SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ASHLEE CRAWFORD** **PART** **38**

Justice

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JOINMUNCH LLC,

Plaintiff,

- v -

ISMAIL CEM BEGO,

Defendant.

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INDEX NO. 650012/2022

MOTION DATE 04/01/2022[1]

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 24

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this action to enforce restrictive covenants in an employment agreement, plaintiff JoinMunch LLC asserts claims against its former employee, defendant Ismail Cem Bego, for breach of contract, unfair competition, prima facie tort, misappropriation of trade secrets, and permanent injunction. Defendant asserts counterclaims against plaintiff for breach of contract and, alternatively, unjust enrichment/quantum meruit, to recover unpaid salary and other sums.

Plaintiff moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss defendant's counterclaims, and defendant cross-moves pursuant to the same provisions to dismiss plaintiff's complaint.

BACKGROUND

As alleged in the complaint, plaintiff was in the business of providing online food ordering software and related services to restaurant owners. Pursuant to a written employment

[1] This action was transferred to the undersigned effective February 3, 2025.

agreement dated May 22, 2020 ("Employment Agreement"), plaintiff hired defendant to serve as its Executive Vice President and Chief Technology Officer, which position afforded defendant access to plaintiff's confidential and proprietary materials, including source code and other software that plaintiff had developed (see Employment Agreement [NYSCEF 9]).

Central to the parties' dispute is Section 8 of the Employment Agreement, which contains a non-disclosure clause providing in relevant part as follows:

> Employee acknowledges that in connection with his employment, Employer will make highly sensitive Confidential Information available to Employee. Employee further acknowledges that if any of this Confidential Information is used or revealed, directly or indirectly, to any third party or is otherwise used for Employee's own personal commercial advantage to the detriment of Employer, Employer will be irreparably harmed. Employee hereby agrees to maintain in absolute and strict confidence and not to use or disclose to any third party or use for Employee's own personal commercial advantage, any Confidential Information obtained by him. Employee acknowledges and agrees that this obligation of confidentiality shall survive the termination of his employment, whether for any reason or no reason, and shall continue thereafter in perpetuity [Employment Agreement ¶ 8(a)(ii)].

The Employment Agreement also contains a non-competition clause, which provides that:

> Employee agrees that throughout the Term and for a period of one (1) year following the expiration or termination of this Agreement, Employee shall not, directly or indirectly, on his own behalf or for another person, partnership, corporation, or other entity, compete with Employer with regard to activity relating to restaurants payment software [id. at ¶ 8(b)].

The Employment Agreement contemplates the termination of defendant's employment, including upon defendant's resignation (id. at ¶¶ 6[a]-[e]). It also contains a Kentucky choice of law provision (id. at ¶ 15).[2]

[2] Although the parties expressly selected Nassau County or Kentucky as exclusive forums for disputes concerning the Employment Agreement, they do not seek to enforce that provision (see Employment Agreement ¶ 15).

Defendant's employment terminated in or about July 2021, and, since that time, defendant allegedly has used plaintiff's proprietary and confidential information to operate his own competing business, in breach of the restrictive covenants in the Employment Agreement.

DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are deemed to be true, and the plaintiff is accorded the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (Godfrey v Spano, 13 NY3d 358, 373 [2009]). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d at 88). "In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (id. [internal citation omitted]).

I. Motion to Dismiss Counterclaims

Defendant alleges that in August 2020, plaintiff ceased paying his base salary and business expense reimbursements, as required under the Employment Agreement, and asserts counterclaims for breach of contract and unjust enrichment/quantum meruit.

In support of its motion to dismiss the counterclaims, plaintiff argues that defendant's counterclaims were known at the time a June 1, 2021 Dissolution Agreement was entered into between non-parties BP Solutions LLC, Bego LLC, and JM Acquisitions LLC, and were released under the mutual releases contained therein (Gulko Affirm in Support [NYSCEF Doc.

8]; Dissolution Agmt., Ex. B to Gulko Affirm [NYSCEF Doc. 10]). Defendant opposes plaintiff's motion on the ground that he did not release any claims against plaintiff in his individual capacity, emphasizing that neither he nor plaintiff are parties to the Dissolution Agreement (Def's Memo of Law in Opp/Support at 7-8 [NYSCEF Doc. 20]).

"It is a general principal that only the parties to a contract are bound by its terms" (Highland Crusader Offshore Partners, L.P. v Targeted Delivery Technologies Holdings, Ltd., 184 AD3d 116, 121-122 [1st Dept 2020]; see Gurney-Goldman v Sol Goldman Investments LLC, 235 AD3d 428 [1st Dept 2025]; Huguenot LLC v Megalith Capital Group Fund I, L.P., 228 AD3d 404, 405 [1st Dept 2024]; Randall's Island Aquatic Leisure, LLC v City of New York, 92 AD3d 463, 463-464 [1st Dept 2012], lv denied 19 NY3d 804 [2012]). Because the parties to this action are not parties to the Dissolution Agreement, plaintiff's motion to dismiss defendant's counterclaims is denied.

II. Cross-Motion to Dismiss Complaint

A. Standing

Defendant argues that plaintiff's claims must be dismissed because plaintiff is no longer in business and, thus, cannot enforce the restrictive covenants in his Employment Agreement (Def's Memo of Law in Opp/Support at 8-11 [NYSCEF Doc. 20]; Employment Agmt. ¶ 8 [NYSCEF Doc. 9]). In opposition to the cross-motion, plaintiff merely recites that it has sufficiently pled its causes of action without specifically addressing defendant's arguments (Gulko Affirm in Reply/Opp [NYSCEF Doc. 22]).

In New York, a company generally has standing to assert claims on its own behalf, but if it is defunct, it may lack capacity to do so (see generally Favourite Ltd. v Cico, 42 NY3d 250, 257 [2024]). Defendant submits proof from the Delaware Department of State, Division of

Corporations, showing that plaintiff was not in good standing as of June 1, 2021, prior to the commencement of this action (NYSCEF Doc. 19).

A Delaware limited liability company not in good standing "may not maintain any action, suit, or proceeding in any court of the State of Delaware until such domestic [LLC] . . . has been restored to . . . good standing" (Bull Hill, LLC v HFZ Member RB Portfolio LLC, 2024 N.Y. Slip Op. 30649[U],*9 [Sup Ct, NY Co. 2024] [Joel Cohen, J.], quoting 6 Del. C. § 18-1107[l]; see also id. § 18-1107[h]). Because plaintiff does not assert that it has remedied its corporate standing in Delaware, where it was formed, and plaintiff was not in good standing at the inception of this action (cf. Young Adult Inst., Inc. v Corp. Source, Inc., 236 AD3d 483, 486 [1st Dept 2025]; TADCO Constr. Corp. v Dormitory Auth. of the State of N.Y., 202 AD3d 559, 560 [1st Dept 2022]), the Court finds that plaintiff lacks standing to assert its claims.

Notwithstanding, the Court will analyze plaintiff's claims on the merits.

B. Breach of Contract

Defendant argues that the non-competition clause is too broad to be enforceable, because it does not contain a geographic limitation and the term restricting defendant from engaging in "activity relating to restaurants payment software" is too vague (Def's Memo of Law in Opp/Support at 14-15; Employment Agreement ¶ 8[b]).

Even if the non-compete clause in the Employment Agreement were enforceable under Kentucky law, the Court would not enforce it on the ground that it is offensive to the fundamental public policy of New York (see Brown & Brown, Inc. v Johnson, 25 NY3d 364, 368-369 [2015]). Specifically, the non-compete clause imposes restrictions greater than required for the protection of plaintiff's legitimate interest (BDO Seidman v Hirschberg, 93 NY2d 382,

388-389 [1999]), given that it does not contain a geographic limitation (cf. Delta Enterprise Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012]).

However, on the merits, plaintiff has sufficiently pled a claim for breach of the confidentiality provision in the Employment Agreement (see Complaint at ¶¶ 9-24; Noto v Planck, LLC, 228 AD3d 516, 516 [1st Dept 2024][elements of breach of contract]; Markov v Katt, 176 AD3d 401, 401-02 [1st Dept 2019][same]). Plaintiff alleges that defendant expressly acknowledged and agreed in the Employment Agreement that his use or revelation of any "confidential information" obtained during the course of his employment with plaintiff would irreparably harm plaintiff, and that the confidentiality provision "shall survive the termination of his employment, whether for any reason or no reason, and shall continue thereafter in perpetuity" (Employment Agreement ¶ 8[a][ii]; Complaint at 13). While the Court has determined that plaintiff cannot maintain this action due to its lack of good standing in Delaware, there is a possibility that plaintiff could remedy this issue. As such, dismissal of plaintiff's breach of contract claim based on the confidentiality provision is granted without prejudice, and is otherwise granted with prejudice.

C. Unfair Competition

Defendant argues without support that unfair competition must be pled with specificity under CPLR 3016(b), and that plaintiff fails to sufficiently allege unfair competition (Def's Memo of Law in Opp/Support at 12-14).

"A plaintiff asserting an unfair competition claim must allege the bad faith misappropriation of a commercial advantage which belonged exclusively to the plaintiff" (Valkyrie AI LLC v PriceWaterhouseCoopers LLP, 233 AD3d 460 [1st Dept 2024][internal quotation marks and citation omitted]; see Brook v Peconic Bay Medical Center, 152 AD3d 436,

439 [1st Dept 2017]; Apogee Handcraft, Inc. v Verragio, Ltd., 155 AD3d 494, 496 [1st Dept 2017], lv denied 31 NY3d 903 [2018]; Ahead Realty LLC v India House, Inc., 92 AD3d 424, 425 [1st Dept 2012]). "A cause of action based on unfair competition may be predicated on the bad faith misappropriation of proprietary information or trade secrets" (Valkyrie AI LLC v PriceWaterhouseCoopers LLP, 233 AD3d at 460).

Plaintiff has failed to state a cause of action for unfair competition, because it does not allege a bad faith misappropriation by defendant (see Complaint at ¶¶ 7-8, 10-11, 16 25-28). Even if plaintiff had made such an allegation, its cause of action for unfair competition would be duplicative of its breach of contract claim (see EVEMeta, LLC v Siemens Convergence Creators Corp., 176 AD3d 612, 613 [1st Dept 2019]). Defendant's motion is accordingly granted as directed to plaintiff's unfair competition claim.

D. Prima Facie Tort

Defendant seeks dismissal of plaintiff's claim for prima facie tort, arguing there is no allegation that malevolence was defendant's sole motivation for the alleged misconduct, or that plaintiff suffered special damages (Def's Memo of Law in Opp/Support at 11-12).

"The requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (AREP Fifty-Seventh, LLC v PMGP Assoc., L.P., 115 AD3d 402, 403 [1st Dept 2014]; see also Posner v Lewis, 80 AD3d 308, 312 [1st Dept 2010], affd 18 NY3d 566 [2012]). "There can be no recovery under this theory unless malevolence is the sole motive for defendant's otherwise lawful act or, in other words, unless defendant acts from disinterested malevolence" (Kickertz v New York University, 110 AD3d 268, 277 [1st Dept 2013][internal quotation marks and citation omitted]; see also

Feehan v Consolidated Edison Co. of New York, 227 AD3d 522, 522-523 [1st Dept 2024]). "Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which cannot stand on its legs" (Kickertz v New York University, 110 AD3d at 277 [citation omitted]).

By this standard, plaintiff has not sufficiently pled a claim for prima facie tort (see Complaint at ¶¶ 6-19, 29-32). That part of defendant's motion seeking dismissal of this claim is therefore granted.

E. Misappropriation of Trade Secrets

Defendant maintains that the allegations supporting the claim for misappropriation of trade secrets are purely speculative (Def's Memo of Law in Opp/Support at 13; Complaint at ¶¶ 36-37 ["Defendant will inevitably use and/or disclose Plaintiff's trade secrets for his own benefit"; "As an unavoidable result of Defendant's impending misappropriat[ion] of Plaintiff's trade secrets, Plaintiff will be irreparably harmed"]). He additionally maintains, without support, that the heightened pleading standard of CPLR 3016 (b) applies to claims for misappropriation of trade secrets, and that plaintiff has not met this standard (Def's Memo of Law in Opp/Support at 12-14). Alternatively, defendant argues that plaintiff released its claims under the Mutual Release provision in the Dissolution Agreement (Def's Memo of Law in Opp/Support at 14).

"A plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means" (E.J. Brooks Company v Cambridge Security Seals, 31 NY3d 441, 452-453 [2018]).

The Court agrees that plaintiff's allegations in support of the claim for misappropriation of trade secrets are speculative and insufficient to survive dismissal at the pleading stage (see Complaint at ¶¶ 33-37).

F. Permanent Injunction

Because plaintiff's substantive claims are all dismissed, his claim for a permanent injunction is also dismissed (R.C. v City of New York, 229 AD3d 173, 176 [1st Dept 2024]; Hejailan-Amon v Amon, 160 AD3d 481, 483-484 [1st Dept 2018]; Weinreb v 37 Apartments Corp., 97 AD3d 54, 58-59 [1st Dept 2012]). Moreover, plaintiff has not alleged an injury that could not be remedied through monetary damages (Harris Patients Medical, P.C., 169 AD3d 433, 434-435 [1st Dept 2019]).

For the foregoing reasons, it is hereby

ORDERED that defendant's cross-motion to dismiss plaintiff's complaint is GRANTED; and it is further

ORDERED that plaintiff's motion to dismiss defendant's counterclaims is DENIED, and the counterclaims are severed and continued; and it is further

ORDERED that defendant shall serve a copy of this order, with notice of entry, on plaintiff via NYSCEF within seven (7) days; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 22, 2025, at 10:00 AM.

This constitutes the decision and order of the Court.

9/24/2025
DATE

ASHLEE CRAWFORD, J.S.C.

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

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