Fuoco Group, LLP v Weisman & Co., CPAs
2019 NY Slip Op 35270(U)
July 26, 2019
Supreme Court, Nassau County
Docket Number: Index No. 601864/2017
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present: HON. ANTHONY L. PARGA
Justice

---X
FUOCO GROUP, LLP,

Plaintiff,

-against-

WEISMAN & CO., CPAs and LANNY WEISMAN,

Defendant.
---X

PART 4

INDEX NO. 601864/2017

MOTION DATE: 6/6/19
SEQUENCE NO: 006, 007

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Upon the foregoing papers, the motion by plaintiff, Fuoco Group LLP (hereafter as "Fuoco"), for an order, pursuant to CPLR §3212(e), granting plaintiff partial summary judgment on all causes of action contained in its amended complaint; dismissing all of the defendants' counterclaims contained in their amended answer; setting this matter down for an inquest on damages; and the cross-motion by defendants, Weisman & Co., CPA's and Lanny Weisman, for an order, pursuant to CPLR §3212, granting them summary judgment on the counterclaims contained in their Verified Answer with Counterclaims; dismissing the plaintiff's Amended Complaint; and awarding them damages pursuant to their Client Services Agreement ("CSA") with the plaintiff of no less than $5,000.00 for legal fees incurred as the result of a lawsuit initiated by Phil Felice against all parties are determined as follows.

The plaintiff, accounting firm the Fuoco Group , commenced this action to recover damages against defendants for, *inter alia:* their breach of contract by both the defendant accounting firm Weisman & Co. and its owner, the defendant Lanny Weisman. The Fuoco Group alleges that beginning on February 19, 2017, a holiday weekend when their office was closed, the defendants breached their CSA's restrictive covenants by, *inter alia*, removing client files and proprietary information from its office, soliciting its clients including defendants' former clients, soliciting the Fuoco Groups's employees and joining a competitor accounting firm within four miles of the Fuoco Group's office. More specifically, the Fuoco Group alleges the defendants removed the aforementioned contents from its office via a u-haul truck that day and solicited one of its employees, Mary Sharp, to come work for Wesiman & Co. as well as to assist them in procuring another employee from the Fuoco Group. The Fuoco Group also alleges that on February 20, 2017, the defendants sent a disparaging letter to all of its clients, both those that they serviced before their firm was purchased by the Fuoco Group and those that they acquired while working for the Fuoco Group, soliciting them to leave the Fuoco Group and retain Weisman & Co. The Fuoco Group also alleges the defendants began working with a competitor accounting firm, BMKR, which was located within 50 miles of its office in violation of their CSA. The defendants have counterclaimed seeking to recover damages for, *inter alia*, the Fuoco Group's alleged breach of their CSA. They allege that the Fuoco Group has breached their CSA by, *inter alia*, terminating it's employees, increasing client's fees, allowing their telephone number to lapse and seeking injunctive relief from this court instead of seeking arbitration.

Pursuant to the terms of the CSA they entered into on December 31, 2014, the Fuoco Group purchased the Weisman & Co. The CSA provided that Weisman would work full time and service Weisman & Co.'s old and new clients for a three years during the "Direct Service Period" during which time he would be paid a percentage of the fees generated by Weisman & Co.'s clients. The CSA provides that the Transition Period which ran for 72 months would follow the Direct Service Period, during which time the defendants would continue to receive a percentage of the fees generated by Weisman & Co.'s clients. The CSA anticipated that Weisman was to transition out of the firm and eventually retire, however, an option of continuing to work for the Fuoco Group was included in the CSA.

The CSA set forth restrictive covenants which applied during the "Restrictive Covenant Period," which included the Direct Service Period, the Transition Period, plus one year. The CSA provided that during the Restrictive Covenant Period, the defendants shall not (i) solicit Fuoco's employees; (ii) solicit any of Fuoco's clients, including the clients brought by the defendants to Fuoco, prospective clients (as defined in the CSA), or referrals from Fuoco; and, (3) compete with Fuoco, directly or indirectly. The agreement contains a provision awarding the Fuoco Group damages in the event of a breach of the aforementioned restrictive covenant as follows:

> "[Defendants] shall purchase from [Fuoco] the good will associated with such Firm Client [defined as any person for whom Fuoco was providing services of any kind to at the time of Defendant's breach, or 24 months preceding such breach at a value of one hundred fifty percent (150%) of the Collections for the prior twelve (12) month period of such client or clients."

Finally, while the parties agreed that any dispute would be referred to arbitration, the CSA specifically provided the Fuoco Group with the option to seek injunctive relief in court without posting a bond in the event that defendants breached the agreement.

The CSA affords the Fuoco Group with "the sole authority to manage [defendants'] employees, including establishing the terms of employment and termination thereof" and provides that "the [defendants] shall not interfere in any manner with [Fuoco's] exercise of such authority." The CSA provided that the Fuoco Group would own all intellectual party owned by Weisman & Co. as of the date they became affiliated which was comprehensively defined and included, *inter alia*, "all trade marks, service marks, trade dress, logos, slogans, trade names, corporate names, internet domain names and rights in telephone numbers, together with all translations, adaptations, derivations, and combinations thereof...."

By Order to Show Cause, dated March 3, 2017, the defendants were:

" restrained from soliciting, servicing, and communicating with any prospect[ive] clients as such term is defined in the parties' CSA or current clients of Fuoco Group, LLP, and Fuoco Group LLP's employees, regardless of whether or not they were once employees or clients of the Defendants;" "from using or disclosing any confidential information removed from the Fuoco Group, LLP, including, but not limited to, trade secrets, proprietary information, client lists, vendor lists, client leads, financial records, drawings, notebooks, software, data or other documents and material relating to the business and procedures of the Fuoco Group;" "receiving or soliciting payment of any accounts receivable due to Fuoco Group, LLP" and to deposit and maintain any payments received since February 20, 2017, in a separate account; and, "using intellectual property belonging to the Fuoco Group, LLP, including but not limited to trademarks, corporate names, internet domains, and telephone numbers of Weisman & Co., CPAs." The Appellate Division, Second Department upheld that TRO when the defendants challenged it. By short form order, dated June 13, 2017, the plaintiff's motion for a preliminary injunction was granted to the extent that the TRO was continued pending further order of this Court. By order dated February 8, 2018, the Fuoco Group's motion to hold the defendants in contempt of court for violating that preliminary injunction was referred to trial for a determination as to whether defendants' conduct was "willful and contumacious" and the defendants' cross-motion to vacate the preliminary injunction was denied.

By letter, dated March 9, 2017, the Fuoco Group notified the clients, brought to it by defendants including clients the defendants procured once the CSA went into effect, of the terms of the TRO. More specifically, it advised them that the defendant Lanny Weisman had resigned from the Fuoco Group on February 20, 2017, which departure "resulted in legal difficulties" resulting in it having to take immediate action against the defendants; that by Temporary Restraining Order, dated March 3, 2017, this court restrained and prevented defendants from:

> "Soliciting, servicing and communicating with any clients of Fuoco Group, LLC, regardless of whether or not they were once clients of [the defendants];
>
> Using or disclosing any confidential information removed from Fuoco Group, LLP, including but not limited to, trade secrets, proprietary information, client lists, vendor lists, client leads, financial records, drawings, notebooks, software, data or other documents and material relating to the business and procedures of Fuoco group, LLP;
>
> Receiving or soliciting payment of any account receivable or fee due to Fuoco Group, LLP; and,
>
> Using intellectual property belonging to Fuoco Group, LLP, including but not limited to trademarks, corporate names, internet domains and telephone numbers of Weisman & Co., CPA."'

Both parties presently seek partial summary judgment with respect to liability. The plaintiff, Fuoco Group has moved for partial summary judgment holding the defendants liable on all ten causes of action including breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, conversion, tortious interference, misappropriation, unfair competition and unjust enrichment and to have this matter set down for an inquest on damages. They also seek an accounting and permanent injunctive relief. In addition, the Fuoco Group seeks dismissal of the defendants' counterclaims sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, an accounting, tortious interference with business relationships, tortious interference with contractual relationships, unfair competition, libel and declaratory relief.

The defendants seek summary judgment holding the Fuoco Group liable on all counterclaims and ask for an accounting. Defendants' also seek to impose liability on the Fuoco Group for attorney's fees they allegedly incurred in defending a law suit erroneously brought against them by one of the Fuoco Group's former clients.

In support of its motion, the Fuoco Group has submitted, , *inter alia*, the affidavit of its managing director, Lou Fuoco ("Fuoco"). Mr. Fuoco attests that pursuant to the CSA, Weisman became a full-time employee of the Fuoco Group and was to service clients that his firm brought to the Fuoco Group and all new clients retained by members of its firm, for three years during which time he would receive a commission based upon a percentage of the revenues collected from Weisman & Co.'s former and new clients. Thereafter, Weisman was to phase out then retire and continue to receive monthly payments equal to a percentage of the business his firm brought to the Fuoco Group. Fuoco also attests to the aforementioned restrictive covenants regarding who defendants could not solicit including both employees and clients, the prohibition of competing within 50 miles of the Fuoco Group's office and the damages that the Fuoco Group is contractually entitled to in the event of a breach by the defendants, etc.

Fuoco has attested to Weisman's February 19, 2017 removal of proprietary property from the Fuoco Group's office as well as the February 20, 2017 letter Weisman sent to Weisman's alleged clients advising them, *inter alia*, that payments of outstanding invoices should be sent to him, that he was ready to continue to service them and that he was in possession of their records. Fuoco notes that Weisman also enclosed a form with that correspondence enabling the recipient clients to elect to sever their relationships with the Fuoco Group. Fuoco also attests to Weisman's resignation from the Fuoco Group on February 20, 2017, and termination of their agreement based upon the alleged improper firing of his employees, overcharging clients, inadequate servicing of his clients and terminating them. Fuoco notes that Weisman admitted that their CSA affords him sole authority over the employees and that the defendants' clients' fees were never raised nor were any of their clients terminated without Weisman's consent. In addition, Fuoco attests that Weisman violated their CSA by attempting to solicit employees from his firm and one such employee, Mary Sharp. Ms. Sharp has attested, as such in, support of the Fuoco Group's motion. Fuoco also attests that defendants have begun working at a competitor firm in violation of their agreement.

Fuoco readily admits sending the March 9, 2017 letter to the clients brought to his firm by the defendants advising them of the terms of the TRO. And, he attests that Weisman has acted in derogation of the TRO and preliminary injunction and has admitted doing so on the ground that it was "unfairly" or "incorrectly" issued, despite being upheld by the Appellate Division. Fuoco notes that the defendants' position that judicial relief was improperly sought on the ground that arbitration was required by their agreement fails in view of the CSA's exception allowing court relief in the event that injunctive relief is sought based upon the violation of a restrictive covenant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Kapoor v AWI Wireless, LLC,* 159 AD3d 1027, 1029-30 [2d Dept 2018]). The Fuoco Group has established that the defendants breached their CSA by removing property that belonged to the Fuoco Group, soliciting its clients and employees, terminating their agreement prematurely and working with a competitor firm. The Fuoco Group has accordingly established its entitlement to summary judgment on its claim for breach of contract. The burden shifts to the defendants to establish the existence of a material issue of fact with respect to that claim.

The Fuoco Group's claim predicated on a breach of the implied covenant of good faith is duplicative of the breach of contract claim (*CSI Group, LLP v Harper*, 153 AD3d 1314 [2d Dept

2017], lv to appeal dismissed, 31 NY3d 1061 [2018]; *Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511, 512-13 [2d Dept 2007]).

"A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people (citations omitted)" (*Benfeld v Fleming Properties, LLC*, 89 AD3d 654, 655 [2d Dept 2011]). Whether there even existed a fiduciary relationship here is far from clear (*CSI Group, LLP v Harper*, 153 AD3d at 1318). In any event, the Fuoco Group's claim for breach of fiduciary duty is also duplicative of its breach of contract cause of action since those causes of action are based on the same facts and seek essentially identical damages (*Pacella v Town of Newburgh Volunteer Ambulance Corps. Inc.*, 164 AD3d 809, 814 [2d Dept 2018] [citations omitted]).

Via its claim sounding in conversion, the Fuoco Group alleges that the defendants converted client files and other proprietary information as well as accounts receivable and retained Weisman's domain, logos, corporate names, trade name and telephone numbers. "While a cause of action alleging conversion cannot be predicated upon a mere breach of contract, the contracting party may also be held liable in tort where the conduct which constitutes a breach of contract also constitutes a breach of a duty distinct from, or independent of, the breach of contract (citation omitted)" (*Connecticut New York Light. Co. v Manos Bus. Mgt. Co., Inc.*, 171 AD3d 698, 699 [2d Dept 2019]). The Fuoco Group's conversion cause of action is based on the same facts as its cause of action for breach of contract; the Fuoco Group has failed to allege a distinct, cognizable cause of action and the conversion cause of action is also duplicative of the claim for breach of contract and is dismissed (*Orok Edem v Grandbelle Intern., Inc.*, 118 AD3d 848, 849 [2d Dept 2014]; compare, *Connecticut New York Light. Co. v Manos Bus. Mgt. Co., Inc.*, 171 AD3d at 699).

The cause of action for tortious interference with contract "requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*CSI Group, LLP v Harper*, 153 AD3d at 1318). The Fuoco Group has not demonstrated that it had a contract with any of the clients whom defendants brought to its firm. In any event, that cause of action is duplicative of the Fuoco Group's claim for breach of contract as it is similarly based on the defendants' solicitation and servicing the Fuoco Group's clients (*Allerand, LLC v 233 E. 18th St. Co., L.L.C.*, 19 AD3d 275, 278 [1st Dept 2005]).

The Fuoco Group's claim for misappropriation is similarly based upon the defendants' removal and misuse of client files (*CSI Group, LLP v Harper*, 153 AD3d at 1317]) and is also dismissed as duplicative of its cause of action for breach of contract.

To establish a cause of action sounding in unfair competition, "a plaintiff must demonstrate that the defendant wrongfully diverted the plaintiff's business to itself (citation omitted)" (*CSI Group, LLP v Harper*, 153 AD3d at 1319). As this cause of action is premised on the defendants' February 20, 2017 solicitation letter and the defendants' service of its clients, it is also dismissed as duplicative of the cause of action for breach of contract (*NYWC, Inc. v Pro Beauty Concepts, Inc.*, 44 Misc 3d 1209(A) [Sup Ct Queens County 2014] [citations omitted]).

"[T]he existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter (*CSI Group, LLP v Harper*, 153 AD3d at 1317). The Fuco Group's claim sounding in unjust enrichment is also dismissed as duplicative of its claim for breach of contract (*CSI Group, LLP v Harper*, 153 AD3d at 1317 [citations omitted]).

In view of the contractual provisions, the Fuoco Group has clearly established its entitlement to an accounting despite the fact that it is sought not for purposes of equity, but rather, to determine the amount of money damages it is entitled to (*Lex Tenants Corp. v Gramercy N. Assoc.*, 284 AD2d 278 [1st Dept 2001]). Not only have the defendants' breach of contract been established, the CSA specifically provides for a detailed measure of damages under those circumstances.

Finally, in view of the foregoing, the Fuoco Group has also clearly established its entitlement to an permanent injunction the duration of which extends as defined by the parties' CSA, to wit, for 72 months plus one year from the end of the Direct Services Period which ended on December 31, 2017. Therefore, the injunction granted previously in this court's Order to Show Cause dated March 3, 2017 is extended until December 31, 2024.

Turning to the Fuoco' Group's application to dismiss the defendants' counterclaims, as and for the counterclaim sounding in breach of contract, the defendants allege that the Fuoco

Group breached their CSA by "creating a hostile work environment...[which] forced Weisman to terminate the agreement...;" terminating their employees, in particular Weisman's wife based on her age or in an effort to phase defendants out earlier than agreed to; failing to provide them with the "professional and clerical assistance" they were accustomed to; failing to "use commercially reasonable efforts to have the same staff consistently provide services to clients;" failing to make a "good faith effort to resolve the disputed amount due" them; obtaining injunctive relief from this court and not seeking arbitration; forcing them to increase client's fees; threatening to discontinue services to clients it deemed not sufficiently profitable; and, allowing their telephone number to lapse. Furthermore, while the defendants have not specifically alleged that the Fuoco Group breached their CSA in sending the March 9, 2017 letter notifying the clients of the restraining order, they allege that they did so "[b]y restricting [them] from virtually any communication with...[the] clients;" and by failing to allow clients "to receive services elsewhere." The only act by the Fuoco group that this Court can discern that could be interpreted to constitute such conduct was the Fuoco Group's March 9th notification to the firm's clients.

The Fuoco Group has established that its actions in terminating Weisman & Co.'s staff including Weisman's wife, exploring the possibility of raising client retainer fees and refusing further services to certain clients and allowing Weisman & Co.'s telephone number to expire were not violative of the CSA. Weisman even testified at his examination-before-trial that the Fuoco Group had the "absolute" authority to fire the two employees it did and that had it fired his wife, that act would not be a breach of their CSA, either. Handling the clients was the Fuoco Group's perogative and in an any event, none were let go nor were any of their fees raised. And again, Weisman & Co.'s telephone number became the property of the Fuoco Group. As for resorting to this Court, under the CSA, judicial relief was available where, as here, injunctive relief was sought to rectify breaches of restrictive covenants. Moreover, the defendants have not sought to compel arbitration and are on record as objecting to it. Nor have the defendants sought to transfer venue to Suffolk County. The Fuoco Group has also clearly demonstrated that none of the actions undertaken via the March 9, 2017 letter constituted a breach of the CSA as it did no more than notify the clients of this Court's rulings. The burden accordingly shifts to the defendants to establish the existence of a material issue of fact with respect to both the Fuoco

Group's breach of contract claim and their counterclaim for breach of contract. "

As for the defendants' counterclaims sounding in breach of the covenant of good faith and fair dealing, the defendants allege that the plaintiff is liable here for notifying the clients of the TRO, breaching the CSA and not seeking arbitration. This counter claim is duplicative of the counterclaim sounding in breach of contract (*Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d at 512-13). In fact, the defendants' counterclaims sounding in breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with business relationships and contracts, unfair competition and libel all revolve-or at least appear to revolve-around the propriety and content of the Fuoco Group's March 9, 2017 letter, the propriety of which has been established (see, infra). At his examination-before-trial, Weisman was unable to identify anything incorrect in that correspondence and has stilled fail to do so. In any event, the defendants were legally prohibited by both the parties CSA and more importantly, this court from servicing those clients and therefore, have not suffered any damages. So much of the claim sounding in breach of fiduciary duty that is premised on a client's complaint that his phone call was referred to other accountants and not to Weisman, that call was made after Weisman had left the Fuoco Group. The Fuoco Group's failure to provide new contact information for Weisman hardly constitutes a breach by the Fuoco Group of a fiduciary duty to the defendants.

Via its fraud counterclaim, the defendants allege that the Fuoco Group never intended to perform under the contract and bases that allegation on its firing Weinstein & Co.'s employees, raising clients' fees, and notifying clients of the TRO. This claim is also duplicative of the breach of contract claim and is dismissed on that ground (*Weinberg v Picker*, 172 AD3d 784, 788 [2d Dept 2019] [citations omitted]; *Cronos Group Ltd. v XComIP, LLC,* 156 AD3d 54, 56 [1st Dept 2017]). The defendants also allege that the Fuoco Group made unspecified "misrepresentations" to induce them to join their firm. The defendants' recent assertion that the Fuoco Group induced them to join its firm knowing that it was financially insolvent finds no support in the record. In any event, the defendants were paid all sums due them as of when they separated from the Fuoco Group demonstrating that assuming, arguendo, that the Fuoco Group's financial status was as alleged, the defendants have sustained no damages.

The Fuoco Group has not established its entitlement to dismissal of the defendants' cause of action whereby it seeks an accounting. Despite Weisman's admission at his examination-before-trial that the defendants were not owed anything when they separated from the Fuoco Group, the Fuoco Group has not established that the defendants are not owed monies for the remainder of the contractual period.

The Fuoco group has established its entitlement to summary judgment dismissing the defendants' first, second, third, fourth, sixth, seventh, eight, ninth and tenth counterclaims. The burden shifts to the defendants to establish the existence of a material issue of fact with respect to those counterclaims and the plaintiff's first (breach of contract), fifth (accounting) and tenth (injunction) causes of action.

In opposition and in support of the defendants' cross-motion, Weisman alleges that Lou Fuoco breached their agreement by: terminating his wife and his administrative staff; attempting to raise the retainer fees on clients he brought to the practice; and causing him to doubt his intention to honor and perform under their agreement. Weisman also cites the provision in their CSA that requires the Fuoco Group to "offer all of [his company's] employees ...a position with [it] and to make reasonable efforts to retain them" as well as "the right, [with Weinstein's] consent ...to evaluate each employee and to adjust compensation accordingly." He alleges that Fuoco fired his wife based on her age and intended to phase her out along with him as she was not a "transition agent" of the firm. He also alleges that his long time older employees were replaced by younger staff members who had recently passed portions of their CPA exam and that they were inexperienced and unable to properly service his clients. Standing alone, those allegations fail to raise the existence of any issues of fact. The parties' CSA ultimately gave the Fuoco Group "the sole authority to manage [defendants'] employees, including establishing the terms of employment and termination thereof" and provides that "the [defendants] shall not interfere in any manner with [Fuoco's] exercise of such authority."

Weisman also attests that the Fuoco Group promised to provide efficient computer hardware and software programs to accommodate his accounting practice and that it failed to do so. Weisman denies that Lou Fuoco warned him of that possible problem before the CSA was entered and characterizes Fuoco's testimony at his examination-before-trial that he had warned the defendants of the difficulties associated with integrating and assimilating within a new environment and that he had not had one firm merge with his that didn't experience that during the first year as "a lie." Nevertheless, the defendants fail to refer to anything in the CSA that applies to this alleged misconduct.

Weisman also accused the Fuoco Group of having been in a worse fiscal position than he was led to believe, however, again, there is nothing cited in the CSA that renders that conduct a breach. He also asserts the CSA does not address the ramifications of a situation like the present one, where a party leaves the practice before the anticipated contractual period expires. The CSA does in fact address this situation at least in part in specifying the Fuoco Group's right to damages where Weisman & Co. services its prior clients which had become the Fuoco Group's as the result of the CSA. To the extent that the CSA fails to address every ramification of a breach hardly deprives an injured party from enforcing their clear rights under it and procuring relief. Contrary to the defendants' argument, the CSA indeed afforded the Fuoco Group sole ownership and control of their intellectual property rights when the CSA was entered into. Weisman also cites the provision in the CSA that recognized that clients may decide to receive services elsewhere, including from Weisman & Co., as acknowledged by Lou Fuoco at his depostion. That fact however does not absolve the defendants of their obligations under the CSA including the restrictive covenants.

Weisman alleges that Lou Fuoco attempted to "strong arm" him into raising client's retainer fees yet once again, he fails to demonstrate how seeking an increase in those fees was violative of their CSA. While he alleges that Lou Fuoco "mandated" that the fees be raised, there is no evidence to support that and even Weisman acknowledged at his examination-before-trial that the client's fees were in fact never raised. Similarly, while he cites Lou Fuoco's e-mail of January 19, 2017 in which the possibility of raising client's fees was discussed and Lou Fuoco stated that the Fuoco Group had the right not to retain clients without limitation and that clients who were not profitable risked being let go, once again, the defendants have not shown that statement to be violative of the CSA. Equally as important, the defendants have not demonstrated that the Fuoco Group ever refused to continue to service a client. Fuoco's admissions at his examination-before-trial that a loss of Weisman & Co.'s clients would result in both a decrease in defendants' pay-out on collections as well as the amount due them as their final pay out does not suffice to show that the Fuoco Group breached the CSA, either.

Weisman also cites Lou Fuoco's testimony at his examination-before-trial that the loss of Weisman & Co.'s phone number was not done on purpose as evidence of the Fuoco

Group's breach of their CSA. First of all, the loss of the telephone number was not intentional, calling into question whether that conduct could constitute a breach. More importantly, the Fuoco Group was given complete and total control of Weisman & Co.'s telephone number under the CSA.

Weisman's position that arbitration is required by the CSA fails to recognize the provision rightfully relied on here by the Fuoco Group that contemplates court relief in the event that injunctive relief is sought, as was here. Furthermore, defendant Weisman is on record as opposing arbitration and even at this juncture has not sought to compel it. His position that venue belongs in Suffolk County is rejected. Not only have the defendants failed to seek a change in venue as was their choice, assuming, arguendo, this was not a proper venue, the case would be transferred, not dismissed.

In view of the fact that the Fuoco Group was only awarded summary judgment on its causes of action sounding in breach of contract, accounting and injunctive relief, the defendants' opposition will only be examined with regard to those causes of action. The defendants have not raised an issue of fact with respect to the breach of contract or accounting causes of action. Nor have they raised an issue of fact regarding the Fuoco Group's entitlement to injunctive relief; While the injunction does not bar defendants' clients from seeking services from them, it clearly bars the defendants from servicing them.

Fuoco's conduct criticized and relied on by the defendants has not been shown to be in violation of any provision in the CSA. The defendants have not raised an issue of fact with respect to their first counterclaim sounding in breach of contract. Again, firing employees, exploring the possibility of raising fees and threatening to let clients Fuoco deemed unprofitable go were not contrary to anything in the CSA. That a loss of clients would diminish the defendants' pay-out does not render that act a breach, either, as the defendants are not entitled to any set amount under the CSA. Nor does the expiration of Weisman & Co.'s telephone number constitute such a breach under the circumstances since that was within the parameters of the parties' conduct. The defendants' argument that the Fuoco Group is in breach of the CSA on the ground that it did not seek arbitration and brought this action in Nassau are red herrings. First of all, injunctive relief from a court was permitted by the CSA. More importantly, the defendants have waived their objections to the failure to arbitrate and bring this action in Suffolk County as they failed to take any actions to compel that relief. In any event, the claim for breach of fiduciary duty of good faith and fair dealing is duplicative of the breach of contract claim as it is based on the same allegedly wrongful conduct (*Doller v Prescott,* 167 AD3d 1298 [3d Dept 2018]).

The Fuoco Group's March 9, 2017 letter was not a breach of the covenant of good faith and fair dealing. It consisted of nothing more than advising clients of the legal status of this matter which was imposed by this Court and continued by the Appellate Division. To characterize that result as inconsistent with the CSA is incredulous; the CSA specifically precluded the identical acts enjoined by this Court and a court order was necessary only on account of the defendants' failure to honor the terms thereof. The defendants have not raised an issue of fact with respect to their second counterclaim sounding in breach of the covenant of good faith and fair dealing.

Whether the Fuoco Group owed the defendants a fiduciary duty is questionable (*Benfeld v Fleming Properties, LLC*, supra). The parties were contracting parties, not simply partners in a firm as defendants suggest. In any event, in advancing a claim sounding in breach of fiduciary duty, the defendants again rely on the March 9, 2017 letter: Because all these actions have been alleged by the defendants to constitute breaches of the CSA, the fiduciary duty claim is duplicative of the contract claim (*Mullin v WL Ross & Co. LLC,* 173 AD3d 520 [1st Dept 2019]). In any event, that correspondence provides no basis for relief. Defendants also rely on a client's referral to other employees of the Fuoco Group instead of to Weisman when the client wished to communicate with him. Again, that occurred after Weisman had left the firm and the Fuoco group surely had no duty to refer a client to him. The defendants have not raised an issue of fact with respect to their third counterclaim sounding in breach of fiduciary duty.

In their attempt to establish an issue of fact with respect to their fourth counterclaim sounding in fraud, the defendants rely on Fuego's expressed intention to let clients that did not generate a 35% profit go which defendants portray as evidence that Fuoco had every intention of forcing Weisman out and diminishing his ultimate payout by letting unprofitable clients go. This cause of action is also duplicative of the defendants' breach of contract cause of action and must be dismissed on that ground (*Weinberg v Picker,* 172 AD3d at 788; *Cronos Group Ltd. v XComIP, LLC,* 156 AD3d at 56). Furthermore, this conduct is entirely consistent with the parameters outlined in the parties' agreement. Not only did the Fuoco Group have sole autonomy with respect to which clients to keep and let go, clients were going to be let go because they were not profitable to the Fuoco Group, not solely to decrease Weisman's pay-out. More importantly, there is no evidence that any clients were ever released resulting in no damages to the defendants. The defendants have not raised an issue of fact with respect to their fourth counterclaim sounding in fraud.

Even had the Fuoco Group established its entitlement to summary judgment dismissing the fifth counterclaim seeking an accounting, the defendants have in fact raised an issue of fact with respect to that claim despite Weisman's admission that the defendants were paid in full as of when they departed from the Fuoco Group, there are issues of fact as to the defendants' entitlement to a percentage of revenues during February 2017 as well as after separating from the firm and if they are so entitled, the amount. The Fuoco Group's motion to dismiss the fifth counterclaim whereby the defendants seek and an accounting is denied. The defendants' motion for summary judgment declaring their entitlement to an accounting is granted despite the fact that it is sought not for purposes of equity, but rather, to determine the amount of money damages it is entitled to (*Lex Tenants Corp. v Gramercy N. Assoc.*,supra).

The defendants' cause of action sounding in tortious interference with business relationships is duplicative of their cause of action sounding in breach of contract and they have failed to assert an independent wrong (*Silverman v Carvel Corp.*, 8 AD3d 469, 470 [2d Dept 2004], lv denied 4 NY3D 707 [2005]). The conduct by the Fuoco Group relied on by the defendants in advancing this claim consists of the March 9, 2017 letter, which is also relied on, in part, in the breach of contract claim. As for the tortious interference with contract claim, "[t]he parties' rights and obligations respecting the matter in dispute are governed by their contract and the purported claim for tortious interference with contract does no more than restate plaintiffs' claim for the contract's breach" (*Allerand, LLC v 233 E. 18th St. Co., L.L.C.*, 19 AD3d at 277-78). The defendants once again rely on the March 9th letter, the propriety of which has already been ruled on and provides no basis for tort liability. In fact, the CSA as well as the injunction prohibit the defendants from doing business with the parties who were sent the letter therefore, a cause of action premised upon interference with defendants' business relationships and contracts with those parties fails. The CSA and injunction defeat the defendants' counterclaim sounding in unfair competition for the same reason. The March 9th letter did not attempt to usurp the defendants' clients: Such a relationship was barred by the parties' own CSA. To the extent that defendants allege that the Fuoco Group attempted to interfere with their relationships with their clients after the CSA was executed, the CSA prohibited those relationships even then. The defendants have not raised an issue of fact with respect to their sixth, seventh and eighth counterclaims sounding in torious interference with business relationships, torious interference with contract and unfair competition.

"[T]ruth is an absolute defense to a cause of action based on defamation" (*Maun v Edgemont at Tarrytown Condominium*, 156 AD3d 873, 875 [2d Dept 2017]). The defendants have failed to raise an issue of fact with regard to the truth of the contents of the March 9, 2017 letter requiring dismissal of their ninth counterclaim sounding in libel.

The tenth counterclaim seeking declaratory relief is duplicative and is dismissed.

Finally, the defendants' motion for an award of legal fees is denied. Payment of fees to which it is entitled to reimbursement by the plaintiff has not been established.

In conclusion, the plaintiff the Fuoco Group's motion for summary judgment declaring the defendants' liable for breach of contract and its right to an accounting is granted and this matter is to be set down for a hearing on the plaintiff Fuoco Group's damages. The plaintiff Fuoco Group's motion for injunctive relief is also granted (see, infra). In addition, the plaintiff's motion for summary judgment dismissing the defendants' first, second, third, fourth, sixth, seventh, eighth, ninth and tenth counterclaims is granted. The defendants' motion for summary judgment dismissing the plaintiff's second, third, fourth, fifth, sixth, seventh and ninth causes of action is granted and those causes of action are dismissed. The defendants' motion for summary judgment on its counterclaims is granted to the extent that it is granted summary judgment on its fifth counter claim and it is declared that the defendants are entitled to an accounting to determine the amounts due them, if any, pursuant to the CSA, which shall also be determined at the hearing. The defendants' motion for summary judgment on their counterclaims is otherwise denied. The issue of whether the defendants' conduct in violation of this Court's temporary restraining order and preliminary injunction was "willful and contumacious" so as to warrant holding them in contempt of court is also to be determined at the hearing.

The plaintiff and defendant are directed to provide one another with a full and complete accounting **within twenty days of the date of this order** consisting of all books and records which reflect contracts entered into with, services rendered to, invoices generated to and revenues received from any client brought to the Fuoco Group by the defendants including both clients brought to it when the Fuoco Group acquired the defendant Weisman & Co.'s firm as well as clients Weisman & Co. acquired on or after January 1, 2014 until the present.

The issues of both parties damages as well as whether the defendants' conduct in violation of this court's temporary restraining order and preliminary injunction was "willful and contumacious" so as to warrant holding them in contempt of court is respectfully referred to the Calendar Control Part (CCP) for hearing.

Subject to the approval of the Justice there presiding, this matter shall appear on the calendar of CCP for September 11, 2019 , at 9:30 a.m. for that hearing.

A copy of this order shall be served on the calendar clerk within twenty (20) days of this Order.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied

Dated: July 26, 2019

Anthony L. Parga, J.S.C.

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ENTERED
JUL 31 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE