Prager Metis CPAS LLC v Goldstein
2024 NY Slip Op 31891(U)
May 29, 2024
Supreme Court, New York County
Docket Number: Index No. 651768/2023
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** — ***Justice*** — **PART** **60M**

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PRAGER METIS CPAS LLC,

Plaintiff,

- v -

RICHARD L GOLDSTEIN, ADEPTUS PARTNERS LLC

Defendant.

---X

INDEX NO. 651768/2023

MOTION DATE 11/08/2023, 11/08/2023, 11/08/2023

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 40, 43, 44, 45, 46, 63, 64

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 37, 39, 41, 47, 48, 49, 50, 51, 65, 68

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 66, 69, 70, 71, 72

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The court consolidates sequence nos. 001, 002 and 003 for disposition.

Plaintiff Prager Metis CPAS, LLC (Prager) brings this action for, among other things, breach of contract, against a former principal of the company, defendant Richard L. Goldstein (Goldstein), and his present employer, defendant Adeptus Partners, LLC (Adeptus).

Goldstein, in motion sequence no. 001, and Adeptus, in motion sequence no. 002, move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint. In motion sequence no. 003, Prager moves, pursuant to CPLR 3025 (b), for leave to serve a second amended complaint.

Background

The following facts are from the amended complaint unless noted otherwise and are assumed to be true for purposes of these motions (*Tax Equity Now NY LLC v City of New York*, — NY3d —, —, 2024 NY Slip Op 01498, *3 [2024]). Prager is an international advisory and accounting firm with headquarters in New York (NY St Cts Elec Filing [NYSCEF] Doc No. 4, amended complaint ¶ 1). Adeptus is one of Prager's direct competitors (*id.*, ¶¶ 3 and 11).

On January 1, 2017, Prager hired Goldstein as a principal, and they entered into a principal agreement (the Principal Agreement) the same date (*id.*, ¶ 6). Pursuant to section 7 of the Principal Agreement, Goldstein agreed to be bound to the covenants in section 9 in the "Fourth Amended and Restated Limited Liability Company Agreement of Prager Metis CPAS, LLC" dated January 1, 2013 and section 9 in the "Limited Liability Company Agreement of Prager Metis International, LLC" dated January 1, 2013 (together, the Operating Agreements), incorporated by reference into the Principal Agreement (NYSCEF Doc No. 21, Goldstein aff, exhibit 2 at 1 and 6). Section 9.4 of the Operating Agreements (the Restrictive Covenants) provides, in relevant part:

> "Non-Solicitation Covenants. A Member who … voluntarily withdraws from the Firm …, then for a [sic] so long as such former Member is receiving payments pursuant to Section 8 from the Firm and for a period of two years from the receipt of the last such payment, such former Member shall not, directly or indirectly, whether for such Member individually or on behalf of any other Entity, or as employee, shareholder, member, partner, agent, representative or independent contractor of any other Entity:
>
> (a) provide any services or products provided by the Firm or its affiliates in the normal course of its business, to any person, business entity, association, trust, estate, not-for-profit entity or corporation who is or has been (i) a client of the Firm or its affiliates at any time during the eighteen (18) months prior to the date of termination, or (ii) a potential client of the Firm, where there has been direct communication between such Member and such potential client during the twelve (12) months prior to termination, as supported by time sheets, reports, letters or other similar documentation;

> (b) solicit any party described in paragraph (a) above for the purpose of providing any services or products provided by the Firm; or
>
> (c) hire, retain, employ, working with or soliciting for such purpose any person who has been a Member or an employee of the Firm or its Affiliates at any time during the twelve-month period prior to the date of withdrawal.
>
> Each Member acknowledges and agrees that such Member could not engage in activities of the type specified in this Section 9.4 without disclosing or utilizing confidential client information or proprietary information belonging to the Firm, and accordingly, the covenants contained in this Section 9.4 are necessary to preserve and protect for the benefit of the Firm such confidential and proprietary information" (NYSCEF Doc No. 22, Goldstein aff, exhibit 3 at 44-45).

Section 9.5 allows Prager to recover liquidated damages in the event Goldstein breaches section 9.4 (*id.* at 45). Goldstein agreed to remain obligated under section 7 of the Principal Agreement and sections 8 and 9 of the Operating Agreements, including the provisions on non-competition, nonsolicitation, confidentiality, and proprietary information, after the Principal Agreement is terminated (NYSCEF Doc No. 21 at 1 and 7 [sections 1.1 (b) and 9.11]).

Prager alleges that Goldstein resigned from Prager on March 19, 2021 and joined Adeptus as a partner in its White Plains office (NYSCEF Doc No. 4, ¶ 10). Prager alleges that Goldstein breached section 7 of the Principal Agreement and section 9.4 of the Operating Agreements (together, the Agreements) by soliciting and servicing Prager's clients, soliciting three employees – Babacar Ndom (Ndom), Lewis Stark (Stark), and Michael Elam (Elam) – to join Adeptus, and by disclosing Prager's trade secrets and confidential and proprietary information to Adeptus (*id.*, ¶¶ 12-14). Although Prager's former counsel sent defendants a cease-and-desist letter on July 13, 2021, Adeptus continues to employ Goldstein (*id.*, ¶¶ 16-17).

The amended complaint, dated May 4, 2023, asserts four causes of action for: (1) breach of contract against Goldstein; (2) breach of the implied covenant of good faith and fair dealing against Goldstein; (3) unjust enrichment against all defendants; and (4) tortious interference with prospective economic advantage/business relations against all defendants (NYSCEF Doc No. 4). In lieu of serving answers, Goldstein and Adeptus (together, defendants) move separately for dismissal. Prager moves for leave to serve a second amended complaint (the SAC).

Discussion

A. The Motion to Amend

Prager, as permitted by court order (NYSCEF Doc No. 37, order, in *Prager Metis CPAS LLC v Koenig*, Sup Ct, NY County, index No. 652000/2023), moves for leave to amend its complaint a second time. Prager withdraws its third cause of action for unjust enrichment and its fourth cause of action for tortious interference with prospective economic advantage/business relations, seeks to revise the latter claim, assert two new causes of action for unfair competition and tortious interference with contract relations, and plead additional allegations. Adeptus and Goldstein, adopting Adeptus' arguments, oppose. They argue that the proposed SAC is devoid of merit because it suffers from the same deficiencies as the amended complaint and contains only bare legal conclusions without any supporting facts.

It is well settled that "a request for leave to amend should generally be granted absent prejudice or surprise to the opposing party" (*Favourite Ltd. v Cico*, — NY3d —, —, 2024 NY Slip Op 01496, *2 [2024]), unless the proposed amendment is "devoid of merit or palpably insufficient" (*Smith v Founders Entertainment LLC*, 216 AD3d 417, 417 [1st Dept 2023]). To that end, the court may examine the underlying merits of the proposed amendments (*Hibbard v American Fin. Trust, Inc.*, 214 AD3d 452, 452 [1st Dept 2023]). A proposed amendment containing speculative

and conclusory allegations without factual support is considered palpably insufficient and devoid of merit (*Precious Care Mgt., LLC v Monsey Care, LLC*, 221 AD3d 922, 924 [2d Dept 2023]; *Merlino v Knudson*, 214 AD3d 642, 645 [2d Dept 2023]). Delay alone is not a sufficient reason to deny a motion to amend unless the opposing party also establishes significant prejudice, meaning "'[it] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position'" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [citations omitted]).

At the outset, the court declines to deny the motion on the ground that Prager failed to submit a "proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025 [b]). Ordinarily, the failure to comply with this statutory requirement warrants denial (*see Wiltz v New York Univ.*, 217 AD3d 521, 522 [1st Dept 2023]). Prager, however, has cured the defect in reply (NYSCEF Doc No. 70, D'Artiglio affirmation, exhibit 2). Defendants also complain that the proposed SAC submitted on the motion deviates from the redlined proposed SAC Prager had exchanged previously (NYSCEF Doc No. 62, defendants' mem of law at 5 and 7). Defendants, though, have not furnished a copy of the prior redlined version. In any event, defendants have not shown any prejudice from the modifications.

1. Unfair Competition against Defendants

Prager seeks to plead as a new third cause of action a claim for unfair competition based on a misappropriation theory (NYSCEF Doc No. 53, Prager mem of law at 2). The proposed SAC alleges that defendants used "wrongful means" to solicit and hire Prager's employees and in soliciting and servicing Prager's clients in deliberate violation of the Restrictive Covenants in the Principal Agreement and Operating Agreements (NYSCEF Doc No. 55, D'Artiglio affirmation, exhibit 1, proposed SAC ¶ 35).

"Under the 'misappropriation theory' of unfair competition, a party is liable if they unfairly exploit 'the skill, expenditures and labors' of a competitor ... in an unethical way ... [so as to] unfairly neutralize[ ] a commercial advantage that the plaintiff achieved through 'honest labor'" (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018] [citations omitted]; *see also ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007] ["[t]he term 'commercial advantage' has been used interchangeably with 'property' within the meaning of the misappropriation theory"]; *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998], *lv denied* 688 NYS2d 372 [1999] [misappropriation includes the "exploitation of proprietary information or trade secrets"]). The commercial advantage must have belonged exclusively to the plaintiff (*LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 AD3d 474, 476 [2d Dept 2006]). "[S]ome element of bad faith" by the defendant is required (*Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 [2d Dept 2007]), and "[a]llegations of a 'bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information' can give rise to a cause of action for unfair competition" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015] [citation omitted]). Bad faith may be satisfied by showing "fraud, deception, or an abuse of a confidential relationship" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015]).

Here, the proposed SAC is "barren of any factual content to support the claim[ ]" (*Swain v Garban-Intercapital Mgt. Servs. Ltd.*, 2001 NY Slip Op 30081[U], *10 [Sup Ct, NY County 2001], *appeal withdrawn* 287 AD2d 946 [1st Dept 2001]) and merely parrots the elements for an unfair competition claim. The allegation that Goldstein disclosed Prager's trade secrets and confidential and proprietary information (NYSCEF Doc No. 55, ¶ 16) is entirely conclusory. The allegation that Goldstein purportedly disclosed client lists, fee schedules, employee lists, and employee and

compensation is made entirely upon information and belief (NYSCEF Doc No. 53, ¶ 16). Not only has Prager failed to identify the source of its information (*see Dau v 16 Sutton Place Apt. Corp.*, 205 AD3d 533, 535 [1st Dept 2022]), it has not pleaded any facts showing that such information qualified as trade secrets (*see Schroeder*, 133 AD3d at 29). The proposed SAC does not offer any detail explaining when Goldstein allegedly disclosed this information (NYSCEF Doc No. 83, 11/8/2023 oral argument tr at 17, in *Koenig*). The proposed SAC is also patently devoid of any particular factual allegations evincing bad faith on the part of either defendant. Prager vaguely alleges only that defendants employed "wrongful means" without further description (*see Schonfeld Strategic Advisors LLC v Sassun*, 2020 NY Slip Op 30313[U], *9 [Sup Ct, NY County 2020]). As such, the new allegations amount to "no more than a conclusory statement of suspicion or conjecture" (*Liberty Imports v Bourguet*, 146 AD2d 535, 537 [1st Dept 1989]). Prager's motion insofar as it seeks leave to plead a cause of action for unfair competition is denied.

2. Tortious Interference with Contract Relations against Defendants

To state a cause of action for tortious interference with contract, the plaintiff must plead "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). The claim must be supported by more than just "mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]).

Here, the proposed SAC fails to plead any facts to support each element of the claim (*see Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1037 [2d Dept 2011] [proposed tortious interference with contract claim "suffer[s] from the same defects as those

alleged in the amended complaint"]; *Chestnut Hill Partners, LLC v Van Raalte*, 45 AD3d 434, 435 [1st Dept 2007] [speculative allegations insufficient on a proposed tortious interference with contract claim]). The proposed SAC alleges that Adeptus induced Goldstein to breach the Agreements and that defendants induced Stark to breach his employment agreement with Prager (NYSCEF Doc No. 55, ¶¶ 41-43). The proposed SAC, though, fails to set forth any facts to show that Adeptus was actually aware of a contract between Prager and a third party, including Stark and Goldstein (*see Karl Reeves, C.E.I.N.Y. Corp. v Associated Newspapers, Ltd.*, — AD3d —, — , 2024 NY Slip Op 01898, *8 [1st Dept 2024]). The proposed SAC alleges only that Prager placed Adeptus on notice when its counsel sent a cease-and-desist letter to them (NYSCEF Doc No. 55, ¶ 19). There is no allegation that Adeptus was specifically aware of the Agreements prior to the date of that letter or that Adeptus was aware of them when the alleged breaches occurred (*see 2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]).

With respect to the allegations concerning Stark, the proposed SAC does not allege whether Stark's employment agreement with Prager contained a specific term of duration, and thus, the agreement is presumed to have been terminable at will (*see American Preferred Prescription, Inc. v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998]). A tortious interference with contract claim will not lie where the claim involves an agreement that is terminable at will (*see Petrisko v Animal Med. Ctr.*, 187 AD3d 553, 554 [1st Dept 2020]; *Zephir v Inemer*, 305 AD2d 170, 170 [1st Dept 2003]; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299 [1st Dept 1999]).

"But for" causation must be specifically alleged (*see Burrowes*, 25 AD3d at 373), and here, the proposed SAC does not allege that the purported breach of the Agreements would not have

occurred "but for" Adeptus' interference (*see 111 W. 57th Inv. LLC v 111 W57 Mezz Inv. LLC*, 220 AD3d 435, 436 [1st Dept 2023], *lv denied* 41 NY3d 905 [2024]).

In addition, the proposed SAC fails to detail the means by which Adeptus allegedly procured a breach or plead nonconclusory facts that Adeptus intentionally caused Goldstein to breach the Agreements (*see Influx Capital, LLC v Pershin*, 186 AD3d 1622, 1624 [2d Dept 2020] [complaint fails to describe how the defendants induced a breach]; *Ferrandino & Son, Inc.*, 82 AD3d at 1036 [same]; *57th St. Arts, LLC v Calvary Baptist Church*, 52 AD3d 425, 426 [1st Dept 2008] [allegations regarding intentional procurement insufficient]; *CDR Creánces S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 [1st Dept 2007] [the complaint failed to plead the "intent to induce a breach in nonconclusory fashion"]). Prager's motion insofar as it seeks leave to plead a cause of action for tortious interference with contract relations is denied.

3. Tortious Interference with Prospective Economic Advantage/Business Relations against Defendants

Prager seeks to replace its the fourth cause of action for tortious interference with prospective economic advantage/business relations, now withdrawn (NYSCEF Doc No. 53 at 2), with a new fifth cause of action asserting the same claim against both defendants.

A cause of action for tortious inference with prospective economic advantage requires the plaintiff to plead that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]; *see also Chaitman v Moezinia*, 132 AD3d 555, 555 [1st Dept 2015] [tortious interference with business relations requires the plaintiff to plead that the defendant acted solely out of malice or used improper or illegal means]). Unlawful or wrongful means requires

more than "simple persuasion" and can include "physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure" (*Snyder*, 252 AD2d at 300) or conduct that "constitute[s] a crime or an independent tort" (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). The plaintiff must plead the defendant's knowledge of the prospective business relationship with a third party (*see Caprer v Nussbaum*, 36 AD3d 176, 204 [2d Dept 2006]) and tortious conduct directed at that party (*Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 714 [2d Dept 2019]).

Here, the allegations for this revised claim are wholly conclusory and unsupported by any facts, rendering the proposed amendment palpably insufficient and patently devoid of merit (*Chaitman*, 132 AD3d at 555). The proposed SAC fails to identify a third-party client with whom Prager had a business relationship, asserting only that a list of Prager's clients would be provided post-filing (NYSCEF Doc No. 55 at 3 n 2). Prager contends that this intentional omission was made at Adeptus' request (NYSCEF Doc No. 47, Prager mem of law at 6). The proposed SAC also alleges that Goldstein solicited two Prager employees, Ndom and Elam, to join Adeptus[1] (NYSCEF Doc No. 55, ¶ 15). Other than a vague and general allegation of "malice" (NYSCEF Doc No. 55, ¶ 51), the proposed SAC fails to describe the improper means allegedly employed by defendants to solicit these employees or clients (*see BGC Partners, Inc. v Avison Young (Canada) Inc.*, 160 AD3d 407, 407 [1st Dept 2018] [interference by wrongful means not alleged]). The proposed SAC alleges only that "Goldstein engaged in bad faith conduct by utilizing his sensitive position with Prager to leverage his knowledge of Prager's client list, employee relations, fee schedule, and employee compensation arrangements to secure Prager's employees and clients upon him leaving employment with Prager" (NYSCEF Doc No. 55, ¶ 31). This vague description

[1] Neither Ndom nor Elam had employment contracts with Prager (NYSCEF Doc No. 43, Prager mem of law at 4; NYSCEF Doc No. 47 at 4).

of "bad faith conduct" hardly qualifies as "'more culpable conduct' amounting to 'a crime or independent tort'" (*4270 Third Ave. Hous. LLC v CA Ventures LLC*, 211 AD3d 417, 419 [1st Dept 2022] [citation omitted]). In addition, the proposed SAC fails to allege that "but for" the interference, Prager would have received economic benefits (*see Sternberg v Wiederman*, 225 AD3d 820, 822 [1st Dept 2024]) or would have entered into a contract with a third party (*see Trepel v Hodgins*, 183 AD3d 429, 429 [1st Dept 2020]; *BDCM Fund Adviser, L.L.C. v Zenni*, 103 AD3d 475, 478 [1st Dept 2013] [vague and conclusory allegation of a reasonable probability of a business relationship with a third party insufficient]). The proposed SAC also fails to plead any factual allegations tending to show that defendants were "motivated solely by malice, as opposed to [their] normal economic interest" (*Lion's Prop. Dev. Group LLC v New York City Regional Ctr., LLC*, 115 AD3d 488, 489 [1st Dept 2014]). As noted during oral argument, the proposed tortious interference claim is duplicative of the proposed unfair competition claim (NYSCEF Doc No. 83, 11/8/2023 oral argument tr at 6-8, in *Koenig*; *see also Elegran LLC v Urban Compass, Inc.*, 2020 NY Slip Op 33272[U], *3 [Sup Ct, NY County 2020]). Prager's motion for leave to plead a new fifth cause of action for tortious interference with prospective economic advantage/business relations is denied.

B. The Motions to Dismiss

On a motion to dismiss brought under CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "The only question is whether the complaint adequately alleges facts giving rise to a cause of action, 'not whether [it] properly labeled or artfully stated one'" (*Tax Equity Now NY*

LLC, 2024 NY Slip Op 01498, *3 [citation omitted]). Thus, dismissal is warranted if "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). However, "[w]hen documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citation omitted]). Dismissal is appropriate if the evidence demonstrates that the plaintiff has no cause of action (*id.*).

Dismissal under CPLR 3211 (a) (1) is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law (*Audthan LLC v Nick & Duke, LLC*, — NY3d —, —, 2024 NY Slip Op 02223, *5 [2024]). To qualify as documentary evidence, the evidence must be "unambiguous[,] ... of undisputed authenticity ... [and] its contents ... essentially undeniable" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted]).

1. Breach of Contract against Goldstein

The first cause of action alleges that Goldstein breached section 7 of the Principal Agreement and section 9.4 of Operating Agreements when he solicited and serviced Prager's clients, solicited Prager employees to join Adeptus, and disclosed Prager's trade secrets and confidential and proprietary information to Adeptus (NYSCEF Doc No. 4, ¶¶ 12-14).

Goldstein argues that Prager is precluded from enforcing the Restrictive Covenants because Prager also breached the Agreements. Goldstein avers that his annual salary at the time of his resignation was $272,950 (NYSCEF Doc No. 19, Goldstein aff, ¶¶ 2-3). In 2020, Prager and Goldstein executed a notice to all "Class C" members and select principals in which Goldstein

agreed to COVID reduction of 10% of his base compensation for the second quarter that year (NYSCEF Doc No. 20, Goldstein aff, exhibit 1). Goldstein would receive 70% of his base salary, adjusted to reflect the 10% reduction, for the balance of the year, with the remaining 30% deferred and paid at the end of the year (*id.*). Goldstein claims that Prager has violated the New York State Labor Law by failing to pay him the deferred portion of his salary, and that he is owed $17,858.99 in compensation (NYSCEF Doc No. 19, ¶¶ 8-9), together with $35,000 in unpaid vacation and sick days (NYSCEF Doc No. 26, Goldstein mem of law at 6). Goldstein submits redacted paystubs for 2021 and a spreadsheet of his salary reconciliation in support (NYSCEF Doc Nos. 23-24, Goldstein aff, exhibits 4-5). Goldstein also contends that the Restrictive Covenants are overbroad and unenforceable because they apply to any prospective client without geographical limitation.[2]

Prager counters that Goldstein is not entitled to any deferred compensation because it had overpaid him over a period of three years. Section 3 of the Principal Agreement states, in part:

> "**3.1 Total Remuneration**
> (a) In consideration for the Services to be furnished by Goldstein hereunder and Goldstein's representations, warranties and covenants hereinafter set forth, the Company shall pay to Goldstein total remuneration in an amount equal to the Total Remuneration (as defined below) per annum, payable in accordance with the Company's standard paydays and subject to employee withholdings and deductions that may be required by law. Total Remuneration shall consist of (x) all salary payments paid to Goldstein, and (y) the employer 401(k) contribution made by the Company for Goldstein if he elects to participate" (NYSCEF Doc No. 21 at 2).

Prager's Global Managing Partner Lori Roth (Roth) avers that Prager paid Goldstein an additional $7,950 in 401k contributions each year from 2017 to 2020 for a total of $31,800 in

[2] Goldstein also argues that Prager has waived its right to invoke mediation or arbitration under the dispute resolution provision in section 9.4 of the Principal Agreement (NYSCEF Doc No. 26, Goldstein mem of law at 4-5). Whether such waiver occurred, if at all, has no impact on whether the amended complaint fails to state a cause of action under CPLR 3211. Adeptus also moves to dismiss the breach of contract cause of action on similar grounds as those raised by Goldstein (NYSCEF Doc No. 33, Adeptus mem of law at 14-21), but Prager has not asserted that claim against Adeptus.

excess compensation to which he was not entitled (NYSCEF Doc No. 45, Roth aff, ¶¶ 1, 3-4). Prager rejects Goldstein's unsupported assertion that he is entitled to recover $35,000 in unpaid sick and vacation days. Prager also asserts that Goldstein breached section 8.5 (a) of Operating Agreements by resigning with less than six months' notice (NYSCEF Doc No. 22 at 39). In addition, Prager maintains that Goldstein waived his right to any compensation under section 9.8 of the Operating Agreements, which reads as follows:

> "Forfeiture. In the event any withdrawn Member, or counsel on behalf of such partner, asserts or alleges in any arbitration or other legal proceeding that any of the provisions of this Section are or may not be enforceable in whole or in part, in strict compliance with their terms, then such withdrawn Member shall thereupon automatically forfeit any payments other than of capital not yet paid to such Member" (NYSCEF Doc No. 22 at 46).

Last, Prager submits that the Restrictive Covenants are reasonable; and in any event, whether they may be enforced, even in part, cannot be decided at this time.

A cause of action for breach of contract requires the plaintiff to plead the existence of an enforceable contract, the plaintiff's performance, the defendant's breach and damages (*Noto v Planck, LLC*, 225 AD3d 499, 499 [1st Dept 2024]). The complaint must identify the terms of the contract the defendant purportedly breached (*Giant Group v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003]). Prager, at a minimum, has sufficiently pleaded a cause of action for breach of contract.

A plaintiff's performance is an essential element of a claim for breach of contract (*ASKL Enters., Inc. v NYNEX Long Distance Co.*, 7 AD3d 424, 425 [1st Dept 2004]), and a restrictive covenant is not enforceable if the party who benefits from its enforcement is responsible for the breach (*Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 75 [1966]). Goldstein argues that Prager breached the Agreements when it failed to pay the compensation due to him. His evidentiary proof,

however, fails to establish that Prager breached the Agreements such that it is precluded from enforcing the Restrictive Covenants. First, Goldstein's affidavit does not qualify as documentary evidence for purposes of CPLR 3211 (a) (1) (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). Similarly, the paystubs and the undated, unauthenticated spreadsheet upon which Goldstein relies are not the type of documents that are essentially undeniable or of undisputed authenticity so as to utterly refute Prager's claim (*see Lee v Independent Mech., Inc.*, 2022 NY Slip Op 33032[U], *9 [Sup Ct, NY County 2022] [paystubs did not utterly refute the plaintiff's wage claims]). In any event, Roth's averments that Prager overpaid Goldstein are sufficient to controvert Goldstein's evidence at this early stage of the litigation. Goldstein has offered no evidence to support his contention that Prager breached the Agreements by failing to pay him his unpaid vacation and sick days. And, to the extent Goldstein claims that Prager violated Labor Law §§ 191 (3), 193 and 198, the statutes are inapplicable because Goldstein is a "person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of one thousand three hundred dollars a week" (Labor Law § 190 [7]; *Overton v Egami Group, Inc.*, 201 AD3d 455, 455 [1st Dept 2022], *lv dismissed* 38 NY3d 1177 [2022]; *McDonald v McBain*, 99 AD3d 436, 438 [1st Dept 2012], *lv denied* 21 NY3d 854 [2013]). The "'wholesale withholding of payment' … is not a 'deduction' within the meaning Labor Law § 193" (*Kolchins v Evolution Mkts., Inc.*, 182 AD3d 408, 409 [1st Dept 2020] [citation omitted]).

Next, Goldstein argues that the breach of contract claims fails because he is not a "member" in Prager. Thus, he was not required to give six months' prior written notice of his withdrawal as required in section 8.5 (a) of the Operating Agreements. The argument is unpersuasive as Goldstein ignores section 1.1 (b) of the Principal Agreement, the pertinent part of which states:

> "Goldstein expressly agrees that although he is a Principal and not a Member of the Company and International, he shall nevertheless be and remain bound by the applicable provisions contained in Sections 8 and 9 of the Operating Agreements that are applicable to Members, at all times during the term of this Agreement, and, if applicable, after termination of this Agreement, including, without limitation, those provisions related to non-competition, non-solicitation, confidentiality, proprietary information; and independence; the terms of such provisions are hereby incorporated by reference into this Agreement as if separately set forth herein, except that the term 'Member' when used therein is hereby replaced with 'Goldstein.' Goldstein's agreement to be bound by these provisions shall survive the termination of this Agreement" (NYSCEF Doc No. 21 at 1-2).

Goldstein's contention that the liquidated damages provision in section 9.5 of the Operating Agreements is inapplicable to him because he is not a member of the company is equally unpersuasive for the same reason.

New York courts will enforce a restrictive covenant in an employment contract if is it reasonable, meaning "only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman v Hirshberg*, 93 NY3d 382, 388-389 [1999] [internal quotation marks and citation omitted]). "A violation of any prong renders the covenant invalid" (*id.* at 389).

Generally, an employer has "a legitimate interest in preventing former employees from exploiting … the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment" (*Scott, Stackrow & Co., C.P.A's, P.C. v Skavina*, 9 AD3d 805, 806 [3d Dept 2004], *lv denied* 3 NY3d 612 [2004] [internal quotation marks and citation omitted]; *see also 1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503 [1st Dept 2011] [identifying trade secrets and confidential information as legitimate interests]). Likewise, "an employer has a legitimate interest in preventing an employee from leaving to work for a

competitor if the employee has cultivated personal relationships with clients through the use of the employer's resources" (*Genesee Val. Trust Co. v Waterford Group, LLC*, 130 AD3d 1555, 1558 [4th Dept 2015]). The Restrictive Covenants herein restrain Goldstein from servicing or soliciting persons or entities who were Prager's clients in the 18-month period preceding his withdrawal, soliciting persons or entities with whom Prager had communicated with as potential clients in the 12-month period before Goldstein's withdrawal, and soliciting persons employed by Prager in the 12-month period preceding his withdrawal. The Principal Agreement specifically excludes three named clients from the Restrictive Covenants (NYSCEF Doc No. 21 at 13). The Restrictive Covenants also state that Goldstein recognizes that he cannot engage in such activities "without disclosing or utilizing confidential client information or proprietary information belonging to [Prager]" (NYSCEF Doc No. 22 at 45). As such, Prager has minimally identified its client relationships as the legitimate interest the Restrictive Covenants are meant to protect (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014]; *Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 806).

Goldstein submits that the Restrictive Covenants are overbroad and unenforceable because they prohibit him from servicing or soliciting all of Prager's prospective clients, irrespective of the amount of work he may have performed relative to those clients, and without setting forth a geographic limitation. On review, the Restrictive Covenants do not impose a geographic restriction, and Prager is an international accounting firm (*see Good Energy, L.P. v Kosachuk*, 49 AD3d 331, 332 [1st Dept 2008] [covenant covering the entire United States unreasonable]; *but see Malcolm Pirnie, Inc. v Werthman*, 280 AD2d 934, 935 [4th Dept 2001] ["[t]he restrictive covenants ... are client-based, and the court erred in determining that they are unreasonable as a matter of law because they contain no geographic limitations"] and *Business Intelligence Servs.*,

Inc. v Hudson, 580 F Supp 1068, 1073 [SD NY 1984] [covenant without geographic limitation for international business not unreasonable]). In addition, the Restrictive Covenants appear to prohibit Goldstein from dealing with Prager's entire client base, except for the carve-out, above.

Partial enforcement of a restrictive covenant is permissible to the extent the reasonableness standard in *BDO Seidman* is not violated (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 105 [1st Dept.2008], *affd as mod* 14 NY3d 774 [2010]). Whether a restrictive covenant should be enforced involves a "case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement" (*BDO Seidman*, 93 NY2d at 394). Partial enforcement may be justified where the employer demonstrates the absence of "overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" and that it "ha[d] in good faith sought to protect a legitimate business interest" (*id.*). In this instance, a determination whether the Restrictive Covenants may be partially enforced cannot be made on this sparse record (*see Greenwich Mills Co. v Barrie House Coffee Co.*, 91 AD2d 398, 402 [2d Dept 1983] ["without a trial or even full discovery having yet been held, it is impossible to judge the validity of the covenants in question in light of these considerations"]; *Globaldata Mgt. Corp. v Pfizer Inc.*, 10 Misc 3d 1062[A], 2005 NY Slip Op 52079[U], *9 [Sup Ct, NY County 2005] ["it is premature to determine the validity of the restrictive covenant in issue based on a motion to dismiss"]). Additionally, it would be premature on this pre-answer motion to dismiss to determine whether the liquidated damages provision is unreasonable or imposes an unenforceable penalty (*see Davis v Marshall & Sterling, Inc.*, 217 AD3d 1073, 1077 [3d Dept 2023], *appeal dismissed* 40 NY3d 1084 [2024] [material issue whether liquidated damages provision is a "legitimate estimate … or an unenforceable penalty" because of the different percentages of commissions payable on client

contracts]), especially where the validity of the Restrictive Covenants have not yet been determined. Goldstein's motion insofar as it seeks dismissal of the first cause of action is denied.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing against Goldstein

Goldstein argues that the second cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of the breach of contract cause of action. Prager counters that pleading in the alternative is permitted under CPLR 3014.

Implied in every contract in New York is "a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). A cause of action for breach of the implied covenant of good faith and fair dealing will be dismissed as duplicative of a breach of contract cause of action where "'both claims arise from the same facts' and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation" (*BML Props. Ltd. v China Constr. Am., Inc.*, — AD3d —, —, 2024 NY Slip Op 02252, *2 [1st Dept 2024] [citation omitted]).

Here, the cause of action for breach of the implied covenant is duplicative of the breach of contract cause of action. Both claims are predicated upon the same facts and conduct (*BML Props. Ltd.*, 2024 NY Slip Op 02252, *2), and Prager's claim for damages on the breach of the implied covenant claim is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Studio 1872 Inc. v Bond St. Levy LLV,* 225 AD3d 578, 578 [1st Dept 2024] [internal quotation marks and citation omitted]). Prager's attempt to bolster this cause of action by alleging in the proposed SAC that "Goldstein engaged in bad faith conduct" is insufficient (NYSCEF Doc

No. 55, ¶ 31), since its assertion of bad faith is entirely conclusory and unsupported by any factual allegations (*see Paulicopter-Cia. v Bank of Am., N.A.*, 182 AD3d 458, 459 [1st Dept 2020] [dismissing breach of the implied covenant of good faith and fair dealing claim as duplicative of the breach of contract claim where "the complaint makes no nonconclusory allegations of bad faith on defendant's part"]). The second cause of action for a breach of the implied covenant of good faith and fair dealing is dismissed.

3. Unjust Enrichment against Defendants

Prager has withdrawn the third cause of action for unjust enrichment (NYSCEF Doc No. 43 at 3; NYSCEF Doc No. 47 at 3). Accordingly, the third cause of action for unjust enrichment in the amended complaint is permitted to be withdrawn.

4. Tortious Interference with Prospective Economic Advantage/Business Relations against Defendants

Prager has withdrawn the fourth cause of action for tortious interference with prospective economic advantage/business relations (NYSCEF Doc No. 53 at 2). Accordingly, the fourth cause of action for tortious interference with prospective economic advantage/business relations is permitted to be withdrawn. Even if it had not been withdrawn, the tortious interference with prospective economic advantage/business relations claim, as pleaded in the amended complaint, suffers from the same infirmities as in the proposed SAC, discussed *supra*.

5. Recovery of Liquidated Damages and Attorneys' Fees from Adeptus

Finally, Adeptus has also shown that Prager has no basis to recover liquidated damages or attorneys' fees in the absence of a statute, agreement between the parties or court rule (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Accordingly, it is

ORDERED that plaintiff Prager Metis CPAS LLC is permitted to withdraw the third and fourth causes of action in the amended complaint, and those causes of action are deemed withdrawn; and it is further

ORDERED that the part of the motion by defendant Richard L. Goldstein to dismiss the first and second causes of action in the amended complaint (motion sequence no. 001) is granted to the extent of dismissing the second cause of action, only, and the second cause of action is dismissed as against said defendant; and it is further

ORDERED that the part of the motion by defendant Richard L. Goldstein to dismiss the third and fourth causes of action in the amended complaint (motion sequence no. 001) is denied as moot; and it is further

ORDERED that defendant Richard L. Goldstein shall serve an answer to the amended complaint within 20 days of service of this order with written notice of entry; and it is further

ORDERED that the motion by defendant Adeptus Partners LLC to dismiss the amended complaint (motion sequence no. 002) is granted, and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Richard L. Goldstein; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the amended caption is as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

---x

PRAGER METIS CPAS LLC,

Plaintiff,

- against -

RICHARD L. GOLDSTEIN,

Defendant.

---x

Index No. 651768/2023

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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); and it is further.

ORDERED that the motion by plaintiff Prager Metis CPAS LLC for leave to serve a second amended complaint (motion sequence no. 003) is denied.

5/29/2024
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			X	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ]	DENIED	X	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE