

<b>BDO USA, LLP v Morris</b>
2022 NY Slip Op 31682(U)
May 24, 2022
Supreme Court, New York County
Docket Number: Index No. 652352/2020
Judge: Andrew Borrok
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: COMMERCIAL DIVISION PART 53

-----X

BDO USA, LLP,		INDEX NO. <u>652352/2020</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>015 016 017</u>
STEPHEN MORRIS, JAMES STILES,		
Defendant.		<b>DECISION + ORDER ON MOTION</b>

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 015) 259, 260, 261, 262, 263, 264, 268, 280, 281, 282, 283, 284, 285  
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 269, 270, 271, 272, 273, 275, 276, 277, 278, 279, 286  
were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 287, 288, 290  
were read on this motion to/for SEAL.

BDO USA, LLP's (**BDO**) motion to dismiss James Stiles' second amended counterclaims (Mtn. Seq. No. 015) is (i) denied without prejudice with respect to the defamation counterclaim because it is timely brought and adequately alleged and (ii) granted without prejudice with respect to the counterclaim for tortious interference with business relations. Stephen Morris's motion to amend his answer to add a counterclaim for defamation (Mtn. Seq. No. 016) must be granted because the counterclaim is timely, not palpably devoid of merit, and BDO will not be prejudiced. BDO's motion to seal (Mtn. Seq. No. 017) must be granted as good cause exists for sealing.

### The Relevant Facts and Circumstances

Reference is made herein to a Manager Agreement dated October 19, 2012 (the **Manager Agreement**; NYSCEF Doc. No. 3) between Mr. Stiles and BDO whereby Mr. Stiles was employed in a manager position. Pursuant to the Manager Agreement, Mr. Stiles agreed “to devote all of [his] working time and energy and to give [his] best attention exclusively to the business of [BDO]” (*id.*, ¶ 2). Mr. Stiles also agreed to use BDO’s confidential information only as necessary to conduct BDO’s business and that he would return all confidential information in his possession to BDO upon his departure, whether by resignation, termination, or otherwise (*id.*, ¶ 5). Mr. Stiles agreed that his employment created a fiduciary relationship with BDO and that use of BDO’s confidential information or Mr. Stiles’ relationships with clients to take business away from BDO would be a breach of his fiduciary responsibilities (*id.*, ¶ 6).

Mr. Stiles was a member of BDO’s Industry Specialty Services Group (**ISSG**) and the Managing Director of the ISSG Biodefense and Government Contracts Practice (NYSCEF Doc. No. 255, ¶ 29). In that role, he was regularly exposed to BDO’s confidential and proprietary information, including information concerning BDO’s clients and their financial information, and BDO’s business plans and strategies (*id.*, ¶ 33). While at BDO, Mr. Stiles allegedly developed a close working relationship with Eric Jia-Sabota (*id.*, ¶ 31). BDO alleges that while he was still employed by BDO, Mr. Jia-Sabota began plotting to steal BDO’s business after BDO declined to appoint him head of the Public Sector Practice (*id.*, ¶ 41). Mr. Jia-Sabota founded A2Z Associates, Inc., which conducts business under the name EverGlade Consulting (**EverGlade**) and which publicly launched in direct competition with BDO on May 5, 2020 (*id.*, ¶¶ 42-45).

BDO alleges that Mr. Jia-Sabota enlisted Mr. Stiles to help him lure employees from BDO to EverGlade, including by (i) falsely telling the ISSG Biodefense team that the entire ISSG team was joining EverGlade, (ii) telling employees that if they did not join EverGlade they would have little to no job prospects at BDO, (iii) directing employees to apply for positions through EverGlade's website, (iv) instructing employees on the timing and wording of their resignation notices to BDO, and using BDO's confidential information to cause employees to resign from BDO and begin employment at EverGlade (NYSCEF Doc. No. 255, ¶¶ 46-51). BDO also alleges that Mr. Stiles and Mr. Jia-Sabota conspired to steal clients and business opportunities from BDO, including soliciting a pharmaceutical company that had invited BDO to join its advisory board but ultimately informed BDO that it wanted to work with EverGlade instead (*id.*, ¶¶ 66-71). Mr. Stiles also allegedly held weekly planning calls with certain members of the Biodefense team and told them that they would be contacting current and prospective clients of BDO to solicit their business on behalf of EverGlade (*id.*, ¶¶ 71-75).

BDO alleges that he began working at Phlow Corporation (**Phlow**) on May 1, 2020 (NYSCEF Doc. No. 255, ¶ 84) and Mr. Stiles alleges that he began working at Phlow in June 2020 (NYSCEF Doc. No. 256, ¶ 51). ***However, Phlow began paying Mr. Stiles prior to June 1, 2020 (NYSEF Doc. No. 283) and his Form I-9 lists his first day of employment as May 1, 2020 (NYSCEF Doc. No. 233)*** He tendered his resignation to BDO on May 4, 2020, effective May 29, 2020 (*id.*, ¶ 85). ***This overlap appears to be prima facie evidence that he was a faithless fiduciary.*** BDO ultimately terminated Mr. Stiles' employment on May 26, 2020, when they were unaware that he was ***already*** employed by Phlow (*id.*, ¶ 91).

Mr. Stiles alleges that Mr. Jia-Sobota left BDO after he had unsuccessfully tried to investigate, stop, and resolve BDO's non-compliance with federal contracting, and that BDO embarked on a campaign to ruin the reputations of anyone who supported or associated with Mr. Jia-Sobota (NYSCEF Doc. No. 256, ¶¶ 12-13). BDO filed a lawsuit against Mr. Jia-Sobota in the Superior Court for the District of Columbia (the **DC Action**). Mr. Stiles met with Andrea Wilson, his supervisor after Mr. Jia-Sobota left BDO, who allegedly told him that Mr. Jia-Sobota was a liar and a criminal and that if he attempted to help him or EverGlade BDO would "make it painful" (*id.*, ¶¶ 30-37). Mr. Stiles alleges that his employment was terminated two weeks later for gross misconduct, but that BDO never informed him what the gross misconduct allegedly was (*id.*, ¶ 39).

Mr. Stiles alleges that the day he was fired, BDO commenced the DC Action in which they alleged that Mr. Stiles conspired with Mr. Jia-Sobota to divert BDO employees and clients to EverGlade (NYSCEF Doc. No. 256, ¶ 44). Mr. Stiles alleges that Lisa Cozza, a managing director at BDO, then emailed a copy of the complaint in the DC Action to Altavant and Meissa Vaccines, two of BDO's ISSG clients, and Faber Law, a law firm that represents members of the biodefense and government contracts industry (*id.*, ¶¶ 45-46). In her email, Ms. Cozza allegedly wrote that Mr. Morris had been identified to be a conspirator along with Mr. Stiles and Mr. Jia-Sobota (*id.*, ¶ 47). Mr. Stiles alleges that similar emails were sent to others of BDO's ISSG clients (*id.*, ¶ 48). He also alleges that Ms. Cozza told a partner at BDO that she sent the emails to "claw back" the clients from "the evil empire" (*id.*, ¶ 49). Mr. Stiles alleges that Aaron Raddock, a BDO partner in ISSG sent a copy of the complaint to Jenner & Block, a firm that represents government contractors in the biodefense space, for some "light reading" (*id.*, ¶ 50).

Mr. Stiles alleges that he joined Phlow in June 2020 as its Executive Vice President for Government Initiatives and that he became a member of Phlow's Executive Committee (NYSCEF Doc. No. 256, ¶ 51). He asserts that BDO interfered with his relationship with Phlow, including by refusing to send him BDO-Phlow work product, Phlow deliverables, confidential information, and other materials (*id.*, ¶¶ 53-56). BDO also served subpoenas to Phlow, including on Phlow's CEO and CFO at their homes (*id.*, ¶ 58) and allegedly maligned Mr. Stiles to Phlow during negotiations in the summer of 2020. Mr. Stiles alleges that as a result, Phlow reduced Mr. Stiles' authority within the company through an organizational realignment that required Mr. Stiles to report to Phlow's Chief Business Officer who had final authority over the group and, as a result, Mr. Stiles was removed from the Executive Committee (*id.*, ¶¶ 59-60). Mr. Stiles also alleges that he was initially promised between 3% to 5% equity in Phlow but was ultimately given just 1% equity (*id.*, ¶¶ 62-63).

BDO sued Mr. Stiles by summons and complaint dated June 9, 2020, alleging causes of action for breach of contract, breach of fiduciary duty, tortious interference with contract, breach of the duty of good faith and fair dealing, faithless servant, unjust enrichment, and aiding and abetting breach of fiduciary duty (NYSCEF Doc. No. 2). BDO filed an amended complaint dated September 2, 2020 (NYSCEF Doc. No. 20). By decision and order dated January 7, 2021, the Court granted Mr. Stiles' motion to dismiss to the extent of dismissing the causes of action for tortious interference with contract, tortious interference with prospective economic advantage, and unjust enrichment (NYSCEF Doc. No. 55). Mr. Stiles filed his answer dated January 27, 2021 and did not assert any counterclaims at that time (NYSCEF Doc. No. 57). The Court

granted Mr. Stiles' motion to amend his answer, and he filed an amended answer asserting a counterclaim under the False Claims Act (NYSCEF Doc. No. 190). Mr. Stiles subsequently filed another amended answer asserting additional affirmative defenses (NYSCEF Doc. No. 201). Significantly, Mr. Stiles withdrew his counterclaim under the False Claims Act when he filed the amended answer.

BDO filed a second amended complaint dated November 10, 2021, asserting causes of action for breach of contract (first cause of action), breach of fiduciary duty (second cause of action), tortious interference with contract (third cause of action), tortious interference with prospective economic advantage (fourth and fifth causes of action), breach of the duty of good faith and fair dealing (sixth cause of action), faithless servant (seventh cause of action), unjust enrichment (eighth cause of action), and aiding and abetting breach of fiduciary duty (ninth cause of action) (NYSCEF Doc. No. 255). Mr. Stiles filed his answer to the second amended complaint dated November 23, 2021 (NYSCEF Doc. No. 256), alleging counterclaims for defamation per se (first counterclaim) and tortious interference with existing business relations (second counterclaim) withdrawing his claim under the False Claims Act.

### **Discussion**

#### ***The tortious interference with business relations counterclaim is dismissed without prejudice (Mtn. Seq. No. 015)***

On a motion to dismiss, the pleading is to be afforded a liberal construction and the Court must accept the facts as alleged as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Pursuant to CPLR 203(d),

A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed

Pursuant to CPLR 203(f), “A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” A cause of action for defamation per se is subject to a one-year statute of limitations (CPLR 215[3]) and generally accrues on the date of the first publication (*Hoesten v Best*, 34 AD3d 143, 150 [1st Dept 2006]).

Mr. Stiles’ counterclaim for defamation per se is timely brought. Contrary to BDO’s contention, CPLR 203(d), not CPLR 203(f), is the relevant provision (*BEC Capital, LLC v Bistrovic*, 177 AD3d 438, 439 [1st Dept 2019]). Mr. Stiles filed his answer in response to BDO’s second amended complaint. An answer to an amended complaint is an original answer to the amended complaint, and affirmative defenses and counterclaims are not limited to those asserted in the original answer (*Mendrzycki v Cricchio*, 58 AD3d 171, 175 [2d Dept 2008]). Thus, the counterclaims are timely if they would have been timely at the time the complaint was interposed, which was in June 2020. BDO concedes that the communications that form the basis of Mr. Stiles’ defamation per se counterclaim occurred in May and June 2020, well within the one-year statute of limitations. Accordingly, dismissal based on the statute of limitations is not appropriate. The court also notes that, although claims are not entitled to the benefit of the two-

year discovery rule (CPLR 203[g]), BDO cannot reap the benefit of withholding discovery and then assert that the counterclaims are prejudicial.

The defamation counterclaim is not properly dismissed at this stage. Statements made in the course of legal proceedings are privileged if they are at all pertinent to the litigation (*Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006]). This privilege, however, is not conferred where the underlying lawsuit is a sham action brought to defame the defendant (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]). Mr. Stiles has alleged that the DC Action was brought to cause reputational harm to Mr. Jia-Sobota and anyone associated with him, including Mr. Stiles. He also has alleged that employees at BDO have referred to him as part of the “evil empire” and told him that they would make association with Mr. Jia-Sobota “painful”. At this stage, according Mr. Stiles every favorable inference as the Court must, he has sufficiently pled that statements made in connection with the DC Action are not subject to litigation privilege. It is also unclear at this stage whether the allegedly defamatory statements are protected by common interest privilege. The communications sent by BDO to inform clients and lawyers of the DC Action were quoted in the answer with counterclaims but have not been provided for the Court. Thus, BDO is not entitled to a factual finding that any such communications were privileged and therefore must be dismissed. Leave is granted to BDO to bring an OSC and to provide the court with the actual communications that form the basis for the claim of privilege or otherwise not defamatory and supporting its argument that dismissal is appropriate.

The allegedly defamatory statements are not subject to protection under New York's anti-SLAPP statute because BDO has not demonstrated that they are a matter of public interest. Therefore, at this stage, the motion to dismiss the counterclaim for defamation per se must be denied.

BDO is entitled to dismissal of the counterclaim for tortious interference with business relations without prejudice. To allege tortious interference with business relations, a party must plead (i) that it had a business relationship with a third party, (ii) that the defendant new of that relationship and intentionally interfered with it, (iii) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort, and (iv) that the defendant's interference cause injury to the relationship with the third party (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). Defamation is a predicate wrongful act for a tortious interference claim (*id.*). As alleged, it is unavailing to argue that the DC lawsuit was directed at his relationship with Phlow or that the subpoenas were served by the third party in a manner designed to interfere with his relationship with Phlow. The answer does not allege that the process server was organized to deliver the papers at a particular time of day, etc. with the requisite malicious intent. Lastly, the answer with counterclaims does not allege that the allegedly defamatory statements were ever directed toward Phlow. Thus, the counterclaim for tortious interference with business relations must dismissed without prejudice.

***Mr. Morris's motion to amend his answer must be granted (Mtn. Seq. No. 016)***

Leave to amend should be freely given upon such terms as may be just (CPLR 3025[b]).

Motions to amend should be granted absent prejudice or surprise resulting therefrom, unless the

proposed amendment is palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

Mr. Morris moves to amend his answer to assert a counterclaim for defamation, based on the same underlying facts as Mr. Stiles' counterclaim for defamation. BDO argues that the counterclaim is palpably insufficient because (i) it is time-barred, (ii) the statements are protected by litigation privilege and common interest privilege, and (iii) the counterclaim violates New York's anti-SLAPP laws. For the reasons state above, these arguments fail. BDO's argument that it will suffer prejudice if this amendment is permitted also fails. The information that forms the basis of this counterclaim was squarely in BDO's possession and the delay in bringing the counterclaim was caused by BDO's delay in producing this information. The motion to amend is therefore granted. Additionally, leave is granted to BDO to bring an OSC based on the actual statements that such statements are privileged or otherwise not defamatory.

***BDO's motion to seal must be granted (Mtn. Seq. No. 017)***

BDO seeks to seal an earnings statement containing Mr. Stiles' personal information (NYSCEF Doc. No. 283). Good cause has been demonstrated to seal this document in its unredacted form, and the redacted document shall remain publicly filed.

It is hereby ORDERED that the branch of BDO's motion to dismiss Mr. Stiles' counterclaim for defamation is denied without prejudice; and it is further

ORDERED that BDO may move by order to show cause on or before June 24, 2022, to renew the branch of its motion to dismiss Mr. Stiles' counterclaim for defamation based on the common interest privilege or because such communications were not defamatory or such denial shall be with prejudice; and it is further

ORDERED that BDO may move by order to show cause on or before June 24, 2022, to dismiss Mr. Morris' counterclaim for defamation based on the common interest privilege or because such communications were not defamatory;

ORDERED that the branch of BDO's motion to dismiss Mr. Stiles' counterclaim for tortious interference with business relations is granted without prejudice to Mr. Stiles' right to replead; and it is further

ORDERED that Mr. Stiles must file an amended answer with counterclaims to replead the counterclaim for tortious interference with business relations on or before June 24, 2022, or the counterclaim will be dismissed with prejudice; and it is further

ORDERED that Mr. Stiles shall file an affidavit by May 27, 2022, at 5pm addressing the discrepancy between when he began getting paid by Phlow and when he alleges that he began work for Phlow; and it is further

ORDERED that Mr. Morris's motion to amend his answer is granted; and it is further

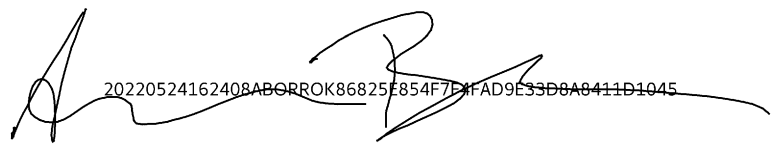
ORDERED that BDO’s motion to seal is granted; and it is further

ORDERED that BDO is directed to upload an unredacted version of NYSCEF Doc. No. 283 under provision seal by order to show cause; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal the unredacted version of NYSCEF Doc. No. 283 and to separate this document and to keep it separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed document to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

  
20220524162408ABORROK86825E854F7E4FAD9E33D8A8411D1045

5/24/2022  
DATE

ANDREW BORROK, JSC

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

652352/2020 vs.  
Motion No. 015 016 017

Page 12 of 13