

Prager Metis CPAS LLC v Koenig

2024 NY Slip Op 31894(U)

May 29, 2024

Supreme Court, New York County

Docket Number: Index No. 652000/2023

Judge: Melissa A. Crane

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

PRESENT:	<u>HON. MELISSA A. CRANE</u>	PART	60M
	<i>Justice</i>		
-----X		INDEX NO.	<u>652000/2023</u>
PRAGER METIS CPAS LLC,		MOTION DATE	<u>11/08/2023, N/A, N/A</u>
Plaintiff,		MOTION SEQ. NO.	<u>001 002 003</u>
- v -			
STEVEN KOENIG, ADEPTUS PARTNERS LLC		DECISION + ORDER ON MOTION	
Defendant.			

-----X

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, 28, 29, 30, 34, 35, 38, 39, 40, 41, 42, 43, 44, 63, 66, 70, 75 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 31, 36, 45, 46, 47, 48, 49, 64, 71, 76 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 68, 69, 72, 73, 74 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 member of the company, defendant Steven Koenig (Koenig), and his present employer, defendant Adeptus Partners, LLC (Adeptus). Koenig, 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. 5, amended complaint ¶ 1). Adeptus is one of Prager's direct competitors (*id.*, ¶¶ 1 and 9).

On October 8, 2018, Prager hired Koenig as a "Class A" member, and they entered into a "Compensation Agreement – Class A Member" (the Member Agreement) the same date¹ (*id.*, ¶ 4). Pursuant to section 1.4 of the Member Agreement, Koenig agreed to be bound to the "Fourth Amended and Restated Limited Liability Company Agreement of Prager Metis CPAS, LLC" dated January 1, 2013 and the "Limited Liability Company Agreement of Prager Metis International, LLC" dated January 1, 2013 (together, the Operating Agreements), including the provisions related to non-competition, nonsolicitation, confidentiality and proprietary information (NYSCEF Doc No. 10 at 2). The Member Agreement terminated automatically if Koenig withdrew (*id.* at 10 [section 3.1]). If the agreement is terminated, Koenig "shall continue to remain obligated under all provisions of the Operating Agreements which are intended ... to survive the termination of [Koenig's] interests in [Prager] ... including, without limitation Section[] ... 9" (*id.* [section 3.3]).

Section 9.4 of the Operating Agreements (the Restrictive Covenants) reads as follows:

"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 Company, the Firm or its respective 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 Company, the Firm or its respective affiliates at any time during the

¹ According to the Member Agreement, S.A. Koenig & Associates CPAs, P.C. had sold and transferred substantially all of its assets to Prager (NYSCEF Doc No. 10, Koenig affirmation, exhibit B at 1).

eighteen (18) months prior to the date of termination, or (ii) a potential client of the Company or 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 Company or the Firm or its respective 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 Company or the Firm, and accordingly, the covenants contained in this Section 9.4 are necessary to preserve and protect for the benefit of the Company and the Firm such confidential and proprietary information” (NYSCEF Doc No. 9, Koenig affirmation, exhibit A at 45).²

In the event Koenig breaches the Restrictive Covenants, Prager may recover liquidated damages from Koenig (*id.* at 46 [section 9.5]).

Prager alleges that Koenig resigned on November 1, 2022 without providing 45 days’ notice and joined Adeptus as a partner in its Long Island office (NYSCEF Doc No. 5, ¶ 8). Prager alleges that Koenig breached sections 1.4 and 3.3 of the Member Agreement and section 9.4 of the Operating Agreements (together, the Agreements) by soliciting and servicing Prager’s clients; soliciting one or more Prager employees to join Adeptus; and, by disclosing Prager’s trade secrets and confidential and proprietary information to Adeptus (*id.*, ¶¶ 11-12). Although Prager’s former counsel sent Koenig a cease-and-desist letter, Adeptus continues to employ him (*id.*, ¶¶ 14-15). It

² This language is taken from the “Fifth Amended and Restated Limited Liability Company Operating Agreement of Prager Metis CPAS LLC” dated January 1, 2022. Although the amended complaint refers to the Fourth Amended and Restated Agreement (NYSCEF Doc No. 5, ¶ 4), Prager discusses the Fifth Amended and Restated Agreement in its opposition (NYSCEF Doc No. 38, Prager mem of law at 4).

is further alleged, upon information and belief, that Koenig has received client payments that should have been paid to Prager (*id.*, ¶ 16).

The amended complaint dated May 15, 2013 asserts four causes of action for: (1) breach of contract against Koenig; (2) breach of the implied covenant of good faith and fair dealing against Koenig; (3) unjust enrichment against all defendants; and (4) tortious interference with prospective economic advantage/business relations against all defendants (NYSCEF Doc No. 5). In lieu of answering the amended complaint, Koenig and Adeptus (together, defendants) move separately for dismissal. Prager moves for leave to serve a second amended complaint (SAC).

Discussion

A. The Motion to Amend

Prager, court order permits (NYSCEF Doc No. 37), 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 a new third cause of action for unfair competition and a new fourth cause of action for tortious interference with contract relations, and plead additional allegations. Defendants contend the proposed SAC 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 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. 69, 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 assert a claim for unfair competition based on a misappropriation theory against both defendants (NYSCEF Doc No. 51, Prager mem of law at 2). The proposed SAC alleges that defendants used “wrongful means” to solicit and hire Prager’s employees and to solicit and service Prager’s clients in deliberate violation of the Restrictive Covenants (NYSCEF Doc No. 53, 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 assertion that Koenig disclosed Prager’s trade secrets and confidential and proprietary information (NYSCEF Doc No. 53, ¶ 16) is entirely conclusory. The proposed SAC does not plead any facts detailing when Koenig alleging disclosed this information (NYSCEF Doc

No. 83, 11/8/2023 oral argument tr at 17). The allegation that Koenig purportedly disclosed client lists, fee schedules, employee lists, and employee compensation is made entirely upon information and belief (NYSCEF Doc No. 53, ¶ 16). Prager has failed to identify the source of its information (*see Dau v 16 Sutton Place Apt. Corp.*, 205 AD3d 533, 535 [1st Dept 2022]), and it has not pleaded any facts showing that this information qualified as trade secrets (*see Schroeder*, 133 AD3d at 29). The proposed SAC is also patently devoid of any factual allegations evincing bad faith on the part of either defendant inasmuch as it has not been alleged that either defendant stole confidential information (*see e.g. Fada Intl. Corp. v Cheung*, 57 AD3d 406, 406 [1st Dept 2008], *lv denied* 12 NY3d 706 [2009]; *see also Schonfeld Strategic Advisors LLC v Sassun*, 2020 NY Slip Op 30313[U], *9 [Sup Ct, NY County 2020] [manner in which defendants acted in bad faith not described]). Further, this proposed cause of action as against Koenig is duplicative of the breach of contract claim because both are predicated upon alleged breaches of the Agreements (*see Richmond Global Compass Fund Capital Mgt. GP, LLC v Nascimento*, 224 AD3d 558, 559 [1st Dept 2024]; *Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 418 [1st Dept 2020]). 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 Adeptus

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]).

Under these principles, 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 Koenig to breach the Agreements by joining Adeptus without providing Prager with the requisite notice and by soliciting Prager’s employees and clients in violation of the Agreements (NYSCEF Doc No. 53, ¶ 44). The proposed SAC, though, fails to plead any relevant facts that Adeptus was actually aware of the Agreements between Prager and Koenig (*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 Koenig (NYSCEF Doc No. 53, ¶ 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]).

The proposed SAC alleges that Koenig solicited employee Nicholas Andujar (Andujar) to join Adeptus (NYSCEF Doc No. 53, ¶ 15). The proposed SAC does not allege whether Andujar had an employment contract with Prager or if Andujar’s contract contained a specific term of duration. Thus, it is presumed the contract was 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 (*Burrowes*, 25 AD3d at 373), and here, the proposed SAC does not plead that the purported breaches 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 Koenig 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 Créances 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 the fourth cause of action for tortious interference with prospective economic advantage/business relations, now withdrawn (NYSCEF Doc No. 51 at 2), with a 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 client with whom Prager had a business relationship, although this omission was purportedly made at Adeptus’s request, with Prager to provide a list of clients post-filing (NYSCEF Doc No. 53 at 3 n 2). The proposed SAC also alleges that Koenig solicited Andujar to join Adeptus (NYSCEF Doc No. 53, ¶ 15). Other than a vague and general allegation of “malice” (*id.*, ¶ 52), the proposed SAC fails to describe the improper means purportedly employed by defendants to solicit Andujar and the unnamed clients (*see BGC Partners, Inc. v Avison Young (Can.) Inc.*, 160 AD3d 407, 407 [1st Dept 2018] [interference by wrongful means not alleged]). The proposed SAC alleges only that “Koenig 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. 53, ¶ 34). This vague description of bad faith conduct hardly qualifies as "more culpable conduct' amounting to 'a crime or independent tort'" (*4720 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 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 indicated during oral argument, the proposed tortious interference claim is duplicative of the proposed unfair competition claim (NYSCEF Doc No. 83 at 6-8; *see also Elegran LLC v Urban Compass, Inc.*, 2020 NY Slip Op 33272[U], *3 [Sup Ct, NY County 2020]).

Last, the proposed SAC alleges that Koenig interfered with Prager's prospective economic advantage and business relations in direct violation of the Restrictive Covenants (NYSCEF Doc No. 53, ¶ 49). This cause of action as against Koenig is duplicative of the breach of contract cause of action, since the claims are based upon the same set of facts and the same conduct (*see Saulsbury v Durfee*, 201 AD3d 1318, 1323 [4th Dept 2022]). Prager's motion for leave to plead a claim 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 Koenig

The first cause of action alleges that Koenig breached section 9.4 of the Operating Agreements and sections 1.4 and 3.3 of the Member Agreement 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. 5, ¶¶ 10-12).

Koenig argues that Prager is precluded from enforcing the Restrictive Covenants because Prager failed to comply with a condition precedent in the Member Agreement when it failed to pay Koenig the monies due to him. Section 8.5 (b) (i) in the Operating Agreements states that when a member withdraws from Prager, "any unpaid Total Remuneration through the date of withdrawal ... shall be payable immediately upon withdrawal"³ (NYSCEF Doc No. 9 at 39). Section 2.3 (c) in the Member Agreement provides that after January 1, 2021, "a portion of Member's annual Total Remuneration shall be subject to a 'holdback' or deferral to be paid to Member in a succeeding year" (NYSCEF Doc No. 10 at 7). On November 22, 2021, Prager's Global Managing Partner, Lori Roth (Roth), emailed Koenig that Prager "will be deferring 10% of equity non-guaranteed draw from 2021 into 2022" (NYSCEF Doc No. 11, Koenig aff, exhibit C). Prager implemented the holdback or deferral of 10% of Koenig's Total Remuneration again in 2022 (NYSCEF Doc No. 12, Koenig aff, exhibit D). Koenig avers that he should have been paid \$450,000 in 2021, but received only \$334,436.10 (NYSCEF Doc No. 8, Koenig aff, ¶ 8). Koenig further avers that he should have been paid \$415,000 in 2022, but received only \$207,073.25 (*id.*, ¶ 9). Koenig submits spreadsheets detailing his compensation and bank statements from 2022 in support (NYSCEF Doc Nos. 13-15, Koenig aff, exhibits E-G). Next,

³ "Total Remuneration" is defined generally as "the aggregate compensation or salary paid to the Member" (NYSCEF Doc No. 9 at 8 [section 1.1]).

Koenig maintains that the Restrictive Covenants are unenforceable under the standard enunciated in *BDO Seidman v Hirshberg* (93 NY2d 382 [1999]) (*BDO Seidman*).

Prager rejects the contention that it had to satisfy a condition precedent and maintains that Koenig is not entitled to additional compensation. On this point, Roth avers that Koenig's distribution was not contractually guaranteed and had been reduced in 2021 and 2022 because of the COVID-19 pandemic (NYSCEF Doc No. 40, Roth aff, ¶¶ 1-3). Prager further claims that Koenig has triggered section 9.8 of the Operating Agreements, which states:

“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. 9 at 47).

By challenging the enforceability of the Restrictive Covenants, Prager claims that Koenig has forfeited his right to any deferred compensation. Prager also argues that the Restrictive Covenants are reasonable. If they are overbroad, Prager urges the court to “blue pencil” the provisions.

A cause of action for breach of contract requires 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 condition precedent is ‘an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises’” (*VXI Lux Holdco S.A.R.L.*, 171 AD3d at 194 [citation omitted]). Thus, a breach of contract claim begins to accrue only after the condition precedent has been satisfied (*Deutsche Bank Natl. Trust Co. v*

Flagstar Capital Mkts., 32 NY3d 139, 149 [2018]). Contrary to Koenig's contention, section 8.5 (b) (i) is not a condition precedent as the language in that section does not expressly or impliedly condition Koenig's performance under the Restrictive Covenants upon Prager's payment of the Total Remuneration due to him upon withdrawal (*see VXi Lux Holdco S.A.R.L.*, 171 AD3d at 195).

A plaintiff's performance is an essential element of its 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]). Koenig argues that Prager committed an anticipatory breach when it failed to pay the compensation due to him. Koenig's evidentiary proof, however, fails to establish that Prager committed an anticipatory breach. Koenig'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]), and the documents upon which he relies do not utterly refute the claim (*see Flushing Sav. Bank, FSB v Siunykalmi*, 94 AD3d 807, 809 [2d Dept 2012] [bank statements were not "unassailable proof" of a default]). The email from Glenn Friedman (Friedman) shows that Prager informed Koenig that his resignation without proper notice constituted a breach of the Member Agreement (NYSCEF Doc No. 12). In addition, Friedman's statement that "it is our intention to distribute the 2021 holdback however this has not occurred to date" (*id.*) hardly qualifies as "proof of a definite and final communication by plaintiff of its intention not to perform" (*1625 Mkt. Corp. v 49 Farm Mkt., Inc.*, 165 AD3d 426, 426 [1st Dept 2018]). And while emails may be considered documentary evidence in some instances (*4720 Third Ave. Hous. LLC*, 211 AD3d at 418), Roth's averments that distributions were not contractually guaranteed and had been reduced are sufficient to controvert Koenig's evidence at this stage.

New York courts will enforce a restrictive covenant in an employment contract if it is 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 here restrain Koenig from servicing persons or entities who were Prager’s clients in the 18-month period preceding Koenig’s withdrawal, soliciting persons or entities with whom Prager had communicated with as potential clients in the 12-month period before Koenig’s withdrawal, and soliciting persons employed by Prager in the 12-month period preceding his withdrawal. The Restrictive Covenants also state that Koenig recognizes he cannot engage in such activities “without disclosing or utilizing confidential client information or proprietary information belonging to [Prager]” (NYSCEF Doc No. 9 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).

Koenig argues the Restrictive Covenants are overbroad and unenforceable because they bar him from servicing or soliciting all of Prager's clients, irrespective of whether that client had a preexisting relationship with him. Upon review, the Restrictive Covenants appear to apply to Prager's entire client base without exception for clients with whom Koenig had a prior relationship, those clients with whom Koenig had no contact with while he was employed at Prager, and those clients who had terminated their relationship with Prager (*compare Crown IT Servs. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004] [employer's time and expense in cultivating business relationship considered a legitimate interest] with *Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 370-371 [2015] [covenant prohibiting the defendant from working with any of the plaintiff's customers, including those the defendant "had never met, did not know about and for whom she had done no work," considered overbroad] and *Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704, 705 [1st Dept 2011] [no legitimate interest found where the defendant developed the client relationship independently from the plaintiff]).

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 record⁴ (*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”]).

Koenig argues that partial enforcement is not permissible because Prager did not request it, citing *Gilman & Ciocia, Inc. v Randello* (55 AD3d 871 [2d Dept 2008]) in support. That case, however, is inapposite because the Court found only that the plaintiff had failed to satisfy its prima facie showing on its motion summary judgment by demonstrating “the absence of overreaching, the coercive use of dominant bargaining power, or other anti-competitive misconduct” in connection with the agreement’s execution” (*id.* at 872). Koenig has not cited any other case to support the proposition that a party must specifically plead that it seeks partial enforcement or a “judicial blue pencil” (*BDO Seidman*, 93 NY2d at 395 [internal quotation marks and citation omitted]) of a restrictive covenant in an employment contract. Koenig’s motion insofar as it seeks dismissal of the first cause of action is denied.

⁴ Koenig asserts that Prager has a history of anti-competitive conduct and cites an action Prager commenced against a former equity partner seeking to enforce the same Restrictive Covenants captioned *Prager Metis CPAS, LLC v Hull*, Sup Ct, NY County, index No. 651078/2020 (NYSCEF Doc No. 19, Kleinmann affirmation, exhibit B). That action, however, was discontinued without a determination on whether the Restrictive Covenants were unreasonable (NYSCEF Doc No. 43, D’Artiglio affirmation, exhibit 1). At oral argument, the parties also referred to an action a former Prager partner brought in California for a judgment declaring the same Restrictive Covenants unlawful under the California Business and Professional Code (NYSCEF Doc No. 83 at 21-22 and 26-28). Counsel for Adeptus, however, acknowledged that the California case “is different ... [because] [u]nder California law you are not permitted to enforce a restrictive covenant against an employee” (*id.* at 26).

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

Koenig contends 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 permissible 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 “intrinsicly 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 Koenig engaged in bad faith conduct (NYSCEF Doc No. 53, ¶ 34) is insufficient since its claim of bad faith is conclusory and unsupported by any factual allegations (*see Paulicopter-Cia. v Bank of Am., N.A.*, 182 AD3d 458, 459 [1st Dept 2020] [“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. 38 at 3; NYSCEF Doc No. 45, Prager mem of law at 2). 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 in the amended complaint (NYSCEF Doc No. 51 at 2). Accordingly, the fourth cause of action 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 Steven Koenig 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 Steven Koenig 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 Steven Koenig 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 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, Steven Koenig; 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,

Index No. 652000/2023

Plaintiff,

- against -

STEVEN KOENIG,

Defendant.

-----X

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.

29
5/29/2024
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE