

Weinstock v Shift Forex, LLC
2020 NY Slip Op 32794(U)
August 26, 2020
Supreme Court, New York County
Docket Number: 152335/2018
Judge: James E. d'Auguste
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55**

-----X
MORDECHAI WEINSTOCK,

Plaintiff,

-against-

Index No. 152335/2018
Decision and Order

SHIFT FOREX, LLC,

Defendant.

-----X
Hon. James E. d'Auguste:

Plaintiff Mordechai Weinstock (Weinstock) commenced this action to recover monetary commissions allegedly due to him pursuant to a written agreement between the parties.

Defendant Shift Forex, LLC (Shift Forex) has counterclaimed for alleged breach of the duty of loyalty; tortious interference; breach of contract; breach of the covenant of good faith and fair dealing; unjust enrichment; and prima facie tort. Weinstock seeks dismissal of Shift Forex's counterclaims. For the reasons stated hereafter, the motion is granted to the extent of dismissing all counterclaims except for the counterclaim alleging breach of contract.

BACKGROUND

Weinstock entered into a written agreement with Shift Forex in March 2016 to solicit the sale of Shift Forex's services and products in exchange for monthly commissions based on net monthly revenue from any client brought by Weinstock to Shift Forex (NYSCEF Doc. No. 1 at ¶ 3-4). Weinstock solicited a client, FX Imperium (FX), who retained Shift Forex's services (*id.* at ¶ 7). Sometime in the summer of 2017, Shift Forex stopped paying commissions to Weinstock purportedly because FX was no longer a client (*id.* at ¶ 10). Weinstock alleges that Shift Forex attempted to terminate him without cause and withheld commissions unless Weinstock signed a termination agreement, which Weinstock refused to do (*id.* at ¶ 12).

On March 16, 2018, Weinstock commenced this action (NYSCEF Do. No. 1). On June 7, 2018, Shift Forex answered with counterclaims against Weinstock alleging causes of action such as defamation and prima facie tort (NYSCEF Doc. No. 4). This court previously issued a decision and order on motion sequence number 001 holding that the counterclaims were devoid of the requisite factual specificity. For example, Shift Forex's defamation claim failed to allege what defamatory words were used, when and where they were published, and to whom. The court allowed Shift Forex sixty days to amend its counterclaims (NYSCEF Doc. No. 14).

On April 8, 2019, Shift Forex filed an amended verified answer, affirmative defenses and counterclaim (hereinafter, amended counterclaim) alleging claims for breach of the duty of loyalty, tortious interference, breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and prima facie tort (NYSCEF Doc. No. 16). The amended counterclaim does not include a cause of action for defamation, but rather, substitutes a cause of action for the breach of the duty of loyalty. On June 6, 2019, Weinstock filed the instant motion seeking to dismiss all of Shift Forex's counterclaims.

According to the amended counterclaim, Shift Forex terminated Weinstock's employment because the sole client that Weinstock introduced to Shift Forex complained that Weinstock was "behaving belligerently and was harassing the client." The client threatened to terminate its relationship with Shift Forex, and so Shift Forex terminated Weinstock's employment (amended counterclaim at ¶ 3-4). Shift Forex asserts that it paid "all commissions duly owed to [p]laintiff" (*id.* at ¶ 6). Shift Forex alleges that Weinstock was upset at his termination and the cessation of commission payments and has taken steps to damage and interfere with Shift Forex's business in "a vindictive effort to destroy it" (*id.* at ¶ 7).

Shift Forex alleges that in or around August 2017, Weinstock falsely stated one of its' former salespersons that Shift Forex "had stolen [p]laintiff's commissions, was engaged in a fraudulent business, and had terminated [p]laintiff's employment illegally" (*id.* at ¶ 16). Shift Forex alleges that Weinstock asked the former salesperson to provide information that might damage Shift Forex; attempted to persuade the former salesperson to breach his agreement with Shift Forex; and offered him a bribe to persuade him (*id.* at ¶ 17-19). Shift Forex alleges that Weinstock's comments and actions "have damaged Shift Forex's business relationships with the former salesperson and Shift Forex has lost potential referrals as a result" (*id.* at ¶ 20).

Additionally, Shift Forex asserts that Weinstock contacted its director of business development via repeated phone calls and attempted to persuade him to provide Shift Forex's sensitive and confidential information seeking his support in his "vendetta against Shift Forex" (*id.* at ¶ 21). Allegedly, Weinstock also harassed Shift Forex's finance manager in that for several months he made repeated phone calls and messages to extort money or obtain confidential client and accounting information (*id.* at ¶ 22). Further, Shift Forex claim that, in August 2017, Weinstock falsely told several of its key vendors that Shift Forex stole Weinstock's commissions; that Shift Forex was engaged in a fraudulent business; and that Shift Forex did not pay its salespeople (*id.* at ¶ 23).

Shift Forex also alleges that Weinstock contacted "important industry regulators such as the Commodities Future Trading Association and the National Futures Association and "disparaged and defamed Shift Forex in an improper and unlawful attempt to cause these regulators to fine, suspend, or otherwise damage Shift Forex" (*id.* at ¶ 24). Shift Forex alleges that Weinstock has disparaged and defamed Shift Forex in "an improper and unlawful attempt to cause the Bureau to fine, suspend, or otherwise damage" Shift Forex (*id.* at ¶ 25). Shift Forex

alleges that Weinstock sent an email to Shift Forex's chief executive officer, chief operating officer and chief technology officer in which he threatened to use Shift Forex's confidential information unless he was paid an amount of money equal to what Weinstock personally believed he was owed (*id.* at ¶ 26). In his emails to Shift Forex, Weinstock has allegedly threatened to contact other regulators and the IRS (*id.* at ¶ 27-28).

The above conduct allegedly constitutes violations of sections 3 and 4 of the parties' agreement, which prohibits Weinstock from using Shift Forex's confidential and proprietary information without Shift Forex's authorization, prohibits Weinstock from diverting clients or business away from Shift Forex, and interfering with Shift Forex's business relations with any clients (*id.* at ¶ 29). As a result of Weinstock's conduct, Shift Forex asserts that the client that Weinstock referred to Shift Forex has refused to pay invoices totaling at least \$40,000 (*id.* at ¶ 32).

The Instant Action

In its first cause of action in the amended counterclaim, Shift Forex claims that Weinstock breached a duty of loyalty he owed to Shift Forex by using Shift Forex's confidential information to its detriment, attempting to solicit confidential information from current and former employees, and using Shift Forex's confidential information to mislead enforcement and regulatory agencies as part of an attempt to extort Shift Forex (*id.* at ¶ 34-36). In the second cause of action for tortious interference, Shift Forex alleges that Weinstock interfered with Shift Forex's contracts, and that "as a direct result of [Weinstock's] actions the client referred to Shift Forex by [Weinstock] has breached its contractual obligations to Shift Forex and refused to pay their contracts with Shift Forex" (*id.* at ¶ 42). In the third cause of action for breach of contract, Shift Forex claims that Weinstock breached sections 3 and 4 of the agreement in that Weinstock

used Shift Forex's confidential information to the detriment of Shift Forex; that Weinstock solicited current and former employees of Shift Forex to disclose its confidential information and used its confidential information to interfere with its relationship with key vendors; and used its confidential information in connection with Weinstock's attempt to mislead law enforcement (*id.* at ¶ 46-48). In the fourth cause of action, Shift Forex alleges that Weinstock breached the covenant of good faith and fair dealing by the aforementioned conduct. In the fifth cause of action, Shift Forex alleges that Weinstock has been unjustly enrichment at its expense. Finally, Shift Forex alleges prima facie tort as its sixth cause of action.

In Motion Seq. #002, Weinstock moves pursuant to CPLR 3211 (a) (7), to dismiss the amended counterclaims on the grounds of failure to state a cause of action with prejudice. For the following reasons, the motion is granted to the extent that Shift Forex's first, second, fourth, fifth and sixth causes of action are dismissed.

DISCUSSION

Weinstock's Motion to Dismiss

Breach of the Duty of Loyalty

Generally, a cause of action for a breach of the duty of loyalty has been limited to cases where the employee, acting as an agent of the employer, unfairly competes with his or her employer, diverts business opportunities to himself or herself or others to the financial detriment of the employer, embezzles from his or her employer or accepts improper kickbacks (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011]). When accepting the factual allegations contained in the amended counterclaim as true, and giving them every favorable inference, the court finds that Shift Forex has failed to adequately state a cause of action. Shift Forex has made no allegations that Weinstock, while an agent of Shift Forex, was

unfairly competing with his former employer or accepting improper kickbacks. Therefore, the cause of action for breach of the duty of loyalty is dismissed.

Tortious Interference

To establish a tortious interference claim, Shift Forex must plead and show (1) a valid contract between it and a third-party; (2) Weinstock's knowledge of that contract; (3) Weinstock's intentional procurement of a breach of that contract without justification; (4) actual breach; and (5) damages (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996]; *accord Vigoda v DCA Prods. Plus*, 293 AD2d 265 [1st Dept 2002]).

Here, aside from conclusory allegations, Shift Forex has not pleaded facts alleging Weinstock's intent to procure a breach of contract with a third party. Further, Shift Forex has not pleaded the terms of any third-party agreement, either expressly referencing it or attaching a copy of it, to satisfy this element. Therefore, the cause of action for tortious interference is dismissed.

Breach of Contract

To establish breach of a contract in its amended counterclaim, Shift Forex must show a contract, that it performed the contract and Weinstock breached it, and that Weinstock's breach caused it to sustain damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Accepting the factual allegations contained in the amended counterclaim as true, and giving them every favorable inference, the court finds that Shift Forex has stated a cause of action for breach of contract. Shift Forex has alleged the existence of a written agreement. Shift Forex alleges that Weinstock breached specific sections of the agreement, and further contends that it sustained damages as a result. Shift Forex alleges that "as a direct result of Weinstock's

actions the client referred to Shift Forex by [Weinstock] has refused to pay invoices totaling at least approximately forty thousand dollars” (amended counterclaim at ¶ 32). While Weinstock may dispute Shift Forex’s factual allegations and may ultimately prevail, the allegations set forth in the amended counterclaim are enough to state a claim for breach of contract. Therefore, the counterclaim for breach of contract is not dismissed.

Breach of the Implied Covenant of Good Faith and Fair Dealing

Shift Forex’s counterclaim for breach of the implied covenant of good faith and fair dealing arises out of the same facts as its breach of contract claim and is therefore dismissed as duplicative. *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 (1st Dept 2011) (holding that the cause of action for breach of the covenant of good faith and fair dealing was "duplicative of the breach of contract claims because they arise from the same facts"). Therefore, the counterclaim for breach of the implied covenant of good faith and fair dealing is dismissed.

Unjust enrichment

Shift Forex alleges a cause of action for unjust enrichment. However, this cause of action, which is a claim for quasi-contract is precluded by the written agreement referenced in the parties’ pleadings. (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005); *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]). Therefore, the counterclaim for unjust enrichment is dismissed.

Prima Facie Tort

“Prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful” (*Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 [1st Dept 1984], quoting *Lincoln First Bank of Rochester v Siegel*, 60 AD2d 270, 270 [4th Dept 1977]). In order to state a cause of action for prima facie tort, special damages must be alleged with sufficient particularity to identify actual losses (*Broadway & 67th St. Corp.*, 100 AD2d at 486). A request for unspecified damages is insufficient for pleading special damages (*Discover Group, Inc. v Lexmark Intl., Inc.*, 333 F Supp 2d 78 [ED NY 2004]).

Shift Forex’s request for damages for this cause of action states that “Shift Forex has incurred substantial harm as a direct and proximate result of [Weinstock’s] conduct” (amended counterclaim at ¶ 64). The request, which does not specify the amount and itemization of the damages claimed, is insufficient. In another allegation in the amended counterclaim, Shift Forex states, “[a]s a direct result of [Weinstock’s] actions the client referred to Shift Forex by [Weinstock] has refused to pay invoices totaling at least approximately forty thousand dollars” (*id.* at 32). Even assuming the truth of this allegation, it likewise fails because, damages pleaded in round sums, without any attempt at itemization, are insufficient for this cause of action (*Leather Development Corp. v. Dun & Bradstreet*, 15 AD2d 761 [1st Dept 1962], *affd* 12 NY2d 909 [1963]). Therefore, the counterclaim for prima facie tort is dismissed.

CONCLUSION

For the foregoing reasons, and all arguments having been considered, it is hereby ordered that

ORDERED that Weinstock's motion pursuant to CPLR 3211(a)(7) to dismiss the amended counterclaim is granted to the extent that Shift Forex's first, second, fourth, fifth and sixth counterclaims are dismissed, but denied as to the dismissal of Shift Forex's third cause of action for breach of contract.

This constitutes the decision and order of the court.

8/26/2020

DATE



JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE