Calabrese v RE/MAX, LLC
2020 NY Slip Op 31630(U)
May 26, 2020
Supreme Court, Kings County
Docket Number: 507254/18
Judge: Larry D. Martin

At an IAS Term, Comm Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of May, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

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SALVATORE CALABRESE, MICHAEL CALABRESE, and RELATED ASSETS LLC d/b/a RE/MAX METRO

Plaintiffs,

-against-

RE/MAX, LLC d/b/a RE/MAX NEW YORK REGION (f/k/a RE/MAX INTERNATIONAL, INC.), BROOK STATEN REALTY LLC, STATEN BROOK REALTY LLC, XYZ CORP., Nos. 1-10, JOSEPH MADAIO, ROBERT COPPOLINO, SALVATORE CAROLA, JOHN/JANE DOE Nos. 1-20, TERRI BOHANNON and SANDY JAMISON,

Defendants.

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Index No.: 507254/18

Mot. Seqs. 6, 7, 8

The following e-filed papers read herein:[1] NYSEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	86,87,98 99,100,111 112,113,114
Opposing Affidavits (Affirmations)	131 117,118,119 132
Affidavits/ Affirmations in Reply	136 137 138

[1] While not normally done, several Memoranda of Law are included in the numbered documents as the parties liberally use such Memoranda to introduce their arguments and proofs.

Upon the foregoing papers, defendants Terri Bohannon (Bohannon) and Sandy Jamison (Jamison), move in motion sequence (mot. seq.) six for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing plaintiffs', Salvatore Calabrese, Michael Calabrese (the Calabreses), and Related Assets LLC d/b/a RE/MAX Metro (collectively plaintiffs), complaint as against them.

Defendant RE/MAX, LLC d/b/a RE/MAX New York Region (f/k/a RE/MAX International, Inc.) (RE/MAX) moves in mot. seq. seven for an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing plaintiffs' complaint as against it.

Defendants Brook Staten Realty LLC, Staten Brook Realty LLC, Joseph Madaio (Madaio), Robert Coppolino (Coppolino) and Salvatore Carola (Carola) (collectively Brook Staten) move in mot. seq. eight for an order pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' complaint as against them.

Background and Procedural History

According to the complaint, the Calabreses began a real estate brokerage in 1980. By 2008, the venture had grown into a significant business covering large territories in Brooklyn and Staten Island and employing dozens of high-quality real estate brokers. On August 14, 2008, the Calabreses, as franchisees, entered into three separate franchise agreements with RE/MAX's then subfranchisor, RE/MAX of New York, Inc. (RMNY) as franchisor. The three agreements gave plaintiffs exclusive territorial rights over a significant part of Brooklyn and all of Staten Island. Pursuant to the agreement, the franchisee could renew the agreement after five years.

Plaintiffs operated successfully under the RE/MAX brand and in 2013 gave notice to Henry Weber, the president of RMNY, of their intention to renew the agreements. They were informed by Mr. Weber that the renewals were in place but could not be "papered" at this time, because RMNY currently was not properly registered in New York State. At all relevant times, plaintiffs remained in good standing and kept current with any and all payments owed to RMNY pursuant to the agreements. Between October 2008 and September 2013, plaintiffs paid in excess of $908,000 in fees to RMNY. Then, between October 2013 and February 22, 2016, plaintiffs paid over $584,000 to RMNY. Finally, from February 22, 2016 to April 30, 2017, plaintiffs paid at least $283,000 in fees to RE/MAX. Plaintiffs and RMNY (and later RE/MAX) behaved at all times during this period as if the franchise renewal agreements were in place.

On February 22, 2016, RE/MAX entered into an agreement with RMNY, to reacquire the Master Franchise for the State of New York and began conducting business under the d/b/a, RE/MAX New York Region, for the sale of RE/MAX franchises in New York. After RE/MAX reacquired RMNY's New York region, Bohannon was appointed Region Vice President and Jamison was named Senior Franchise Development Consultant. Later, in August 2016, Jamison was promoted to become the RE/MAX New York Region Director.

In early March 2016, Bohannon and Jamison exchanged emails with Sal Calabrese to arrange for a face-to-face meeting and "go over the new RE/MAX of New York." Over the next several months, RE/MAX included plaintiffs on all RE/MAX New York region

wide email distributions, collected commissions, and invited them to participate in RE/MAX events (e.g., Broker Summit/Retreat in June 2016).

On May 4, 2016, the Calabreses received a letter from Chris Lighthiser, a contract specialist for RE/MAX, stating that the agreements had expired as of August 13, 2013, and advising them about the potential for renewal. The letter acknowledged that RE/MAX was still unable to currently register franchises in New York but the situation would soon be rectified. RE/MAX waived the 180-day contractual notice requirement and indicated that plaintiffs could still fulfill the requirement to provide written notice of intent to renew by filling out and returning the enclosed Franchise Renewal Ownership Schedule, which plaintiffs did. On July 27, 2016, Sal Calabrese met with Jamison to discuss RE/MAX's offer regarding renewal of plaintiffs' three franchised locations, including but not limited to territory protection and renewal fees. On August 26, 2016, Jamison sent a follow-up email to Sal Calabrese, attaching a letter from RE/MAX and the "intent to renew" documents required for the franchise renewal process. In that letter, Jamison indicated that the renewals were delinquent and that plaintiffs had been operating on a "month to month" basis since the expiration of the 2008 five-year agreement. In subsequent conversations with Jamison, Sal Calabrese made clear that he was prepared to enter into written renewal agreements with RE/MAX for the plaintiffs' franchises even though it was his position that the agreements had already been renewed by RMNY and were only set to expire in October 2018.

On October 7, 2016, Terri Bohannon emailed (and later mailed via FedEx) the Calabreses three termination notices, setting November 7, 2016 as the effective date for

termination of plaintiffs' franchises. Additionally, for the first time, RE/MAX demanded payment of the $2,000 per month administrative charges authorized by the agreements for holdover franchises that continue to operate on a month-to-month basis post-term. During October and November of 2016, the parties continued to negotiate terms for renewal of the agreements. On November 29, 2016, Sal Calabrese emailed Jamison, attaching RE/MAX's required renewal documents, including the personal information forms for Sal and Mike Calabrese, financial information, and entity information for the franchises. Later that day, Jamison replied stating that she would put the documents in for processing right away. Sal Calabrese continued to speak with Jamison and Bahannon trying to finalize the agreements before the end of the year. On December 13, 2016, Sal Calabrese received an email from John Henning, RE/MAX's franchise and business developer asking for a meeting. The next day, at the meeting, Mr. Henning informed plaintiffs that the franchises' territories in Brooklyn and Staten Island would no longer be protected. Sal Calabrese continued to express to RE/MAX his intention of renewing the agreements throughout January of 2017. On January 31, 2017, when the negotiations had concluded and all material terms had been finalized, Jamison promised to send the renewal documents for signature only seeking some clarification. Primarily, Jamison wanted to know whether Sal Calabrese planned to pay the $15,000 renewal fee for a protected one-half mile radius territory in Staten Island or whether he just intended to operate a RE/MAX office in Staten Island without the protection. On February 3, 2017, Sal Calabrese emailed a response indicating his choice that the franchise agreement for Staten Island only be for a RE/MAX Metro office address

and not for a protected territory. As of this email, there were no longer any unresolved issues and the parties were in full agreement as to the terms of the renewal agreements.

On Monday, February 6, 2017, around 1:00 p.m., Sal Calabrese received a phone call from Jamison and Bohannon, who claimed that one of his agents had called RE/MAX informing them that plaintiffs were going independent and not renewing their franchise agreements with RE/MAX. Sal Calabrese denied this and requested RE/MAX send him the renewal franchise agreements for execution. Bohannon and Jamison responded that they did not believe him, refused to send him the renewal agreements for execution and informed him that RE/MAX would be terminating the plaintiffs' agreements. Termination notices were sent on February 6, 2017, terminating the agreements as of April 10, 2017.

Once it became clear that RE/MAX, LLC was terminating the franchise agreements, and would not renew them, plaintiffs offered to sell their RE/MAX Metro franchises, as ongoing business concerns, at a fraction of their true value to Joseph Madaio, a RE/MAX Metro associate broker and office manager, and Robert Coppolino, a RE/MAX Metro sales associate. On February 13, 2017, Sal Calabrese called Bohannon, seeking consent from RE/MAX to sell the three RE/MAX Metro franchises to Madaio and Coppolino. Bohannon considered the request and promised to get back to Sal Calabrese with a formal answer. However, Bohannon allegedly never called Sal Calabrese back and never informed him whether RE/MAX would provide the necessary consent for such a sale. Instead Bohannon and Jamison met with Madaio and Coppolino directly and informed them that they would get better terms by dealing directly with RE/MAX. In February of 2017, RE/MAX granted franchises in plaintiffs' protected territories to Brook Staten, which began operating that

month. Prior to the granting of the franchise to Brook Staten, Jamison and Bohannon along with Brook Staten contacted many of plaintiffs' sales associates to convince them to leave plaintiffs for the new RE/MAX franchises. On March 19, 2017, RE/MAX emailed plaintiffs' agents announcing RE/MAX's new Brooklyn and Staten Island franchised locations writing:

> "I'm pleased to announce new RE/MAX franchised locations have been awarded to Joe Madaio, Robert Coppolino, and Sal Carola. Joe, Rob and Sal will operate two locations: RE/MAX Elite in Brooklyn and RE/MAX Elite on Staten Island…. Real estate professionals who join RE/MAX Elite will be offered unparalleled value, services, education and training…. The contact information is below for Joe, Rob and Sal – please contact them directly to discuss opportunities."

On April 10, 2018, plaintiff commenced this action. An amended complaint sets forth twelve causes of action. All defendants (except the unknown John/Jane Doe) move, pre-answer, to dismiss all causes of action (except the tenth cause of action which is only against the unknown party).

Discussion

For reasons that will be apparent, the court shall discuss the motions out of sequence, beginning with RE/MAX's motion to dismiss.

RE/MAX Motion to Dismiss (mot. seq. seven)

RE/MAX moves to dismiss plaintiffs' first, second, third, fifth, sixth, seventh, eighth and ninth causes of action of the Amended Complaint pursuant to CPLR 3211(a) (5) and (7).

At the outset, RE/MAX argues that all causes of action must be dismissed as against them pursuant to the contractual statute of limitations in the franchise agreements. "Parties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable Statute of Limitations" (*Matter of Incorporated Vil. of Saltaire v Zagata,* 280 AD2d 547, 547 [2001], *lv denied* 97 NY2d 610 [2002]). "Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced" (*id.* at 548 quoting *Timberline Elec. Supply Corp. v. Insurance Co. of N. Am.*, 72 A.D.2d 905, 906 [1979], *affd* 52 NY2d 793 [1980]). Section 15 (u) of the agreements provides that any action arising from the agreement "shall be commenced within one year from the occurrence of the acts or omissions giving rise to such claim or action, or such claim or action shall be barred."

The termination notices were sent on February 6, 2017. The agreements terminated on April 10, 2017. The Summons and Complaint were filed on April 10, 2018. RE/MAX argues that the date of the occurrence giving rise to plaintiffs' complaint should be February 6, 2017, while plaintiffs counter that the date should be tolled from April 10, 2017. "Contractual stipulations which limit the right to sue to a period shorter than that granted by statute, are not looked upon with favor because they are in derogation of the statutory limitation. Hence, they should be construed with strictness against the party invoking them" (*Hurlbut v Christiano*, 63 AD2d 1116, 1117 [1978] quoting *Hauer Constr. Co., Inc. v City of New York*, 193 Misc 747 [App Term, 1st Dept 1948] *affd* 278 AD 841 [1949] *lv denied* 276 AD 798 [1950]; *see also Stanley R. Benjamin, Inc. v Fidelity & Cas.*

Co. of N.Y., 72 Misc2d 742, 743 [Sup Ct, Nassau County 1972, Liff, J.]). Additionally, the court noted that similar termination notices were sent to plaintiffs on October 7, 2016 setting termination for November 16, 2016 and that the agreements were not terminated in November. Therefore, cognizant that on a motion to dismiss the court must give every favorable inference to plaintiffs (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019]), it would be imprudent to dismiss this action, at this stage, for failure to adhere to the contractually shortened statute of limitations.

RE/MAX seeks to dismiss the first cause of action, breach of contract and the second cause of action, breach of the duty of good faith and fair dealing for two reasons. First, RE/MAX argues that there was no renewal of the contract in 2013 or 2016 because there was never a written agreement of renewal and the agreements bar any oral modification. Second, any alleged oral renewal is barred by the statute of frauds.

Section 15 (L) of the agreements provide "This Agreement may not be modified, amended or altered except by an instrument signed by all of the parties to this Agreement." Noteworthy, is that this provision does not expressly state the term renewal. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.).* Here RE/MAX asks the court to supply the term renewed to the above list that specifically delineated the terms modified, amended and altered, that the court cannot do" (*see Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826, 827 [2012]).

Additionally, the specific provision relating to renewal (§ 2 [E]) sets forth requirements by the franchisee to renew and does not specify that there must be an agreement signed by both parties to renew the agreement. "Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls" (*Aguirre v City of New York*, 214 AD2d 692, 693 [1995] citing *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also DeWitt v DeWitt*, 62 AD3d 744, 745 [2009]). Here, because renewal is not specifically mentioned in § 15 (L) and a writing is not required in § 2 (E) it cannot be determined as a matter of law that the agreement could not be orally renewed.

RE/MAX avers that the oral renewal must be dismissed because it violates General Obligations Law § 5-701 (a) (1), because it cannot be completed within one year. Plaintiff first argues that the oral agreement was an agreement to renew the franchise agreements which could, by its terms, be performed within a year. This argument is unavailing as an agreement to renew an existing contract is still subject to the statute of frauds (*see American Prescription Plan v American Postal Workers Union AFL-CIO Health Plan*, 170 AD2d 471, 472 [1991]).

Plaintiffs also argue that the admission exception to the statute of frauds applies here. "A party's admission of the existence and essential terms of an oral agreement is sufficient to take the agreement out of the statute of frauds" (*Camhi v Tedesco Realty, LLC*, 105 AD3d 795, 797 [2013]). Here, plaintiffs have alleged that RE/MAX's predecessor RMNY entered into renewal agreements with the same terms (*cf North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 978 [2009]) as the original five-year

agreements. This allegation is sufficient to survive a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 88 [1984]).[2]

The third cause of action for promissory estoppel is dismissed. If the court determines that the statute of frauds applies to the renewal agreements, the result to plaintiffs would arguably be unfair but would not rise to the level of unconscionability (*see Matter of Hennel*, 29 NY3d 587 [2017}). In the context of a contract an unconscionable agreement is

> "one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Christian v Christian,* 42 NY2d 63, 71 [1977] [internal quotation marks, brackets, and citations omitted]).

"The standard for unconscionability where one party is seeking to avoid the statute of frauds must be equally demanding, lest the statute of frauds be rendered a nullity" (*Hennel*, 29 NY3d at 495).

The fifth cause of action for unfair competition as against RE/MAX is not dismissed. While many of the claims set forth in the cause of action are duplicative of the breach of contract claims, the allegation that RE/MAX induced plaintiffs' sales associates to breach their restrictive covenants is sufficient to survive a motion to dismiss. The primary purpose of restrictive covenants is to prevent unfair competition (*see Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499 [1977]).

[2] The Court at this time has not considered plaintiffs' allegation that the Federal Disclosure Documents filed by RE/MAX constituted admissions to the alleged oral renewal.

The sixth cause of action for unjust enrichment is dismissed as it is entirely duplicative of plaintiffs breach of contract claims (*see Bouchard Transp. Co., Inc. v New York Islanders Hockey Club, LP*, 40 AD3d 897, 898 [2007], *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2005]).

The seventh cause of action for tortious interference with contract is not dismissed. The elements of the tort are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Construing the pleading liberally, as we must on a motion to dismiss, plaintiffs adequately pleaded a cause of action alleging tortious interference with the contracts plaintiffs had with their sales agents (*see*, *Bernberg v Health Mgt. Sys.*, 303 AD2d 348, 349 [2003]). RE/MAX's argument concerning the intention or purpose of the restrictive covenants is insufficient to warrant dismissal pursuant to CPLR 3211 (a) (7).

Plaintiffs' eighth cause of action for tortious interference with prospective contractual relations must be dismissed. "To establish a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by wrongful means or that defendant acted for the sole purpose of harming the plaintiff" (*Caprer v Nussbaum*, 36 AD3d 176, 203 [2006] [internal quotation marks omitted]). To establish "wrongful means," one must demonstrate that defendant's conduct amounted to a crime or an independent tort (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). However,

"conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*id.*). Here, plaintiffs have made no allegations that RE/MAX committed illegal or tortious acts against Brook Staten. Plaintiffs have also failed to plead sufficient facts to establish that RE/MAX acted solely with the intent to harm plaintiffs. To sustain an action for tortious interference with contract, it has been held that even affording the liberal construction of the pleading required on a motion to dismiss "plaintiff[s] must support [their] claim with more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [2006] *lv denied* 7 NY3d [704]); *see also Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1035 [2020]). This standard must apply equally on a claim for tortious interference with prospective contractual relations.

Plaintiffs' ninth cause of action for fraudulent inducement is also dismissed. The gravamen of plaintiffs' allegation is that RE/MAX promised to renew the contracts but never intended to fulfil that promise. A cause of action for fraudulent inducement requires "a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract" (*WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2001] citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). However, "a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (*id., see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738,741 [2009]).

Bohannon and Jamison motion to dismiss (mot seq. six)

Bohannan and Jamison move to dismiss plaintiffs' fifth, seventh, eighth and ninth causes of action of the Amended Complaint pursuant to CPLR 3211(a) 5 and 7.

Bohannan and Jamison repeat RE/MAX's argument that the action against them is barred by the shortened statute of limitations in the franchise agreements. That argument is rejected for the same reasons stated above.

The fifth and seventh causes of action, unfair competition and tortious interference with contract or tortious interference with contractual relations are dismissed. The basis for both these claims is that Bohannon and Jamison interfered with the contracts that plaintiffs had in place with their sale associates by recruiting them and granting new franchises in plaintiffs' territories to a number of them. It is well established

> "that an officer or director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken" (*Potter v Minskoff*, 2 AD2d 513, 514 [1956] *affd* 4 NY2d 565 [1958] quoting *Matter of Brookside Mills, Inc.* [*Raybrook Textile Corp.*], 276 AD 357, 367 [1950]).

Furthermore, "a corporate director may not be held personally liable for damages absent proof of commission of independent tortious acts" (*Mobarak v Mowad*, 117 AD3d 998, 1000-1001 [2014]). As such, "[a] cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [2002]). Plaintiffs argue that the immunity of corporate officers

extends only to contractual torts between the corporation and plaintiffs, and not an induced breach of a contract between plaintiffs and third parties. Plaintiffs arguments are unavailing. There is no logical reason to carve out an exception and hold corporate officers personally liable for the interference in third-party contracts, barring malice or personal gain. Such an exception would "undermin[e] the limitation of liability which is one of the principal objects of corporations" (*Brookside Mills, Inc.* at 367).

Plaintiffs have failed to satisfy the enhanced pleading standard to maintain an action for tortious interference or unjust enrichment. The unsupported claim that "the tortious acts of Ms. Jamison and Ms. Bohannon were undertaken with malice and were calculated to impair the Plaintiffs' business for their own personal gain (e.g., if these individuals received commission tied to the number of sales agents they solicited, but RE/MAX LLC, as a whole, lost sales associates or other business because of these individuals' conduct)" (Complaint 61-62) is speculative (*see Burrowes* at 373).

The eighth and ninth causes of action against Bohannon and Jamison, tortious interference with prospective contractual relations and fraudulent inducement are both dismissed for the reasons those same causes of action were dismissed against RE/MAX as well as the reasons for dismissing the sixth and seventh causes of action.

Brook Staten's motion to dismiss (mot. seq. eight)

Brook Staten moves to dismiss plaintiffs' fourth, fifth, sixth, seventh, eleventh and twelfth causes of action of the Amended Complaint pursuant to CPLR 3211(a) 7.

Plaintiffs' fourth cause of action is for breach of the Sales Associate Agreement (SAA) that plaintiffs had with Madaio, Coppolino and Carola. Paragraph 11 of the SAA provides:

> "Following termination or expiration of this Agreement without Renewal or of SALES ASSOCIATE's affiliation with the RE/MAX Organization upon any other event, SALES ASSOCIATE shall be free to continue SALES ASSOCIATE's real estate business with competing real estate operations or to establish SALES ASSOCIATE's own brokerage operation or other business alone or in concert with others. However, SALES ASSOCIATE acknowledges the exclusive rights of RE/MAX, LLC to its real estate system, its method of operation and its distinguishing characteristics, including but not limited to the RE/MAX Marks, slogans, advertising copy, copyrighted materials and other distinguishing characteristics now or hereafter adopted, displayed, used, existing as part of or becoming a part of the RE/MAX System, and RE/MAX, LLC's compelling business interest in protecting the exclusivity of same to members of the RE/MAX Network. Notwithstanding the above the SALES ASSOCIATE agrees not to associate him or herself with another RE/MAX office within three (3) miles radius of a RE/MAX Metro office for a period of twelve (12) months from the date of termination."

Here, plaintiffs allege that Madaio, Coppolino and Carola opened a RE/MAX franchise in the area proscribed by the SAA in violation of its terms.

Brook Staten argues that the restrictive covenant in the SAA is unreasonable and unenforceable. "[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976], *see also Long*

Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d 575, 577 [2018] *lv denied* 32 NY3d 913 [2019]). Brook Staten maintains that the restrictive covenant fails all four prongs of this test. Here, cognizant that on a motion to dismiss we must give every favorable inference to plaintiffs and recognizing that "the application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement" (*BDO Seidman v Hirshberg* 93 NY2d 382, 390 [1999]), we cannot determine that the instant restrictive covenant is not reasonable in time and area, injurious to the public of unnecessarily burdensome to the employee (*see*, *Greenwich Mills Co. v Barrie House Coffee Co.* 91 AD2d 398, 402 [1983] ["without a trial or even full discovery having yet been held, it is impossible to judge the validity of the covenants in question"]). Noteworthy to this particular restriction, is that it only prevents plaintiffs' former sales associates from joining a RE/MAX franchise in the restricted area for one year, and specifically allows them to join a competitor or open their own business. As such, the provision appears to be narrowly tailored and does not offend the "public policy which militate[s] against sanctioning the loss of a [person]'s livelihood" (*Purchasing Assoc. v Weitz*, 13 NY2d 267, 272 [1963]).

Brook Staten's more compelling argument is that because plaintiffs' franchise agreements were terminated, they no longer had a legitimate interest to protect. "[A] court normally will not decree specific enforcement of an employee's anticompetitive covenant unless necessary to protect the trade secrets, customer lists or good will of the employer's business" (*American Broadcasting Cos. v Wolf*, 52 NY2d 394, 403 [1981]). As for trade secrets and customer lists, those are not applicable to this situation, as the SAA clearly

allows the agents to join a competitor or establish their own business without restriction. Also, this particular set of facts does not fit the general sense of good will in that the good will in the RE/MAX name, pursuant to the franchise agreements, belongs to RE/MAX and not plaintiffs. While this particular set of circumstances does not lend itself to the typical analysis for restrictive covenants, plaintiffs make a compelling argument that this restrictive covenant was intended to prevent exactly what happened here, the creation of a competing RE/MAX franchise in plaintiffs' territory by its former sales associates who were instructed in the RE/MAX system by the plaintiffs. Accordingly, it can be said at this stage in the litigation, that plaintiffs have demonstrated a cognizant interest needing protection, thus, the fourth cause of action survives.

Brook Staten advances two other reasons why the breach of contract action should be dismissed. First, they argue that because there can be no oral renewal of the franchise agreements, the SAA's are no longer valid. As discussed above, the court has not ruled that the franchise agreements were not renewed. Second, they maintain that plaintiffs failed to attach all the relevant SAAs. "In order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (*Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 751 [2011]). Plaintiffs have done so, the failure to attach all the contracts is not fatal to the claim on a motion to dismiss.

The fifth and seventh causes of action for unfair competition and tortious interference with contract are not dismissed for the same reasons those causes of action were not dismissed against RE/MAX, except to note that in the seventh cause of action it

is plaintiffs' allegation that Brook Staten interfered with the SAAs plaintiffs had in place with its other sales agents that joined Brook Staten. The sixth cause of action for unjust enrichment is dismissed as it is entirely duplicative of the breach of contract action.

The eleventh cause of action for tortious interference with the franchise agreements is not dismissed. Plaintiffs have adequately alleged all the elements of the tort: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc.* at 94).

The twelfth cause of action the conversion/civil theft is dismissed. "To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" *Cusack v American Defense Sys., Inc.,* 86 AD3d 586, 587 [2011]). Here plaintiffs have failed to show that Brook Staten appropriated anything that plaintiffs had a superior right to.

Brook Staten also seeks dismissal of plaintiffs' civil conspiracy claim, which is not pleaded as an independent cause of action. While "New York does not recognize civil conspiracy to commit a tort as an independent cause of action . . . a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme" (*Blanco v Polanco*, 116 AD3d 892, 896 [2014] [internal quotation marks and citations omitted]). "[U]nder New York law, in order to properly plead a cause of action

to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*id*. [internal quotation marks, brackets and citations omitted]). Here, plaintiffs have adequately pleaded all of these elements.

Plaintiffs' request for punitive damages is dismissed. "Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future (*Walker v Sheldon*, 10 NY2d 401, 404 [1961]). To warrant punitive damages in a contract action, plaintiffs must demonstrate that "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker*; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). While plaintiffs' claim that RE/MAX and Brook Staten conspired to put them out of business may constitute an independent tort (*see North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 180 [1968]), "plaintiffs failed to allege sufficient facts warranting punitive damages to vindicate a public right" (*Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511, 513 [2007]).

Accordingly, it is

ORDERED that RE/MAX's motion to dismiss, in sequence seven, is granted to the extent that plaintiffs' third, sixth, eighth and ninth causes of action are dismissed as against it and the motion is otherwise denied, and it is further

ORDERED Bohannon and Jamison's motion to dismiss, in sequence six, is granted and the action is dismissed as against them, and it is further

ORDERED that that Brook Staten's motion to dismiss, in sequence eight, is granted to the extent that plaintiffs' sixth and twelfth causes of action are dismissed as against them and the motion is otherwise denied, and it is further

ORDERED that plaintiffs' request for punitive damages is dismissed.

The court, having considered the parties' remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of this court.

ENTER

J.S.C.