

**Environmental Fin. Consulting Group, Inc. v AEC
Advisors, LLC**

2020 NY Slip Op 31682(U)

May 26, 2020

Supreme Court, New York County

Docket Number: 654761/2018

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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THE ENVIRONMENTAL FINANCIAL CONSULTING GROUP, INC.,

Plaintiff,

- v -

AEC ADVISORS, LLC, ANDREJ AVELINI, JOSHUA LAHRE, TYLER ALBRIGHT, JOSEPH SMETONA,

Defendants.

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HON. BARRY R. OSTRAGER

INDEX NO.	654761/2018
MOTION DATE	
MOTION SEQ. NO.	005

DECISION + ORDER ON MOTION

Before the Court is a motion by plaintiff The Environmental Financial Consulting Group, Inc. (“EFCG”) to dismiss the three counterclaims filed by defendants Andrej Avelini, Joshua Lahre, Tyler Albright, and Joseph Smetona (“the Individual Defendants”) in their Amended Answer pursuant to CPLR § 3211(a) (1) and (7) based on documentary evidence and failure to state a cause of action. No counterclaim has been asserted by defendant AEC Advisors, LLC (“AEC”). For the reasons stated below, the motion is granted in part and denied in part.

Background Facts

Plaintiff EFCG is a financial consulting firm focused on engineering and construction. The Individual Defendants are former employees of EFCG who were in negotiations to purchase EFCG but then resigned in September 2018 and allegedly misappropriated EFCG’s trade secrets and proprietary information to form co-defendant AEC and unfairly compete against EFCG. The Amended Complaint filed on July 25, 2019 (NYSCEF Doc. No. 87) asserts nine causes of action: (1) misappropriation of trade secrets against the Individual Defendants; (2)

misappropriation of trade secrets against AEC; (3) unfair competition against all defendants; (4) conversion against all defendants; (5) trespass to chattel against all defendants (6) tortious interference with prospective economic relations against all defendants; (7) breach of duty of loyalty against the Individual Defendants; (8) aiding and abetting breach of duty of loyalty against all defendants; and (9) injunctive relief against all defendants. In addition to the injunctive relief, EFCG seeks compensatory damages of at least \$12M, plus punitive damages and attorney's fees.

The Amended Answer with Counterclaims filed on January 28, 2020 (NYSCEF Doc. No. 141) asserts three counterclaims, all titled "Breach of Contract" and all based on alleged oral agreements purportedly evidenced by custom and practice. The First Counterclaim on behalf of defendant Avelini seeks the payment of \$1,750,000, calculated as 50% of EFCG's \$3.5M in profits during the period January 2018 through July 2018. Avelini claims he had been receiving similar compensation, in addition to his annual salary, in July and December of each year for about a decade because he had been "working at a level equivalent to an equity holder" (¶ 29). The Second Counterclaim, also on behalf of Avelini, seeks similar payments in the amount of \$1,250,000 based on profits generated during the period July 2018 through September 2018. The Third Counterclaim seeks "bonus" payments due in July 2018 to the remaining three Individual Defendants, who also had allegedly been receiving payments in July and December of each year, in addition to their annual salaries. The amounts claimed are \$450,000 to defendant Lahre and \$300,000 each to defendants Albright and Smetona based on 2017 profits.

The Amended Answer at issue in this motion was filed following the Court's dismissal without prejudice of the counterclaims included in an earlier Amended Answer filed on August 15, 2019 (NYSCEF Doc. No. 88). Those counterclaims, which had no titles, sought (1)

\$1,750,000 in compensation allegedly due to Avelini in July 2018 based on semi-annual payments previously paid for years; (2) additional “wages” of \$1,250,000 to Avelini, \$450,000 to Lahre, and \$300,000 each to Smetona and Albright allegedly due in July 2018 based on work performed in 2017; and (3) damages in the amount of \$25M to AEC and the Individual Defendants based on tortious interference with business relations. The Court dismissed those counterclaims, with leave to replead, finding that the first two counterclaims appeared to be based on oral contracts which were not defined in sufficient detail to state a cause of action, and the third counterclaim appeared to allege that the unlawful conduct by EFCG was some ill-defined defamation that failed to state a claim for tortious interference (see Decision and Order dated January 15, 2020 and Transcript of Proceedings, NYSCEF Doc. Nos. 137 and 140). In the Amended Answer being considered in this motion defendants have abandoned their tortious interference counterclaim and have repleaded the first two counterclaims but split into the three counterclaims described above on behalf of the Individual Defendants only.

Discussion

As indicated above, EFCG seeks dismissal of the three counterclaims based on failure to state a cause of action and documentary evidence. Under CPLR 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, “the facts as alleged fit within any cognizable legal theory ... 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*, 84 NY2d 83, 87-88 (1994) (citations omitted).

EFCG first argues that all three counterclaims should be dismissed as the Individual Defendants fail to plead the essential terms of an oral contract. The Court rejects that argument.

To state a claim for breach of contract, the Individual Defendants must plead the requisite elements of (1) the existence of a valid contract, (2) performance by the Individual Defendants, (3) EFCG's breach, and (4) damages suffered by the Individual Defendants. *See Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 478-79 (1st Dep't 2007) (accepting the allegations as true, and giving the claimant the benefit of every possible inference, a cause of action for breach of an agreement had been stated and dismissal for failure to state a cause of action was denied).

Those elements for breach of an oral contract have all been adequately asserted in each of the counterclaims. The Individual Defendants allege the existence of an oral agreement pursuant to which EFCG made certain payments to the Individual Defendants in July and December of each year over the course of several years as compensation in addition to annual base salaries. The Counterclaims explain how those payments were calculated and the precise outstanding amounts claimed to be due for each party. The allegations describe the work each Individual Defendant performed based on his particular job title and duties. The Counterclaims further allege a breach of each oral contract by EFCG based on the failure to pay the amounts allegedly due and damages suffered by the Individual Defendants measured by the lost compensation for work performed. None of the emails cited by EFCG constitutes unambiguous documentary evidence that disposes of the contract claims as a matter of law. Therefore, dismissal based on failure to state a claim for breach of an oral agreement is denied.

However, EFCG next correctly argues that the Individual Defendants are not entitled to any compensation payable after they resigned in September 2018. The Counterclaims as pleaded allege oral contracts to make payments in July and December of each year based on profits previously earned by EFCG. The Individual Defendants nowhere allege that the oral contracts included a term allowing for the monies due to be pro-rated should the employment relationship

end before the year-end payment became payable. On the contrary, the purported agreements imply that the payments were part of a compensation package tied to continued employment. It is irrelevant that the amount was calculated based on the company's earnings during a prior period; the relevant issue is when the contractual duty to pay the monies allegedly accrued. Thus, the Second Counterclaim for monies payable in December 2018, after Avelini left EFCG, is dismissed. The Court construes the First and Third Counterclaims as demanding payments due in July 2018 when the Individual Defendants were still employed. Should discovery reveal otherwise, EFCG may move for summary judgment dismissing those counterclaims in whole or in part on that ground.

Lastly, EFCG seeks dismissal of all the counterclaims, arguing the claims are barred by the wrongful conduct of the Individual Defendants that included the conversion and theft of EFCG's property. EFCG appears to rely on both the faithless servant doctrine and the contract principle that a material breach by one party excuses performance by the other. However, the Individual Defendants vigorously dispute the allegations by EFCG, at a minimum creating issues of fact that can only be resolved after the completion of discovery. Applying the liberal pleading standard, the Court finds the First and Third Counterclaims state causes of action for the reasons stated above and that no documentary evidence cited by EFCG establishes either of the claimed defenses as a matter of law.¹

¹ EFCG also appears to suggest that, to the extent any of the compensation allegedly due consists of "wages," this Court dismissed the wage claims asserted in a prior lawsuit between the parties and that *res judicata* would bar the reassertion of those claims here. *See Avelini, et al., v EFCG, et al.*, Index No. 652027/19. The Court disagrees. Those claims were specifically based on alleged statutory violations under the Labor Law, as opposed to the breach of contract alleged in this suit. What is more, the claims were discontinued without prejudice to their assertion in this action and not determined on the merits. (See NYSCEF Doc. Nos. 53 and 55).


Accordingly, it is hereby

ORDERED that the motion by plaintiff The Environmental Financial Consulting Group, Inc. ("EFCG") to dismiss the three counterclaims filed by the Individual Defendants Andrej Avelini, Joshua Lahre, Tyler Albright, and Joseph Smetona in their Amended Answer is granted to the extent of severing and dismissing the Second Counterclaim with prejudice and is otherwise denied without prejudice to renewal on summary judgment at the conclusion of discovery or at trial; and it is further

ORDERED that EFCG shall file a Reply to Counterclaims by June 16, 2020, the parties shall proceed expeditiously to complete discovery by September 15, 2020, and plaintiff shall file a Note of Issue by September 19, 2020; and it is further

ORDERED that counsel shall appear before this Court for a status conference on September 9, 2020 at 10:00 a.m. with full settlement authority and to address any extension of discovery deadlines that may be needed based on exigent circumstances. Should counsel desire a settlement conference with the Court before that time or a reference to ADR, counsel shall efile a letter request, and the Court will address it promptly.

Dated: May 26, 2020


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE