

**Barasch & McGarry, PC v Marcowitz**

2022 NY Slip Op 31328(U)

April 20, 2022

Supreme Court, New York County

Docket Number: Index No. 655369/2018

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 38M

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BARASCH & MCGARRY, PC, d/b/a BARASCH MCGARRY SALZMAN & PENSON,	<b>INDEX NO.</b>	<u>655369/2018</u>
Plaintiff,	<b>MOTION DATE</b>	<u>09/09/2020</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>002</u>
EDWARD L. MARCOWITZ,		
Defendant.	<b>DECISION + ORDER ON MOTION</b>	

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43

were read on these motions for SUMMARY JUDGMENT.

Plaintiff Barasch & McGarry, PC, d/b/a Barasch McGarry Salzman & Penson, a law firm (“plaintiff” or the “firm”), brings this action against defendant Edward L. Marcowitz, Esq. (“defendant”), formerly employed as an associate-attorney at the firm, for breach of the duty of loyalty and violation of the faithless servant doctrine for referring a client to the law firm of Weitz & Luxenberg P.C., instead of to plaintiff.

Defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment on the complaint.

For the reasons set forth below, plaintiff’s cross-motion is granted, and defendant’s motion is denied.

### FACTS

Defendant was employed as a full-time associate of the firm from September 7, 2004, to November 5, 2015 (complaint [NYSCEF Doc No. 1] ¶ 3). On November 5, 2015, defendant

resigned from the firm to take a position at another law firm (*id.*, ¶ 4). The firm's practice focused almost exclusively on the representation of victims of personal injury, and included a wide variety of personal injury matters, including, but not limited to, those involving premises liability, medical malpractice, motor-vehicle accidents, municipal liability, products liability, and toxic torts (*id.*, ¶¶ 8-9).

Plaintiff alleges that the firm required its associates to bring it any prospective personal injury clients they could, as well as all fee-sharing opportunities in referring prospective clients to other law firms (*id.*, ¶¶ 14-15). Plaintiff further alleges that the firm's usual policy was to share referral fees equally with associates who originated a referral, and that defendant, who had shared in referral fees in the past pursuant to the firm's usual policy, was aware of the firm's policy (*id.*, ¶¶ 16-18).

As alleged, in July 2013, defendant referred Vincent Ferraioli, a prospective client, to the law firm of Weitz & Luxenberg (*id.*, ¶ 19). Mr. Ferraioli asserted a claim for personal injuries against multiple defendants based on latent injuries, including mesothelioma, from exposure to asbestos (*id.*, ¶¶ 20-21). Plaintiff alleges that defendant did not try to bring Mr. Ferraioli's case to the firm or bring to the firm the fee-sharing opportunity to refer Mr. Ferraioli to Weitz & Luxenberg (*id.*, ¶¶ 26-27).

According to plaintiff, at first, defendant referred the case directly to Weitz & Luxenberg (*id.*, ¶ 29). Thereafter, in order to mask the referral as coming from someone else, defendant then advised Weitz & Luxenberg that the referral was from David Lee, another lawyer, and friend of defendant's (*id.*, ¶ 30). But in reality, as alleged, the referral was solely from defendant (*id.*, ¶ 31). Defendant subsequently told Michael Barasch, the firm's senior partner, that defendant never shared any part of the fee with Mr. Lee (*id.*, ¶¶ 32- 33).

Mr. Ferraioli retained Weitz & Luxenberg to handle his personal injury claim, and it successfully resolved parts of Mr. Ferraioli's claim (*id.*, ¶¶ 38-39). Weitz & Luxenberg is continuing to process the claim against other, non-settling, parties (*id.*, ¶ 40). In a series of payments starting sometime after November 5, 2015, it is alleged that Weitz & Luxenberg paid defendant, directly or indirectly through Mr. Lee, a referral fee approximating one-third of Weitz & Luxenberg's net fee (*id.*, ¶¶ 41-42).

According to Mr. Barasch, he discovered defendant's secret Ferraioli referral on April 20, 2017, one-and-a-half years after defendant left the firm to take a job with a competing firm. Because of a fee dispute with defendant involving several other matters, Mr. Barasch conducted a search of defendant's emails on plaintiff's email server and discovered the Ferraioli emails between defendant and Weitz & Luxenberg (Barasch aff [NYSCEF Doc No. 33] ¶ 19). The emails reveal that defendant told Erik Jacobs at Weitz & Luxenberg that: "As discussed this is not a Barasch McGarry case. David Lee who is my partner in mass torts cases is the referring attorney" (*see* emails [NYSCEF Doc No. 34]).

On October 1, 2019, plaintiff served defendant with a Notice for Discovery and Inspection (NYSCEF Doc No. 35), which sought production of documents relating to the referral of Mr. Ferraioli's matter to Weitz & Luxenberg; the division of labor between defendant and Weitz & Luxenberg; the payment of the referral fee; and any agreement with, or involvement of, Mr. Lee, in the referral of Mr. Ferraioli to Weitz & Luxenberg. Discovery produced by Weitz & Luxenberg (NYSCEF Doc No. 37), reveals that Weitz & Luxenberg made referral fee payments to Mr. Lee in the Ferraioli matter totaling \$140,296.42. The disclosure from Weitz & Luxenberg includes a retainer statement dated August 6, 2013, and filed with the Office of Court Administration, which states that Mr. Lee referred the Ferraioli matter to Weitz & Luxenberg (*see, id.*).

Plaintiff alleges that the referral fee paid by Weitz & Luxenberg to Mr. Lee was forwarded by Mr. Lee to defendant. Plaintiff further alleges that because there remained defendants in the Ferraioli matter who had not yet paid settlement shares, this referral fee was not final, but that it does not know how much more was paid, because both defendant and Weitz and Luxenberg have refused to provide this information (complaint ¶ 44). Plaintiff seeks the referral fee that defendant was paid by Weitz & Luxenberg, plus interest from the date that he received the payment (*id.*, ¶ 43).

Defendant does not deny that he made the referral to Weitz & Luxenberg (defendant's memorandum of law [NYSCEF Doc No. 24] at 7 ["Plaintiff presses a claim against Mr. Marcowitz for a breach of the duty of loyalty for . . . referring the 'Ferraioli' matter to Weitz & Luxenberg instead of to Plaintiff"], but contends that law firm associates do not have a duty to refer every potential client who asks for a referral to their respective law firm employers (*see, id.*).

### DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853; *see also, Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1<sup>st</sup> Dept 2002], *affd* 99 NY2d 647 [2003]).

Both parties move for summary judgment and agree that the sole governing question in this action is whether a law firm associate has a duty to refer all potential referrals to his or her law firm employer. Summary judgment is appropriate where, as here, the decision on a question of law is controlling (*see, Marinas of the Future, Inc. v City of N.Y.*, 87 AD2d 270, 277 [1<sup>st</sup> Dept], *appeal dismissed* 57 NY2d 775 [1982]; *see also, NYCTL 1996-1 Trust v Westmoreland Assocs.*, 2 AD3d 811, 812 [2d Dept 2003] [“There being no issues of fact summary judgment was properly granted to the plaintiffs”]). The existence and scope of a duty is a question of law to be determined by the court (*see, Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585 [1994] [“Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor’s duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration”]; *accord, Sanchez v State of N.Y.*, 99 NY2d 247, 252 [2002]; *Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d 812, 813 [2d Dept 2019]; *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]).

Accordingly, the issue of whether a law firm associate owes a law firm employer a duty to refer all cases to that firm is a matter of law to be determined by the court.

Plaintiff alleges in the complaint that defendant breached both his fiduciary duty and his duty of loyalty by referring the Ferraioli matter to Weitz & Luxenberg instead of to plaintiff. Defendant argues that there is no duty as a matter of law for defendant to have referred the Ferraioli case (or any other potential case) to plaintiff. Specifically, defendant contends that he did not owe a fiduciary duty to plaintiff, and that he did not breach his duty of loyalty to the firm.

#### Breach of Fiduciary Duty

This court agrees with defendant to the extent of his position that, as an associate of the firm (as opposed to a member of the firm), his status did not fall within the purview of a “fiduciary.” Under New York law, employees (including law firm associates) do not owe fiduciary duties to their employers (*see, King v Fox*, 2005 WL 741760, \* 4 [SD NY 2005] [explaining that, under New York law, while it “is true that law partners stand in a fiduciary relationship one to another . . . it does not follow that an associate, as an employee, owes a fiduciary duty to his employer”]; *see also, Rather v CBS Corp.*, 68 AD3d 49, 55 [1<sup>st</sup> Dept 2009] [“The law in this Department, and indeed enunciated in every reported appellate-division-level case, is that employment relationships do not create fiduciary relationships”], *lv denied* 13 NY3d 715 [2010]; *Vitale v Steinberg*, 307 AD2d 107, 109-10 [1<sup>st</sup> Dept 2003] [finding that law is clear that no fiduciary duties exist between an employer and an at-will employee]).

Accordingly, as a law firm associate during his tenure with plaintiff, defendant did not have a “fiduciary” duty toward plaintiff as his employer.

### Breach of the Duty of Loyalty

However, plaintiff's claim is more properly framed as a breach of the common law duty of loyalty that exists between an employee and employer. Defendant argues that this duty does not include a requirement for law firm associates to refer all cases that come their way to their law firm employers because a claim for an employee's breach of the duty of loyalty is "available only where the employee has acted directly against the employer's interests – as in embezzlement, improperly competing with the current employer, or usurping business opportunities" (*Grika v McGraw*, 55 Misc 3d 1207[A], 2016 NY Slip Op 51878[U], \* 17 [Sup Ct, NY County, 2016] [citation omitted], *affd* 161 AD3d 450 [1<sup>st</sup> Dept 2018]).

However, in making this argument, defendant ignores the faithless servant doctrine, which "has been firmly established in New York for over a century and requires an employee to exercise the utmost good faith, including a duty of loyalty, toward his employer" (*Consolidated Edison Co. v Zebler*, 40 Misc 3d 1230[A], 2013 NY Slip Op 51354[U], \*4 [Sup Ct, NY County 2013]; *see also, Phansalkar v Anderson Weinroth & Co., L.P.*, 344 F3d 184, 200 [2d Cir 2003] [the faithless servant doctrine "is grounded in the law of agency, and has developed for well over a century"] [applying New York law]). Under this doctrine, "an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits and forfeit his right to compensation" (*Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY County 2013] [internal quotation marks, typographical alterations, and citations omitted]; *see also, Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 928 [1977] ["One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"]; *Art Capital Group, LLC v Rose*, 149 AD3d

447, 449 [1<sup>st</sup> Dept 2017] [citation omitted] [“New York’s strict application of the faithless servant doctrine ‘mandates the forfeiture of all compensation . . . where . . . one who owes a duty of fidelity to the principal is faithless in the performance of his services’”]; *see, e.g., Schulhof v Jacobs*, 54 Misc 3d 1221[A], 2017 NY Slip Op 50264[U], \* 3 [Sup Ct, NY County 2017] [defendant, “as a faithless servant, must account to Mr. Schulhof for the \$1 million of secret profits earned for the sale of the Work”], *judgment affd and appeal dismissed* 157 AD3d 647 [2018]).

A claim for the breach of the duty of loyalty is assertable in “cases where the employee, acting as the agent of the employer, unfairly competes with his employer, diverts business opportunities to himself or others to the financial detriment of the employer, or accepts improper kickbacks” (*Sullivan & Cromwell LLP v Charney*, 15 Misc 3d 1128[A], 2007 NY Slip Op 50889[U], \* 7 [Sup Ct, New York County 2007], citing *Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977] [kickbacks]; *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133, 138 [1936] [earning secret profits at expense of employer]; *Alexander & Alexander of N.Y., Inc., v Fritzen*, 147 AD2d 241, 247–48 [1<sup>st</sup> Dept 1989] [diverting corporate opportunities]; *Foley v D’Agostino*, 21 AD2d 60, 69 [1<sup>st</sup> Dept 1964] [competing with one’s employer]).

The faithless servant doctrine and the duty of loyalty are applicable to employee-attorneys. The case of *Chung v William Schwitzer & Assocs., P.C.* (index No. 654961/2017 [Sup Ct, N.Y. County, Aug. 31, 2020]) (NYSCEF Doc No. 39)<sup>1</sup> is directly on point. In that case, the motion court found that Attorney Chung, an employee-attorney, violated his duty of loyalty to William Schwitzer & Associates, P.C. [WSA], his law firm employer, by surreptitiously referring cases to a competing law firm, and profiting financially from those referrals, and granted WSA’s motion for summary judgment on its affirmative faithless servant claim against Chung (*id.*, at 8-9).

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<sup>1</sup> Modified and otherwise affirmed, 200 AD3d 514 (1<sup>st</sup> Dept 2021) (*discussed, infra*).  
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In granting WSA's motion for summary judgment, the court found that, as an associate of WSA, Chung "would not be free to take business for himself or direct it to a competitor for his profit without the express consent of [WSA]" (*id.* at 8, citing *Maritime Fish Prods., Inc., v World-Wide Fish Prods., Inc.*, 100 AD2d 81, 89 [1<sup>st</sup> Dept], *appeal dismissed* 63 NY2d 675 [1984]). The court concluded that Chung's disloyalty "would require a forfeiture of approximately \$50,000 of salary paid him during that period," as well as the "\$50,000 in secret profits that Chung received from" the party to whom he made the referrals (100 AD2d at 89).

Chung appealed, and the Appellate Division, First Department, modified the lower court's order by denying summary judgment on the faithless servant cause of action, on the ground that "issues of fact exist as to whether WSA waived its faithless servant claim by paying Chung \$50,000 after learning he had referred cases to another attorney" (*Chung v William Schwitzer & Assocs., P.C.*, 200 AD3d 514, 515 [1<sup>st</sup> Dept 2021]). Nevertheless, the Appellate Division specifically found that "Supreme Court correctly concluded that, as a matter of law, Chung breached his duty of loyalty to WSA by referring cases to another attorney while still employed by WSA" (*id.*, citing *Lamdin*, 272 NY at 138 ["we are of the opinion that the plaintiff in this instance fell below the standard required by the law of one acting as an agent or employee of another" by taking kickbacks, because he "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties"]; *Bon Temps Agency Ltd. v Greenfield*, 184 AD2d 280, 281 [1<sup>st</sup> Dept] [citation omitted] ["(w)hen, as here, the employee engages in a business which, by its nature, competes with the employer's a double breach of duty occurs' since the services for which he has contracted have been turned against him"], *lv denied* 81 NY2d 759 [1992]).

Here, in contrast, no such issues of fact exist. In making his motion for summary judgment, defendant does not proffer any facts other than by annexing plaintiff's complaint. Nor does he deny the facts that are material to this motion: that he alone referred Vincent Ferraioli to Weitz & Luxenberg; that he did so while in plaintiff's employ as an associate-attorney; that he made the referral without plaintiff's knowledge and consent; and that he profited financially from the referral. Thus, like the law firm associate in *Chung*, defendant's conduct in referring the Ferraioli matter to another law firm, while still employed by plaintiff, was a breach of his duty of loyalty, making him liable for damages under the faithless servant doctrine. Plaintiff is entitled to the entire referral fee, with interest (*see, Two Rivers Entities, LLC v Sandoval*, 192 AD3d 528, 529 [1<sup>st</sup> Dept 2021] ["the faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties it not entitled to recover either salary or commission"]; *Epstein Eng'g P.C. v Cataldo*, 101 AD3d 552, 552 [1<sup>st</sup> Dept 2012] ["A faithless servant must account not only for profits attributable to clients poached from the principal, but for all profits ascribable to the wrongful diversion of business"]).<sup>2</sup>

Accordingly, plaintiff's cross-motion for summary judgment on its faithless servant claim against defendant is granted, and defendant's motion dismissing the complaint is denied. However, because the court is unable to determine the full amount of the referral fee on the papers submitted, the issue of the amount of damages due plaintiff is referred to a special referee or judicial hearing officer to hear and determine.

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<sup>2</sup> Although plaintiff would also be entitled to the salary paid to defendant during the period of disloyalty (*see, Chung, supra*), the complaint only speaks in terms of the referral fee received by Chung from Weitz & Luxenberg and not in terms of his compensation received from plaintiff (*see, complaint, passim*).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the complaint is granted, and the clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of the referral fees discussed hereinabove, to be determined by the special referee or judicial hearing officer ("JHO") to be designated as hereinafter set forth, plus interest thereon at the statutory rate from the date of defendant's receipt of the referral fees; and it is further

ORDERED that the issue of such referral fees is severed and a JHO or special referee shall be designated to conduct an inquest and determine the amount of said referral fees, which is hereby submitted to the JHO/special referee for such purpose; and it is further

ORDERED that the powers of the JHO/special referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the decision and order of the court.

ENTER:



<u>4/20/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input checked="" type="checkbox"/>	OTHER
				<input checked="" type="checkbox"/>	REFERENCE