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| <b>Four Five Capital LLC v Schwartz</b>                                                                                                                                                                                        |
| 2022 NY Slip Op 30795(U)                                                                                                                                                                                                       |
| March 9, 2022                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 151347/2021                                                                                                                                                                                           |
| Judge: Andrew Borrok                                                                                                                                                                                                           |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53-----X  
FOUR FIVE CAPITAL LLC

INDEX NO. 151347/2021

Plaintiff,

MOTION DATE 06/23/2021

- v -

MOTION SEQ. NO. 001

JONATHAN SCHWARTZ,

Defendant.

**DECISION + ORDER ON  
MOTION**-----X  
HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, Jonathan Schwartz's motion to dismiss pursuant to dismiss is granted solely to the extent that the cause of action sounding in unjust enrichment is dismissed.

1. Mr. Schwartz is not entitled to dismissal of the cause of action for unfair competition because the allegations are that Four Five Capital (**FFC**) gave Mr. Schwartz non-public information that 824 Madison Avenue (the **Property**) was available for sale (Affidavit of Jason Silverstein, NYSCEF Doc. No. 22, ¶¶ 11-12) and the price which FFC was prepared to pay for such Property to Benchmark Real Estate Group (**Benchmark**). Despite Mr. Schwartz's arguments to the contrary, FFC had a reasonable expectation that Mr. Schwartz would keep the proprietary deal information confidential based upon his longstanding business and personal relationship with FFC's principals, during which FFC provided use of its office space, internet, phones, real estate software to Mr. Schwartz in exchange for his consultation and brokering of various deals which extended up until

2021 (Complaint, ¶¶ 12-13; Affidavit of Jason Silverstein, ¶¶ 3-6). Under these facts, it is clear that a special, continuous fiduciary relationship existed between Mr. Schwartz and FFC at the time the information including the price they were negotiating a contract for about the Property was conveyed to him. Instead of keeping this critically sensitive proprietary information private, Mr. Schwartz breached his fiduciary duty to FFC by giving this information to a competitor and encouraging them to purchase the Property for a few hundred thousand dollars more so that he would get paid a substantial commission. (Complaint, ¶¶ 19-22, 25-27). This is sufficient to establish a claim for unfair competition (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1<sup>st</sup> Dept 2015]). Mr. Schwartz's attempt to mis-characterize the relationship as a prior relationship where a broker has no continuous duty to his former clients simply misstates the facts as alleged. As discussed above, Mr. Schwartz was not merely a broker who had done prior deals with FFC. He was given special accommodation post-prior deals to use their office space, internet service and other things during which time he allegedly misappropriated this critically sensitive information.

Mr. Schwartz's other argument that FFC has failed to plead special damages is misleading. Pleading special damages merely requires that actual losses be identified and causally related to the alleged tortious act (*Waste Distillation Technology v Blasland & Bouck Engineers, P.C.*, 136 AD2d 633 [2<sup>nd</sup> Dept 1988]). The facts in the instant matter are not similar to those in *Drug Research Corp. v Curtis*, 7 NY2d 435 [1960] where a round number of \$5,000,000 was alleged as damages to a libel claim, without any explanation or itemization of how plaintiff had been injured in that amount. Here, FCC's

actual losses are obviously identifiable as those incurred as a result of its the loss of the deal, caused by Mr. Schwartz's deception.

2. Mr. Schwartz is not entitled to dismissal of the cause of action for breach of fiduciary duty. As discussed above, Mr. Schwartz, was not merely their prior broker. Under the facts of this case as alleged he owed fiduciary duties to FFC which he breached by conveying the "off-market" terms to Benchmark (Complaint, ¶¶ 27, 37-41). As a result, FFC was damaged. These allegations are sufficient to establish a breach of fiduciary duty in the pleadings (*Burry v Madison Park Owner LLC*, 84 AD3d 699 [1<sup>st</sup> Dept 2011]).

Mr. Schwartz cites *L. Magarian & Co. v Timberland Co.*, 245 AD2d 69, 70 [1<sup>st</sup> Dept 1997] for the premise that "control by one party of the other for the good of the other" is an essential element of a breach of fiduciary duty claim. This is incorrect. The First Department offers "control by one party over the other" as one of a number of ways that a plaintiff can establish special circumstances under which a fiduciary relationship is created (*Id.*; see also *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 163 [1993] [Court of Appeals identified circumstances under which a broker creates a fiduciary relationship with a client]). In this case, FFC does not need to establish the "control" element, because, for the reasons set forth above, under the specific facts alleged, it has established that a fiduciary relationship existed between FFC and Mr. Schwartz.

3. Mr. Schwartz is also not entitled to dismissal of the cause of action for tortious interference with prospective economic advantage. As alleged, Schwartz interfered with

FFC's potential contract with the seller of the Property by conveying the terms of the private deal, and ultimately brokering the deal, on behalf of Benchmark (Complaint, ¶¶ 27-29). Mr. Schwartz employed "wrongful means" through his interference because his actions alone amount to an independent tort – specifically those causes of action for breach of fiduciary duty and unfair competition that FFC has already successfully pled (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

Mr. Schwartz's reliance on *Phillips v Carter*, 58 AD3d 528 [1<sup>st</sup> Dept 2009] for the proposition that a defendant's own economic justification is a complete defense to the claim of tortious interference misstates the law. The *Phillips* Court held that the plaintiff failed to plead facts showing "that defendant acted solely to harm plaintiff by unlawful means beyond mere self-interest", or "*that defendant's conduct was otherwise unlawful*" (*Id.* [emphasis added]). Here, Mr. Schwartz's conduct, as alleged, was otherwise unlawful because he allegedly breached his fiduciary duty to FFC. Stated differently, the fact that he profited as a result does not shield him from liability where he otherwise committed an independent tort.

4. Finally, Mr. Schwartz is however entitled to dismissal of FFC's claim for unjust enrichment. Mr. Schwartz was not enriched *at FFC's expense* because Mr. Schwartz received office space and internet access or because the brokerage fee was paid to him by Benchmark, not FFC (Complaint, ¶¶ 28-29). The provision of the office space or internet access was not wrongfully obtained by him. The brokerage commission does not unjustly enrich him because FFC did not pay the brokerage commission. Thus, the cause

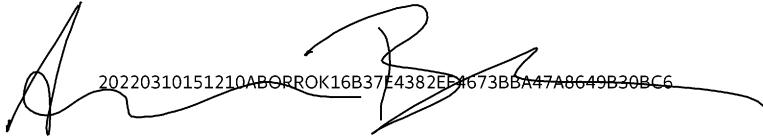
of action sounding in unjust enrichment must be dismissed (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141-142 [2009]).

Accordingly, it is

ORDERED that Defendant's motion to dismiss is granted to the extent that FFC's claim for unjust enrichment is dismissed; the portions of the motion seeking to dismiss the causes of action for breach of fiduciary duty, tortious interference with prospective economic advantage and unfair competition are denied; and it is further

ORDERED that the parties appear for a status conference via Microsoft Teams on May 2, 2022 at 11:30 a.m.

3/9/2022  
DATE

  
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 ANDREW BORROK, J.S.C.

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