

Wolberg v IAI N. Am., Inc.

2017 NY Slip Op 32465(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 653621/2016

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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GADI WOLBERG

Plaintiff

Index No. 653621/2016

v

DECISION AND ORDER

IAI NORTH AMERICA, INC., and ISRAEL
AEROSPACE INDUSTRIES, LTD.

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action to recover for breach of an employment termination and severance agreement (the Agreement), breach of a nondisparagement clause set forth in the Agreement, tortious interference with a prospective business opportunity, and prima facie tort.

The defendants IAI North America, Inc. (North America), and Israel Aerospace Industries, Ltd. (IAI), move pursuant to CPLR 3211(a) to dismiss the complaint, arguing, among other things, that IAI is not subject to longarm jurisdiction in New York and was not properly served with process (CPLR 3211[a][8]). They further contend that documentary evidence establishes that IAI was not a party to the agreement in any event, and that the complaint fails to state a cause of action against it for that reason (CPLR 3211[a][1], [7]). In addition, the defendants argue

that the causes of action set forth in the complaint fail to state a cause of action against both IAI and North America, since the allegations fail to support claims sounding in breach of contract, tortious interference with a business opportunity, or prima facie tort. CPLR 3211(a)(7).

The plaintiff counters that the motion was not timely made, inasmuch as the motion papers were served subsequent to the last date permitted by the CPLR, and that there is no merit to the motion in any event. The defendants, in effect, request leave to serve a late motion to dismiss the complaint.

The defendants' application for leave to serve a late motion to dismiss the complaint is granted. The motion is thereupon granted to the extent that (a) the cause of action alleging prima facie tort is dismissed, and (b) so much of the breach of contract cause of action as alleges breach of a "no re-employment" clause in the Agreement is dismissed. The motion is otherwise denied, the plaintiff's time to properly serve IAI is extended for a period of 60 days after this order, and North America is directed to serve an answer within 30 days of this order.

II. BACKGROUND

A. Allegations in the Complaint

The plaintiff, Gadi Wolberg, alleges in his complaint that he had been employed by North America from 2005 through January

31, 2016. He asserts that North America is incorporated in Delaware, its principal place of business is located in Arlington, Virginia, and it is registered with the New York State Secretary of State as a foreign business corporation authorized to do business in New York. The plaintiff further alleges that he also worked for IAI from 1971 through 2005, that IAI is based in Israel, and that it is an Israeli-owned company. The plaintiff asserts that North America is a wholly-owned subsidiary of the larger IAI, as explained on North America's website, that IAI controls the day-to-day operations of North America, and that North America is a mere division or department of IAI which was incorporated solely to permit IAI to do business in the U.S.

The plaintiff asserts that, upon leaving his employment in 2016, he entered into the Agreement with North America. The Agreement, dated December 16, 2015, contains both a severance provision and a general release, and was signed by the plaintiff and the CEO of North America. The plaintiff avers that, at the time he signed the Agreement, and continuing through the present, he was and is a resident of New York.

The Agreement contains two clauses that are the subject of the dispute. Clause 12, entitled "Non-disparagement clause," provides that

"[Plaintiff] and [North America] agree that neither will disparage the other or make or publish any communication that reflects adversely upon any of them and the Parties will not permit, and will use their

best efforts to prevent, anyone claiming to act on their behalf, to make disparaging comments, written or verbal. Furthermore, [North America] shall use best efforts to cause its officers, shareholders, directors, members, partners and employees to comply with the obligation of non-disparagement."

Clause 15, entitled "No Reemployment Clause" provides that:

"Employee agrees that he will not seek reemployment with [North America] or any current or future parent company, subsidiary, affiliate or joint venture, except at the request of [North America]. If Employee applies for employment or a position with [North America] or any Company Releasee and is denied such employment or position, or is subsequently employed through merger, acquisition or other business transaction, then the existence of this Agreement shall be valid, lawful, non-discriminatory basis for rejecting any application or, in the event Employee obtains or continues in such employment, to terminate such employment. Nothing herein shall be deemed to preclude Employee from performing services as an independent contractor for any IAI entity worldwide should such entity desire Employee to perform any services."

The plaintiff asserts that, after the execution of the Agreement, he began discussions with Eric Womble, the CEO of ELTA North America, Inc. (ELTA), a wholly-owned subsidiary of North America. The plaintiff claims that, on or about February 1, 2016, he discussed with Womble the possibility of working 4 days per month as an independent contractor/consultant for ELTA, and be compensated the sum of \$4,000 dollars per month.

The complaint alleges that, in or about Spring 2016, Womble informed the plaintiff in writing that Robert Fogelson, the CEO of North America, gave instructions prohibiting Womble from hiring the plaintiff. The plaintiff further alleges that Alon

Rosenfeld, the plaintiff's successor at North America, directed Virginia Mauldin, North America's director of human resources, to issue written instructions to employees of North America ordering them to not hire or work with the plaintiff in any capacity. The plaintiff also alleges that Fogelsong and/or Joseph Weiss, the CEO of IAI, and/or Yehoshua Eldar, the Vice President for Procurements and Logistics at IAI, sent similar instructions to all persons employed by North America not to hire or work with the plaintiff in any capacity.

Additionally, the plaintiff alleges that Rosenfeld attended a meeting at ELTA and was specifically instructed by Weiss, Eldar, and/or other individuals not to hire him as an independent contractor/consultant. The plaintiff further alleges that either Rosenfeld, Weiss, Fogelsong, Mauldin, or Elder, alone or in conjunction, verbally or in written instructions, sent similar "prohibitions/instructions/threats" to Womble after the plaintiff and Womble had entered into a preliminary agreement establishing the time that the plaintiff would work at, and the compensation that he would receive from, ELTA.

The complaint further asserts that the defendants breached the nondisparagement clause set forth in the Agreement by making statements impugning the plaintiff's character, thus causing ELTA to withdraw its offer of a consulting contract, and other potential employers to avoid working with the plaintiff.

B. Procedural History

The plaintiff commenced this action by filing a summons and complaint on July 11, 2016. On August 4, 2016, the plaintiff served copies of the summons and complaint upon IAI, through an Israeli attorney, Matiiyahu Apel, who personally delivered them to Ilan Yaari, an employee in IAI's legal department at its offices at Ben Gurion Airport in Israel. The plaintiff filed an affidavit of service referable thereto on October 7, 2016.

On August 5, 2016, the plaintiff served copies of the summons and complaint upon North America by delivering them to the New York State Secretary of State. On August 9, 2016, the plaintiff served additional copies of the summons and complaint upon North America by personally delivering them to North America's chief financial officer at its offices in Arlington, Virginia. On September 7, 2016, the plaintiff filed affidavits of service referable to service of process upon North America.

On September 7, 2016, the defendants moved pursuant to CPLR 3211(a)(1), (7), and (8) to dismiss the complaint. In support of their motion, they submitted attorneys' affirmations, the complaint, portions of the Agreement, a printout from North America's website, and the New York registration status of both North America and ELTA. They also submitted a memorandum of law, arguing that the complaint failed to state a cause of action, New York had no personal longarm jurisdiction over IAI, IAI was not

properly served with process in any event, and documentary evidence, consisting of the Agreement and a written release set forth therein, established a complete defense to the action. The plaintiff opposed the motion with an attorney's affirmation, his own affidavit, and a memorandum of law.

In his opposition, the plaintiff first asserted that the defendants' motion to dismiss the complaint was untimely, since it was made more than 30 days after service was effected upon both defendants. He further argued that North America was a subsidiary of IAI that was incorporated solely for the convenience of IAI in doing business in the United States and that, as such, IAI was not legally an entity separate from North America. The plaintiff argues that, as a consequence, IAI was subject to jurisdiction in New York since North America has authority to do business in the state. The plaintiff also contends that the complaint stated a cause of action and that the terms of the Agreement did not preclude him from asserting the claims he makes in this action.

In their reply, the defendants informally requested that they be permitted to serve late motion papers. They asserted, in effect, that although North America was served by delivery of process to the Secretary of State on August 5, 2016, and regardless of whether it kept its forwarding address current, North America would not have received the papers forwarded by the

Secretary of State until after it was personally served in Virginia on August 9, 2016. The defendants contend that they thus measured the 30-day deadline for answering or moving from August 9, 2016, when they first obtained notice that an action had been commenced against North America. They also contested the plaintiff's arguments set forth in his opposition papers.

III. DISCUSSION

A. TIMELINESS OF MOTION AND REQUEST TO EXTEND TIME TO MOVE

After service is completed, a defendant corporation has 30 days to file a responsive pleading or a pretrial motion where it is personally served with process without the State (see CPLR 303; 3012[c]), and 30 days to file a responsive pleading or pretrial motion where process is served upon the Secretary of State. See CPLR 311(a); 320(a); 3012(c). Here, IAI was required to serve a responsive pleading or motion by September 5, 2016, which is the first business day 30 days after it was personally served in Israel, and North America was required to serve a responsive pleading or motion on September 6, 2016, or 30 days after delivery of process to the Secretary of State. See Business Corporation Law § 306; CPLR 3211(e). IAI and North America together moved to dismiss the complaint on September 7, 2016. Thus, IAI was two days late, and North America was one day late in serving the motion papers.

In their reply, the defendants, in effect, informally request that they be permitted to serve a late motion, and that the plaintiff be compelled to accept it.

Generally, a party seeking affirmative relief must request it by way of a motion or cross motion, but a court may exercise its discretion where the request for relief is informally made in opposition or reply papers, and the request is clearly made on the face of those papers. See CPLR 2215; Fried v Jacob Holding, Inc., 110 AD3d 56 (2nd Dept 2013); see also Paulus v Christopher Vacirca, Inc., 128 AD3d 116 (2nd Dept. 2015); McGee v Dunn, 75 AD3d 624 (2nd Dept. 2010). Relevant factors to be considered include the interrelatedness of the informally requested relief and the relief requested in the main motion, the prominence in the papers of the informal request for additional affirmative relief, the plaintiff's opportunity to address that request, and the interest of judicial economy. See Fried v Jacob Holding, Inc., supra.

In considering an informal request to compel acceptance of a late answer or motion to dismiss a complaint, the court must also consider whether the excuse given for filing the late motion is reasonable, the length of the delay in requesting such relief, the lack of prejudice to the plaintiff, and the potential merit of the motion. See CPLR 3012(d); 5015(a)(1).

While a corporation's neglect to maintain an up-to-date

forwarding address with the Secretary of State, standing alone, does not constitute a reasonable excuse for a default in answering a complaint or moving with respect thereto (see Baez v Ende Realty Corp., 78 AD3d 576 [1st Dept. 2010] Lawrence v Esplande Gardens, 213 AD2d 216 [1st Dept. 1995]), even had North America kept its address current, it would not have received a copy of the summons and complaint from the Secretary of State prior to personal service upon it in Virginia. Thus, based upon a claim of law office failure, North America's attorneys have a reasonable excuse for measuring that defendant's time to answer or move from the date of personal service, rather than the date of service upon the Secretary of State, particularly in light of the lack of prejudice to the plaintiff, the lack of a pattern of delay, and the public policy of deciding cases on the merits. See American Audio Serv. Bur. Inc. v AT&T Corp., 33 AD3d 473 (1st Dept. 2006); Mediavilla v Gurman, 272 AD2d 146 (1st Dept. 2000).

Since IAI and North America are united in interest, are represented by the same attorneys, and jointly moved to dismiss the complaint, IAI has a reasonable excuse for the fact that its motion papers were untimely served two days after the statutory deadline.

Moreover, North America's one-day delay and IAI's two-day delay in making the motion are de minimis.

Contrary to the plaintiff's contention, the defendants have

not waived the affirmative defense of lack of personal jurisdiction. That affirmative defense is only waived where a defendant answers the complaint and fails to assert it therein, or moves to dismiss the complaint pursuant to CPLR §3211(a) based solely on other defenses. Where, as here, a defendant has neither answered nor moved to dismiss solely on grounds other than lack of personal jurisdiction, the otherwise untimely assertion of a personal jurisdiction defense, standing alone, is not a basis for concluding that the defense has been waived. See Matter of Government Empls. Ins. Co. v Basedow, 28 AD3d 766 (2nd Dept. 2006); CPLR 3211(e); see generally Citimortgage, Inc. v Jameson, 140 AD3d 1493 (3rd Dept. 2016) (applying rule to the defense of lack of standing). The defendants have sufficiently demonstrated that IAI has a potentially meritorious defense to the action based on lack of personal jurisdiction, and that both defendants have a potentially meritorious defense to several causes of action.

Upon consideration of the relevant factors, including the very short nature of the delay, the court excuses the defendants' defaults and grants their informal request to make, and compel acceptance of, a late motion to dismiss the complaint. See Fried v Jacob Holding, Inc., supra; Fox Wander W. Neighborhood Assn. v Luther Forest Community Assn., 178 AD2d 871 (3rd Dept. 1991).

Although a plaintiff may seek leave to enter a default

judgment against a defendant pursuant to CPLR 3215(a) where an answer or motion to dismiss the complaint is untimely served (see e.g. Nouveau El. Indus., Inc. v Tracey Towers Hous. Co., 95 AD3d 616 [1st Dept. 2012]), to the extent that the plaintiff informally requests leave to enter a default judgment against the defendants here, the court denies that application in light of its determination to permit the defendants to serve and file late motion to dismiss the complaint.

B. MERITS OF THE MOTION TO DISMISS THE COMPLAINT

1. Lack of Personal Jurisdiction Over IAI

The defendants argue that the complaint should be dismissed as against IAI pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction because IAI is not subject to longarm jurisdiction in New York, and was not served in accordance with the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (the Hague Convention) (20 UST 361, 658 UNTS 163, TIAS 10072).

a. Longarm Jurisdiction

"A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted." Landoil Resources Corp. v Alexander & Alexander Servs., Inc., 77 NY2d 28, 33

(1990). Pursuant to CPLR 302(a)(1), a nondomiciliary defendant is subject to personal jurisdiction in New York where it "transacts any business within the state or contracts anywhere to supply goods or services in the state." A defendant is considered to have transacted business where it "projects [itself] into this state to engage in a sustained and substantial transaction of business" or "seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship." Paterno v Laser Spine Inst., 24 NY3d 370, 377 (2014); see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d 292 (2017).

"It is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an 'articulable nexus' or 'substantial relationship' with the defendant's transaction of business here. At the very least, there must be 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim.'"

D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, *supra*, at 298-299, quoting Licci v Lebanese Can. Bank, SAL, 20 NY3d 327, 339 (2012).

In addition, to satisfy due process concerns, "[t]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state. Burger King v Rudzewciz, 471 US 462, 474 (1985), quoting International Shoe Co. v Washington, 326 US 310, 316 (1945); see

Daimler AG v Bauman, ___ US ___, 134 S.Ct. 746 (2014) (a court may assert jurisdiction over a foreign corporation to hear any and all claims against it only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State); D&R Global Selections, S.L., *supra*; *see also* BNSF Ry. v Tyrell, ___ US ___, 137 S.Ct. 1549 (2017).

The plaintiff alleges that, although IAI is a foreign corporation with its principal place of business in Israel, North America is its wholly-owned subsidiary. He further alleges that North America is registered to do business in New York, and is nothing but a domestic branch or a "mere department" of IAI, thus constitutionally subjecting IAI itself to longarm jurisdiction in New York under both the "doing business" standard of CPLR 301 and the "transacting business" standard of CPLR 302. *See* Taca International Airlines, S.A. v Rolls-Royce England, Ltd., 15 NY2d 129 (1965); Sung Hwang Co., Ltd. v Rite Aid Corp., 150 AD3d 594 (1st Dept. 2017).

The factors that must be considered in determining whether a New York subsidiary of a foreign corporation is a domestic branch or mere department of that foreign corporation include common ownership, financial dependency of the subsidiary on the parent, the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel, the degree to

which it fails to observe corporate formalities, and the degree of control over marketing and operational policies of the subsidiary exercised by the parent. See Sung Hwang Co., Ltd. v Rite Aid Corp., supra; Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F2d 117 (2nd Cir. 1984). Common ownership is essential, and while proof that the other factors are applicable is not necessary, the factors are nonetheless important. See Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., supra.

Although the plaintiff has the burden of establishing personal jurisdiction over IAI (see Peterson v Spartan Indus, 33 NY2d 463 [1976]), on this motion to dismiss, he need only show that facts "may exist" to support the exercise of long arm jurisdiction over it. Id. at 465. The plaintiff here has demonstrated that common ownership of North America and IAI "may exist," and has thus satisfied the first factor. He has further alleged in his complaint that additional facts may exist that suggest North America's financial dependence on IAI, and that facts actually exist demonstrating that IAI routinely interferes with North America's selection of executive personnel. He also demonstrated that facts may exist that suggest that IAI exercises complete control over North America's operational decisions, inasmuch as he alleged that IAI's deputy counsel negotiated the severance agreement between North America and him. Since the defendants do not refute these allegations, there is no basis for dismissing the complaint against IAI on the ground that the court

lacks longarm jurisdiction over it.

b. Improper Service of Process Under the Hague Convention

The defendants contend that IAI was not properly served with process in accordance with article 10 of the Hague Convention. The plaintiff counters that service was proper since he retained an Israeli attorney to personally serve IAI in Israel. The court rejects the plaintiff's contention, and concludes that IAI has not been properly served, but extends the plaintiff's time to do so in accordance with the Hague Convention for a period of 60 days after this order.

The Hague Convention is a multilateral treaty "intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and facilitate proof of service abroad." New York State Thruway Auth. v Fenech, 94 AD3d 17, 18 (2nd Dept. 2012) (citations omitted). Parties in the United States must follow the guidelines set out in the Hague Convention if they are to properly serve foreign individuals and corporations residing in signatory countries. See Volkswagenwerk Aktiengesellschaft v Schlunk, 486 US 694 (1988).

Where a signatory nation objects to methods of service outlined in article 10(a) and designates its own method of service, it is improper to serve a foreign national residing within such county via an unauthorized method unless (1) the

method of service specified would be too costly or otherwise impracticable, (2) the parties agree to an alternative form of service, or (3) the country's objection is a mere suggestion rather than a mandatory requirement. See generally Mutual Benefits Offshore Fund v Zeltser, 140 AD3d 444 (1st Dept. 2016); American Intl. Group, Inc. v Greenberg, 23 Misc. 3d 278 (Sup Ct., N.Y. County 2008), affd, 60 AD3d 483 (1st Dept. 2009).

Article 10 of the Hague Convention provides that

"Provided the State of destination does not object, the present Convention shall not interfere with

"a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

"b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

"c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

According to the Status Report on the Hague Convention, Israel ratified the Hague Convention with a declaration and reservation providing that

"[t]he State of Israel, in its quality as State of destination, will, in what concerns Article 10, paragraphs b) and c), of the Convention, effect the service of judicial documents only through the Directorate of the Courts, and only where an application for such service emanates from a judicial authority or from the diplomatic or consular representative of a Contracting State."

Since IAI was not served through the Israeli Directorate of

the Courts (the Directorate), and the plaintiff did not request a U.S. or New York judicial authority, or a U.S. diplomatic or consular representative, to apply to the Directorate for permission to delivery the summons and complaint personally to IAI, the personal service of process upon IAI by an Israeli attorney is insufficient to obtain jurisdiction here.

Nonetheless, pursuant to CPLR §306-b, where, as here, a plaintiff fails to serve a defendant within 120 days after filing of the summons in an action, the court may dismiss the action without prejudice as to that defendant upon motion, or may extend the time for service upon good cause shown or in the interest of justice. See Leader v Maroney, 97 NY2d 95 (2001). A plaintiff need not demonstrate that he or she made diligent efforts to serve a defendant in order to invoke the "interest of justice" standard. See Bumpus v New York City Tr. Auth., 66 AD3d 26 (2nd Dept. 2009). Inasmuch as the statute of limitations referable to the plaintiff's causes of action will not expire for several years, IAI received notice of the allegations in the summons and complaint, IAI is being permitted to make a late motion based on the defense of improper service of process, and there will thus be no prejudice to IAI if the plaintiff's time to effect service upon it is extended, the interest of justice warrants extending the plaintiff's time to serve IAI pursuant to the Hague Convention for a period of 60 days after this order. See generally Deutsche Bank, AG v Vik, 149 AD3d 600 (1st Dept. 2017);

Petracca v Hudson Tower Owners, LLC, 139 AD3d 518 (1st Dept. 2016).

2. Failure to State a Cause of Action

The defendants further contend that the complaint should be dismissed against both of them pursuant to CPLR §3211(a)(7) since they did not breach the clause in the Agreement barring the plaintiff's reemployment by IAI and North America, and the clause imposed no additional duties upon them to assure that another company would employ him. They also argue that the statements that the plaintiff accuses them of making did not constitute disparagement, and thus did not run afoul of the nondisparagement provision set forth in Agreement. The defendants additionally assert that IAI is not a party to the severance agreement in any event. They also contend that the plaintiff's tort causes of action should be dismissed as duplicative of the breach of contract causes of action.

a. Standards Applicable to CPLR 3211(a)(7) Motion

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every

possible favorable inference" (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. *See Hurrell-Harring v State of New York*, 15 NY3d 8 (2010); *Leon v Martinez*, 84 NY2d 83 (1994); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, *supra*, at 152 (internal quotation marks omitted); *see Leon v Martinez, supra; Guggenheimer v Ginzburg*, 43 NY2d 268 275 (1977).

Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg, supra*, at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it." *Id.* "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion." *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372, 372 (2nd Dept. 2002); *see Guggenheimer v Ginzburg, supra; Rivietz v Wolohojian*, 38 AD3d 301 (1st Dept. 2007); *Beattie v Brown & Wood*, 243 AD2d

395 (1st Dept. 1997). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530, 530 (2nd Dept. 2007).

b. Breach of Contract

A cause of action to recover for breach of contract must allege that there was "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009); see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016).

i. Non-reemployment Clause

The non-reemployment clause included in the Agreement authorizes the defendants to decline to reemploy the plaintiff as an employee, and restricts the plaintiff from seeking reemployment with either defendant. However, it does not restrict the plaintiff from seeking affiliation with either defendant as an independent contractor or consultant, but does not require the defendants to offer him such an arrangement. Nor does it restrict the plaintiff from entering into a consulting agreement with an entity related to or affiliated with the defendants, such as ELTA, although the clause does not obligate the defendants to assist the plaintiff in securing such an

arrangement, and does not bar them from communicating with those affiliates in connection with the plaintiff's attempts to secure employment or a consulting arrangement.

The facts as alleged in the complaint do not state a cause of action to recover for breach of the non-reemployment clause, since those allegations do not specify in what fashion the defendants failed to perform any obligation imposed upon them by virtue of the clause. Hence, so much of the breach of contract cause of action as is premised on the non-reemployment clause must be dismissed.

ii. Non-disparagement Clause

Conversely, the non-disparagement clause of the Agreement imposes an obligation on the defendants to refrain from making statements to third parties that disparage the character and competence of the plaintiff. The plaintiff states a cause of action to recover for breach of the obligations imposed upon the defendants by the clause. Since the clause is executory in nature, that is, it may only satisfied by future performance with no specific end date, the plaintiff need only allege that he performed his own obligations by not disparaging the defendants, and that he does not intend to do so in the future. See American List Corp. v U.S. News & World Report Inc., 75 NY2d 38 (1989); Hajdu Nemeth v Zachariou, 309 AD2d 578 (1st Dept. 2005). Even if the plaintiff did not explicitly make such an allegation, in the absence of a contrary statement by the defendants, the court may

infer that the plaintiff intended to satisfy his obligations under the clause. See NJP Enters., Inc. v Shooze Inc., 280 AD2d 533 (2nd Dept. 2001).

Here, the plaintiff explicitly alleged that the defendants made disparaging statements to a potential employer or contractor, including assertions that he was "dangerous," and had "chutzpah," and that the employer consequently declined to hire or retain him. While the first epithet is clearly derogatory, the term "chutzpah," meaning "nerve," "temerity," or "audacity," might be derogatory under certain circumstances, and a compliment under others. In the context of the other allegations here, and given the liberal pleading standards under New York law, the court may infer that the plaintiff interprets the term as derogatory, and was invoked by the defendants to dissuade potential employers from hiring or entering into a consulting agreement with him. Cf. Sage Realty Corp. v Kerin, 281 AD2d 334 (1st Dept. 2001) (employee's humorous statement about why he left his employment did not constitute disparagement).

In addition, at the pleading stage, there is no basis upon which the court can conclude, as a matter of law, that the defendants' statements were rendered nonactionable by virtue of the common-interest qualified privilege doctrine. That privilege permits a party to make otherwise disparaging or defamatory statements to protect the economic interest of a person or entity with whom the declarant shares a common interest. See Sokol v

Leader, 74 AD3d 1180 (2nd Dept. 2010); Art4All, Ltd. v Hancock, 5 AD3d 106 (1st Dept. 2004).

Hence, the complaint states a cause of action to recover for breach of the non-disparagement clause.

c. Tortious Interference With Business Opportunity

To state a claim for tortious interference with business relations, the plaintiff must plead

"(1) that [he] 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 AD3d 40, 47 (1st Dept. 2009). "Malice in this context means 'that the conduct by defendant that allegedly interfered with plaintiff's prospects [] was undertaken for the sole purpose of harming plaintiff.'" Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (1st Dept. 2004); see Alexander & Alexander of N.Y., Inc. v Fritzen, 68 NY2d 968 (1986). "Where . . . the alleged interference was with prospective contractual relationships, rather than existing contracts, 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." Out of Box Promotions, LLC v Koschitzki, 55 AD3d 575, 577 (2nd Dept. 2008) (internal quotation marks and citations omitted); see Guard-Life Corp. v Parker Hardware Mfg. Corp., 50

NY2d 183 (1980).

Since the allegations in the complaint support the claim that the defendants acted with disinterested malice in communicating with the Womble and others with whom the plaintiff sought employment or a contractual relationship, and instructing them not to deal with the plaintiff, the complaint states a cause of action to recover for tortious interference with business opportunities and prospective business relationships.

d. Prima Facie Tort

Prima facie tort affords a remedy for "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." Freihofer v Hearst Corp., 65 NY2d 135, 142 (1985) (citation and internal quotation marks omitted); see ATI, Inc. v Ruder & Finn, 42 NY2d 454 (1977). The allegations here, however, constitute a mere restatement of the causes of action to recover for breach of the non-disparagement clause and tortious interference with business opportunity, and "cannot be made to stand independently as a prima facie tort," since prima facie tort "'should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs.'" Gertler v Goodgold, 107 AD2d 481, 490 (1st Dept. 1985), affd 66 NY2d 946 (1985), quoting Belsky v Lowenthal, 62 AD2d 319, 323 (1st Dept. 1978), affd 47 NY2d 820 (1979). Hence, that cause of action must be dismissed as duplicative of the other causes of action. See

Perez v Violence Intervention Program, 116 AD3d 601 (1st Dept. 2014); Fleischer v NYP Holdings, Inc., 104 AD3d 536 (1st Dept. 2013); Akpinar v Moran, 83 AD3d 458 (1st Dept. 2011).

3. Defense Based on Documentary Evidence

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, supra, at 87-88; see Ellington v EMI Music, Inc., 24 NY3d 239 (2014). In order for evidence to qualify as "documentary," it must be "unambiguous, authentic, and undeniable." Fontanetta v John Doe 1, 73 AD3d 78, 84-86 (2nd Dept. 2010). Thus, although documents such as deeds, which reflect out-of-court transactions and are essentially unassailable, qualify as documentary evidence within the intended scope of CPLR 3211(a)(1), affidavits do not. See Granada Condominium III Assn. v Palomino, 78 AD3d 996 (2nd Dept. 2010); Suchmacher v Manana Grocery, 73 AD3d 1017 (2nd Dept. 2010); Fontanetta v John Doe 1, supra. Here, there is no documentary evidence which, standing alone, establishes a complete defense to any of the causes of action.

Although a release may constitute documentary evidence (see Cardinal Holdings, Ltd. v Indotronix Intl. Corp., 73 AD3d 960 [2nd Dept. 2010]), the release set forth in the Agreement does not include clear or specific language regarding tort claims arising from conduct subsequent to its execution. Thus, it

neither precludes the plaintiff from seeking to recover damages for breach of the Agreement itself, nor from seeking damages for tortious conduct postdating the execution of the Agreement. See Wechsler v Diamond Sugar Co., Inc., 29 AD3d 681 (2nd Dept. 2006). Although IAI was not a signatory to the Agreement, the plaintiff alleged that it exercised complete control over North America, its U.S. subsidiary, and is thus itself liable under the contract. See Eastern St. Elec. Contrs. v. William L. Crow Constr. Co., 153 AD2d 522 (1st Dept. 1989). Thus, although the Agreement constitutes documentary evidence, the absence of IAI's signature thereon does not conclusively establish its defense to the breach of contract causes of action.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' application to extend their time to answer or move with respect to the complaint, and to compel the plaintiff's acceptance of its late motion to dismiss the complaint, is granted; and it is further,

ORDERED that the motion to dismiss the complaint is granted only to the extent that (a) so much of the first cause of action as seeks to recover for breach of the "no re-employment" clause of the subject severance agreement is dismissed, and (b) the fourth cause of action, which seeks to recover for prima facie tort, is dismissed, and the motion is otherwise denied; and it is


further,

ORDERED that the plaintiff's time to properly serve the defendant Israel Aerospace Industries, Ltd., in accordance with the Hague Convention is extended until January 9, 2018; and it is further,

ORDERED that the defendant IAI North America, Inc., shall serve and file an answer to the complaint on or before December 11, 2017.

This constitutes the Decision and Order of the court.

Dated: 11-9-17

ENTER: 

J.S.C.

HON. NANCY M. BANNON