founder of WCT. See Pl. Memo, pp. 8-10. However, these

allegations, made by third-parties are not enough to overcome the genuine issue of fact that still exists as to when Padawer became a member of WCT. Therefore, JAKKS motion for partial summary judgment is denied as it relates to Padawer's alleged co-founding of WCT while employed at JAKKS.

Padawer's Disparagement of JAKKS to its Licensor While Still Employed by JAKKS

JAKKS motion for partial summary judgment based upon Padawer's disparagement to OAA while employed by JAKKS is denied.[1] "An employee owes his employer good faith and loyalty and cannot publicly downgrade his employer's reputation under New York law." British Am. & E. Co. v. Wirth Ltd., 592 F.2d 75, 80 (2d Cir. 1979); see also Ritasa Freight Servs., Inc. v. Zucchi, 161 A.D.2d 187, 188 (1st Dept 1990) ("The allegations that corporate officers...disparaged plaintiffs' reputation in the business community...sufficiently state a valid cause of action" sought by the plaintiff). Plaintiff alleges that Padawer "indisputably engaged in a stunning display of disloyalty" when he bad-mouthed JAKKS to OAA, thereby deliberately damaging JAKKS relationship and unlawfully putting his own interests above those of his employer. See Plaintiff's Memo., p. 14-15.

[1] As this court is denying plaintiff's motion for summary judgment on the grounds that there are issues of fact yet to be resolved, it is not determining whether Gilday's email is inadmissible evidence based upon the hearsay exception. Argument on this issue is reserved for trial.

Plaintiff alleges that the specific breach of duty occurred during a conversation with OAA's licensing agent Colleen Gilday ("Gilday") in which Padawer told Gilday that "JAKKS is not doing a good job with retail" and "many of JAKKS lines are not performing well at "retail." JAKKS further alleges that Padawer stated that the sales team "does not go the extra mile..." and that a certain employee "is very limited in his ability to get things through." Finally, JAKKS contends that Padawer told OAA that JAKKS margin on the CPK sales were low and that expectations for sales in 2013 would be low as well. See McGrath Aff., Ex. S.

However, once again there is an issue of fact that is raised by defendants that precludes this court from granting JAKKS motion for partial summary judgment. Gilday states that the conversation at issue was between her and Padawer and that she had taken notes during the conversation that were then sent in an email by Gilday and "do not reflect what Mr. Padawer said literally during the call but are [her] own summary of what was a larger conversation." Gilday Aff. ¶¶ 17, 19-20.

Regarding the statements allegedly made by Padawer that contained confidential information about JAKKS retail, Gilday states that she based this opinion on the fact that JAKKS was not performing at retail, that Wal-Mart was not happy with JAKKS and the CPK line and public information regarding JAKKS financial condition. Id. at ¶11. Gilday also claims that the alleged comments made

about the sales team were her words gleaned from her knowledge that JAKKS was allegedly not devoting the time and resources to the CPK brand that OAA had hoped. Id. at ¶20. Finally, Gilday affirms that "Mr. Padawer did not disparage JAKKS in any way during this call or at any other time." Id. at ¶23.

JAKKS reliance on Rebecca Broadway Ltd P'ship v. Hotton, 143 A.D.3d 71 (1st Dept 2016) is misguided. Plaintiff is correct that the court held that the disparaging emails sent to the prospective investor "destroyed or injured the right of the producer to receive the fruits of its contract with the agent…[which is] the very definition of a breach of the covenant of good faith and fair dealing that the law of New York implies in every contract." Id. at 74. However, there is a distinct and crucial difference between Rebecca and the facts of this case, which is that in Rebecca, the agent was found to have sent the disparaging emails.

In the case at hand, there is a question of fact as to whether the conversation that plaintiff alleges took place and subsequently sent in an email by Gilday, actually occurred in the matter complained of. Issues of credibility are for the fact finder and are not to be resolved on summary judgment. See Hutchings v. Yuter, 108 A.D.3d 416 (1st Dept 2013); DeSario v. SL Green Management LLC, 105 A.D.3d 421 (1st Dept 2013); Asabor v. Archdiocese of New York, 102 A.D.3d 524 (1st Dept 2013); Martin v. Citibank, N.A., 64 A.D.3d 477 (1st Dept 2009).

Therefore, as the court must draw all inferences in favor of defendants, the non-moving party on this motion, and since there is a triable issue of fact, plaintiff's motion for partial summary judgment is denied.

Defendants' Motion for Summary Judgment

Defendants' move for summary judgment based upon three different legal theories. First, that JAKKS is collaterally estopped from bringing claims for tortious interference with contract, tortious interference with prospective economic advantage and unfair competition. Second, that even if this court does not find that JAKKS is collaterally estopped, it should nonetheless grant summary judgment because JAKKS has failed to offer any evidence supporting the required elements of these claims. Finally, that JAKKS has not shown either special damages or a confidential relationship and therefore, this court should grant defendants' summary judgment motion as against plaintiff's claim for unfair competition.

Defendants' Claims for Collateral Estoppel

As a preliminary matter, Georgia law governs the issue of collateral estoppel. The type of preclusive effect that should be afforded another state's judgment is that it be given the same preclusive effect as it would be afforded in the rendering state. See Boudreaux v. State of Louisiana, Dept. of Transp., 49 A.D.3d 238 (1st Dept 2008), aff'd, 11 N.Y.3d 321 (2008); Schultz v. Boy Scouts of America, 65 N.Y.2d

189 (1985) ("the full faith and credit clause of the Federal Constitution requires the courts of each State to give to the judgments of other States the same conclusive effect between the parties as such judgments are given in the States in which they are rendered."); Harvey v. Amateur Hockey Ass'n of U.S., 171 A.D.2d 464 (1st Dept 1991) ("Michigan law governs the question of whether the doctrine of collateral estoppel does or does not bar the plaintiff's present claims against the Association."); Ionescu v. Brancoveanu, 246 A.D.2d 414 (1st Dept 1998) (court looked to preclusion rules of rendering state and cited to the principle that the preclusive effect of a judgment is determined by the law of the jurisdiction which rendered it.) As the basis of defendants' collateral estoppel claim is premised on the arbitration decision that was based on Georgia law, this court must apply Georgia law in deciding the collateral estoppel issue. See License Agreement, ¶XXIX (the license is "governed by and construed in accordance with the laws of the State of Georgia.")

The courts of Georgia have made it clear that the mutual identity of the parties is required for collateral estoppel. In Wickliffe v. Wickliffe Co., Inc., 227 Ga.App. 432 (Ct. App. 1997), Georgia's Court of Appeals held,

> Our Supreme Court has remained consistent that the elements of collateral estoppel require identity of parties or their privies in both actions. Therefore, we are constrained to follow the Supreme Court and require that collateral estoppel requires identity of parties. Our decision necessitates that we overrule [cases to the contrary]. While the Supreme Court cases did not in fact turn on the identity of parties element, they consistently listed the mutuality of parties requirement as a necessary

> element in invoking collateral estoppel. We are not authorized to ignore the holdings of the Supreme Court.

Id. at 434; see also Thomas County Bd. of Tax Assessors v. Thomasville Garden Center, 277 Ga.App. 591, 593 (Ct. App. 2006) ("the collateral estoppel doctrine precludes the readjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies...collateral estoppel requires the identity of the parties or their privies in both actions.") Defendants' argue that because plaintiff had a full and fair opportunity to litigate the issue, the issue of privity is not implicated. See Defendants' Reply Memo., p. 11-12.

As this court could not find and parties have not supplemented this court with any Georgia Supreme Court cases to the contrary, this court denies defendants' invitation to take a contrary position to a Georgia's appellate level court that gives the clear direction that for collateral estoppel purposes, identity of parties or their privies in both actions is required.

This court must analyze whether there is privity between OAA and WCT, such that this requirement is met under Georgia law. "While parties need not be identical, they must be so connected with a party to the previous judgment that the party fully represents the interest of the privy." QOS Networks Ltd. v. Warburg, Pincus & Co., 294 Ga.App. 528, 542 (Ct. App. 2008) citing U.S. Micro Corp. v.

Atlantix Global Systems, 278 Ga.App. 599, 602 (Ct. App. 2006). "[P]rivity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." Miller v. Steelmaster Material Handling Corp., 223 Ga.App. 532, 535 (Ct. App. 1996). "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of...collateral estoppel, since privity depends upon the circumstances. Privity may be established if the party to the first suit represented the interests of the party to the second suit." Coffee Iron Works v. QORE, Inc., 322 Ga.App. 137, 141 (Ct. App. 2013), quoting Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 421-22 (2006).

Defendants' misconstrue the holding in QOS. In QOS, the Georgia Appellate Court found that there was privity between the defendants' even though they were different than the parties in the preceding New York action because the complaint treated the defendants' as joint tortfeasors in that they helped each other take various tortious actions. 294 Ga.App. at 542. Defendants' argue that JAKKS "analogizes OAA and WCT as 'joint tortfeasors'" and that it was OAA's alleged acts together with WCT that led to plaintiff's breach of contract claim. See Plaintiff's Reply Memo., p. 13. However, in QOS, the court noted that Hendrickson served on the QoS board of directors as chief operating officer and Warburg owned a considerable interest in QoS, as he had made a large investment to the company.

In other words, Warburg and Hendrickson were intimately connected in that "if Warburg with its greater number of shares and influence is not liable to QoS for damages, Hendrickson with his lesser influence would not be liable." Id. at 534. Here, no such connection between WCT and OAA exists. There are no common shareholders or board members alleged in either suit. The only connection is the claim which is allegedly based upon a breach of the underlying licensing agreement between OAA and JAKKS.

Once again, the clear language contained in Wickliffe, gives this court pause in finding that there is privity between OAA and WCT. The Wickliffe court specifically states,

> In one line of cases we have held that the modern trend in applying the doctrines of res judicata and collateral estoppel is to confine the privity requirement to the party against whom the plea is asserted, so as to permit one who is not a party to the judgment to assert the judgment against a party who is bound by it, and thus to preclude relitigation by that party of issues which have been determined adversely to him in the prior action...While the modern trend...is perhaps the better position, only our Supreme Court has the authority to overrule its earlier holdings and to adopt the modern trend in Georgia.

Id. at 434-35 (internal quotations omitted).

Ultimately, defendants are requesting that this court adopt the modern trend to collateral estoppel that the Georgia courts have rejected. There are no credible allegations that OAA represented WCT in the arbitration, nor could it as WCT was not a party to the licensing agreement. Furthermore, WCT itself tried to intercede in

the arbitration hearing but was denied by the arbitrator who held that WCT was not a party to the licensing agreement nor an affected party. See Robins Aff., Ex. C. The core of defendants' argument is that because the arbitrator's award holds that OAA did not breach the contract, this clearly effects JAKKS ability to succeed on its claims against WCT. This court agrees with this reasoning. However, the Georgia courts have clearly rejected this line of reasoning for purposes of collateral estoppel. See Wickliffe, 227 Ga.App. at 434; see also U.S. Micro Corp. v. Atlantix Global Systems, LLC, 278 Ga.App. 599, 602 (Ct. App. 2006) ("the relationship must show that one party has fully represented in litigation the legal right of another and that the two parties' rights are 'fully congruent'.")

Therefore, defendants' motion for summary judgment based upon collateral estoppel is denied.

Defendants' Claims for Summary Judgment Based Upon Plaintiff's Failure to Produce Adequate Evidence

Plaintiff's Claim for Tortious Interference with Prospective Economic Advantage

Defendants' motion for summary judgment based upon plaintiff's failure to produce adequate evidence for its second cause of action for tortious interference with prospective economic advantage, is denied. To prevail on a claim for tortious interference with prospective economic advantage, JAKKS must show,

> 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party.

Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 (2009). "Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." Vigoda v. DCA Prods. Plus Inc., 293 A.D.2d 265, 266 (1st Dept 2002); see also Snyder v. Sony Music Entertainment, 252 A.D.2d 294 (1st Dept 1999).

Defendants' contend that the evidence clearly shows that they did not interfere with JAKKS relationship with OAA or cause OAA to not renew its license with JAKKS and therefore, JAKKS claim should be dismissed. The crux of defendants' claims stems from statements made by Ms. Tolhurst, president of OAA that "OAA decided to not renew its license with JAKKS because of our over 10 year personal experiences with the company, its failure to properly manage the brand, lack of engagement, poor financial results, and under developed pitch materials." Tolhurst Aff. ¶44. According to defendants', this decision made by OAA was directly related to JAKKS taking over the CPK license from Play Along in its acquisition and its precipitous drop of sales over the course of the contract, which allegedly hovered between a 70 and 90 percent loss from peak sales attained under Play Along. See id., ¶¶13 and 16.

This decline in sales also allegedly led to strained relationships with retailers of CPK products such as Wal-Mart and led OAA to rethink their relationship with JAKKS through the negotiation of short-term licenses for the CPK brand. Gilday Aff. ¶8 and 12. OAA was also allegedly aware of JAKKS financial difficulties as JAKKS admitted to Ms. Tolhurst that "earnings for JAKKS was not great and [JAKKS] are having to make some changes internally to adjust spending and overhead." Tolhurst Aff. ¶23; see also Gilday Aff., ¶9 (OAA grew concerned because "during the 2009 to 2013-time period, OAA watched JAKKS stock price fall, revenue stream drop, and head count shrink"). OAA was also told by some international partners that JAKKS handling of pricing was "preventing OAA from growing the business." Gilday Aff. ¶13.

Despite all of this knowledge, OAA invited JAKKS to make business proposals for the 2015 CPK license. However, allegedly, "senior management did not express interest or attend" and OAA was unimpressed with JAKKS presentation worrying that the relationship moving forward would be "more of the same." Tolhurst Aff., ¶29-30.

JAKKS does not specifically dispute these allegations, but rather contends that the reason OAA decided not to pursue a continuing relationship was because Padawer was involved in the founding of a competing toy company, WCT and while employed with JAKKS, had been 'bad-mouthing' JAKKS to OAA. JAKKS points

to the June 11, 2012 WCT Operating Agreement, which lists Padawer as an initial member. See WCT Operating Agreement, §1.1, 2.1. JAKKS also alleges that Padawer was a founding member of WCT (HK), the organization that would handle all of WCT's international business and evidenced by the August 20, 2012 Certificate of Incorporation. See McGrath Aff., Ex. E. According to JAKKS, Padawer created these organizations while still employed with JAKKS. Similarly, JAKKS alleges that while employed at JAKKS, Padawer made multiple disparaging comments to Gilday, which caused JAKKS relationship with OAA to sour. See McGrath Aff., Ex. S. Finally, JAKKS alleges that these allegations are bolstered by multiple third-party admissions that Padawer was in fact a co-founder of WCT, while working for JAKKS. See McGrath Aff., Exs. H-R.

To reiterate, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all inferences in favor of the non-moving party and should not pass on the issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992) (citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). JAKKS, as the non-moving party, is entitled to have all inferences drawn in its favor. On a motion for summary judgment, the role of the court is not as fact-finder. Since

there is a triable issue of fact, defendants' motion for summary judgment on plaintiff's claim for tortious interference with prospective economic advantage is denied.

Plaintiff's Claim for Tortious Interference with Contract

Defendants' motion for summary judgment on plaintiff's first cause of action for tortious interference with contract is denied. In order to state a claim for tortious interference with contract, plaintiff must prove "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract and damages resulting therefrom." Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413 (1996).

Defendants' contend that plaintiff cannot adequately allege the breach of contract requirement. A required element of tortious interference with contract is that "the breach of contract would not have occurred but for the activities of the defendant." Cantor Fitzgerald Associates, L.P. v. Tradition N. Am., Inc., 299 A.D.2d 204 (1st Dept 2002); see also Marks v. Smith, 885 N.Y.S.2d 463 (1st Dept 2009). Defendants' also claim that plaintiff cannot prove damages resulting from the breach. See Oddo Asset Mgt. v. Barclays Bank PLC, 950 N.Y.S.2d 325 (2012) (finding that plaintiff must prove damages resulting from the breach.)

However, as discussed in detail *supra*, plaintiff has adequately alleged that but for Padawer's disparaging comments and WTC's interference, JAKKS would not have been damaged. JAKKS has also adequately alleged damages resulting from the alleged breach. Therefore, defendants' motion for summary judgment is denied.[2]

Plaintiff's Claim for Breach of Fiduciary Duty

Defendants' motion for summary judgment on plaintiff's fourth cause of action for breach of fiduciary duty against Padawer is denied. The elements of a cause of action to recover damages for breach of fiduciary duty are (i) the existence of a fiduciary relationship, (ii) misconduct by the defendant, and (iii) damages directly caused by the defendant's misconduct." Singh v. PGA Tour, Inc., 42 Misc.3d 1225(A) (Sup. Ct. N.Y. Cnty. Feb. 13, 2014). "A fiduciary relationship '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.'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" Id. "It is elemental

[2] Defendants' allege that because JAKKS has not disputed the allegations related to the claim for tortious interference with contract, the claim is abandoned and therefore the motion for summary judgment should be granted. See Josephson LLC v. Clumn Fin., Inc., 94 A.D.3d 479 (1st Dept 2012); Fed. Nat. Mortg. Ass'n v. Karastamatis, 52 Misc.3d 1007 (Sup. Ct. Nassau Cnty. 2016). However, plaintiff has adequately alleged facts that raises genuine issues of material fact that dispute defendants' claims. See *supra*; *infra*.

that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989).

Under New York law, an employee owes a duty of loyalty to his employer and "is prohibited from acting in any manner inconsistent with his or her agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his or her duties." Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 295 (1977) quoting Lamdin v. Broadway Surface Adv. Corp., 272 N.Y.133, 138 (1936); see also British Am., 592 F.2d at 80; Ritasa, 161 A.D.2d at 188. Although defendants' dispute the factual allegations underpinning the cause of action, plaintiff has adequately alleged that during his employment at JAKKS, Padawer formed a direct competitor (WCT) and bad-mouthed JAKKS to OAA. Giving every reasonable inference in favor of the non-moving party, defendants' motion for summary judgment is denied.

Plaintiff's Claim for Unfair Competition

Defendants' motion for summary judgment on plaintiff's third cause of action for unfair competition is granted in part. Unfair competition is "the bad faith misappropriation of a commercial advantage which belonged exclusively to a plaintiff." Private One of New York, LLC v. JMRL Sales & Service, Inc., 21 Misc.3d

1106(A) (Sup. Ct. Kings Cnty Oct. 6, 2008) quoting LoPresti v. Massachusetts Mut. Life Ins. Co., 30 A.D.3d 474, 476 (2d Dept 2006). An unfair competition claim must contain the requisite element of either "a confidential relation between the parties or a valid agreement to refrain from the alleged unfair competition" to establish bad faith misappropriation. V. Ponte & Sons, Inc. v. Am. Fibers Int'l. 222 A.D.2d 271, 271 (1st Dept 1995).

Plaintiff has failed to establish in any of its pleadings that they entered into any kind of relationship with WCT. JAKKS "had only ever entered into an agreement with OAA for the CPK license, to which WCT was at best a third party." See JAKKS v. Wicked Cool Toys et al., Index No. 159812/2015 (Sup. Ct. N.Y. Cnty. Jul. 6, 2016). As plaintiff cannot establish a relationship with WCT, defendants' motion for summary judgment on plaintiff's claim for unfair competition must be granted as to WCT.

Defendants' motion for summary judgment is denied as it relates to Padawer. "Where employees, during the period of their employment, and a corporation formed by them, engage in and carry out a conspiracy to compete with the employer...said conduct constitutes actionable unfair competition." Foley v. D'Agostino, 21 A.D.2d 60, 69 (1st Dept 1964); see also Mitzvah Inc. v. Power, 106 A.D.3d 485 (1st Dept 2013). As discussed *supra*, the relationship between Padawer and JAKKS at the time of Padawer's employment constitutes a confidential relationship between the parties.

Defendants' final contention is that plaintiff cannot establish special damages. See Waste Distillation Tech., Inc. v. Bias/and & Bouck Engineers, P.C., 136 A.D.2d 633 (1st Dept 1988) ("the absence of sufficient allegations of special damages mandates the dismissal of the plaintiff's unfair competition claim."). "In pleading special damages, actual losses must be identified and causally related to the alleged tortious act." Id. at 877. Plaintiff alleges that as a direct result of Padawer's discouraging remarks made to an OAA director and his intention to harm the business relationship based upon his formation of a direct competitor (WCT), JAKKS was damaged in the amount of $554,000 plus interest for Padawer's salary and profits for sales that were lost in 2015. See Keller Aff., Ex. C. At this stage, this is enough to deny defendants' motion for summary judgment as against the unfair competition claim against Padawer.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment on plaintiff's first cause of action for tortious interference with contract is denied; and it is further

ORDERED that defendants' motion for summary judgment on plaintiff's second cause of action for tortious interference with prospective economic advantage is denied; and it is further

ORDERED that defendants' motion for summary judgment on plaintiff's third cause of action for unfair competition is granted to the extent of dismissing the claim against WCT; and it is further

ORDERED that defendants' motion for summary judgment on plaintiff's fourth cause of action for breach of fiduciary duty is denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that parties are to appear for a pre-trial conference on April 4, 2017 at 2:30 P.M. at 60 Centre Street, Room 218.[3]

Date: January 31, 2017
New York, New York

Anil C. Singh

[3] By separate order, parties are ordered to mediation.