

<b>Residential Energy JV LLC v Pinto</b>
2025 NY Slip Op 35246(U)
May 23, 2025
Supreme Court, Westchester County
Docket Number: Index No. 59095/2024
Judge: Gretchen Walsh
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

-----X  
RESIDENTIAL ENERGY JV LLC  
d/b/a PARACO PLUMBING

Plaintiff,

-against-

EDWIN PINTO, PINTO PLUMBING & HEATING CORPORATION, MELQUIN POCHECO and ETHANS PLUMBING & HEATING LLC

Defendants.  
-----X

WALSH, J:

The following e-filed documents, listed in NYSCEF by document numbers 79-153, were read on this motion by Defendants Edwin Pinto (“Pinto”) and Pinto Plumbing & Heating Corporation (collectively “Pinto Defendants” or “Defendants”) for an Order pursuant to CPLR 3212 granting summary judgment in favor of the Pinto Defendants. Plaintiff Residential Energy JV LLC d/b/a Paraco Plumbing (“Plaintiff” or “Paraco”) opposes the Pinto Defendants’ motion.

Upon the foregoing papers, and for the reasons stated herein, the Pinto Defendants’ motion shall be granted in part and denied in part.

**BACKGROUND**

Plaintiff initiated this action by filing its Summons and Verified Complaint on March 22, 2024 (NYSCEF Doc. No. 1 [“Complaint”]). Plaintiff filed a proposed Order to Show Cause on March 26, 2024 (NYSCEF Doc. No. 2). During an April 17, 2024 conference on Plaintiff’s Order to Show Cause, Plaintiff withdrew its Order to Show Cause and the parties stipulated that Defendants would not solicit Plaintiff’s current customers (NYSCEF Doc. No. 51 at 13-14). On April 3, 2024, the Pinto Defendants filed their Verified Answer (NYSCEF Doc. No. 23 [“Pinto Answer”]). On May 21, 2024, Defendants Melquin Pocheco (“Pocheco”) and Ethans Plumbing & Heating LLC (“Ethans Plumbing”) filed their Verified Answer (NYSCEF Doc. No. 32]). On September 9, 2024, Plaintiff filed a second proposed Order to Show Cause seeking an order, pursuant to CPLR 6301 and CPLR 6311, enjoining and restraining Defendants from soliciting or

performing any service work at the Silo Ridge Field Club in Amenia, New York (“Silo Ridge”) (NYSCEF Doc. No. 44). On January 3, 2025, the Court issued a Decision and Order denying Plaintiff’s motion for a preliminary injunction ordering Defendants to cease any and all work with customers at the Silo Ridge Field Club community (NYSCEF Doc. No. 75). The Court presided over a number of discovery dispute conferences. At the Trial Readiness Conference held on January 24, 2025, based on this Court’s prior adjournments to the deadline for the end of discovery and the numerous warnings given that any discovery not completed by the Trial Readiness Conference would be deemed waived, the Court issued the Trial Readiness Order determining that to the extent there was outstanding discovery, it was deemed waived (NYSCEF Doc. No. 76). Plaintiff served and filed its Note of Issue on February 2, 2025 (NYSCEF Doc. No. 77) and, on February 6, 2025, the Pinto Defendants filed this motion for summary judgment.

## THE PARTIES’ PLEADINGS

### *A. Plaintiff’s Verified Complaint*

Plaintiff asserts that Defendant Pinto was employed by Plaintiff’s predecessor, Thuesen Mechanical Corp. (“Thuesen Mechanical”) beginning in or around 2003, eventually becoming a manager overseeing six to twelve employees in Thuesen Mechanical’s office in Amenia, New York (NYSCEF Doc. No. 1, [the “Complaint”] at ¶¶ 8-9). Plaintiff asserts that Pocheco, a licensed plumber, had been a long-time employee with Thuesen Mechanical, having left approximately five years before the inception of this action, and that Pocheco currently owns Ethans Plumbing (*id.* at ¶ 10). Plaintiff asserts that it, as a corporate entity, was created from a merger between Paraco Gas and Thuesen Mechanical in or around 2022, and that Pinto became Plaintiff’s employee – continuing his position as manager at the Amenia branch – beginning in November 2022 (*id.* at ¶¶ 11-12). Plaintiff explains that it maintains clients in the Amenia area, including – critically – at Silo Ridge, which it describes as a “high-end exclusive private residential gated community” at which “Plaintiff has had many plumbing, heating and other projects . . . , including yearly maintenance heating service contracts with Silo Ridge homeowners” (*id.* at ¶¶ 13-16). Plaintiff alleges that Pinto used his position as Plaintiff’s manager in order “to siphon clients away from Plaintiff to Defendant Pinto Plumbing, which he incorporated [on] September 28, 2023[,] unbeknownst to Plaintiff” and that Pinto “schemed with Defendant Pocheco . . . to undercut bid proposals made by Plaintiff for work in the Amenia area” (*id.* at ¶¶ 18-19).

Plaintiff states that it submitted bids for work in the summer of 2023 – with respect to a property located outside of Silo Ridge and identified as “Project RR2” – to Stoneleaf Construction LLC (“Stoneleaf”), an Amenia-based construction management firm (*id.* at ¶ 20). As Plaintiff explains, “Stoneleaf acts as general contractor and referral service to Silo Ridge, as well as other homeowners and facilities” (*id.* at ¶ 21). The subject work involved the installation of plumbing, heating and stone melt systems at Project RR2, and the subject “proposals submitted by Plaintiff . . . involved approximately \$500,000 of proposed work” (*id.* at ¶¶ 22-23). Plaintiff alleges, “[u]pon information and belief, [that] Defendant Pinto improperly, and in violation of his duty of loyalty as an employee of Plaintiff, passed along the bid proposal made by Plaintiff to [Ethans Plumbing] who, in turn, was able to rig its bid to undercut the price Plaintiff proposed, resulting in the contract being awarded to [Ethans Plumbing]” (*id.* at ¶ 24). Plaintiff alleges that GPS tracking in Pinto

Plumbing's company vehicle indicates that it was "parked at the Stanfordville Town Hall on February 14, 2024 where the building department with jurisdiction over [Project RR2] is located" noting that "Plaintiff had no other business which would have necessitated Defendant Pinto visiting the Stanfordville Town Hall building department," and further claims that "[t]he GPS tracker also revealed that [Pinto's] company vehicle was at the RR2 project site in February, 2024" (*id.* at ¶¶ 25-26). In addition to the Project RR2 allegations, Plaintiff asserts that it submitted bids on contracts for suppression and plumbing on a residential property constructed at Silo Ridge ("Estate Lot 4") and that "[u]pon information and belief, [Pinto] steered the contract to [Ethans Plumbing], which rigged the bid to undercut [Plaintiff's bid]" and that, thereafter, "[Ethans Plumbing] obtained the Estate Lot 4 contract" (*id.* at ¶¶ 28-30). Plaintiff states that Silo Ridge's Residential Services did not renew their annual heating system maintenance contracts with Plaintiff due to Pinto's diversion of such work to Pinto Plumbing or Ethans Plumbing (*id.* at ¶¶ 31-33). Finally, Plaintiff asserts that Pinto has impermissibly "solicited homeowners who are or were customers of Plaintiff by advising them that he is working independently and that those customers should call him personally for any plumbing needs" (*id.* at ¶ 34). Plaintiff alleges that Pinto has used his access to "supplies kept under lock at the Silo Ridge storage site" for servicing customers other than Plaintiff's customers, and "has invoiced Plaintiff for supplies which were purchased to use for Defendant Pinto's customers as opposed to Plaintiff's customers" (*id.* at ¶¶ 35-36).

Plaintiff asserts three causes of action: (1) a First Cause of Action against Pinto and Pinto Plumbing for breach of duty of good faith and loyalty; (2) a Second Cause of Action against all Defendants for unfair competition and misappropriation of confidential or proprietary information; and (3) a Third Cause of Action against all Defendants for unjust enrichment (*id.* at ¶¶ 37-51).

For its First Cause of Action, Plaintiff alleges that "Defendant had access to financial details [constituting confidential and proprietary information] regarding the [Project RR2] proposals . . . [and that,] [u]pon information and belief, Defendant Pinto disclosed that confidential and proprietary information to [Pacheco] to enable [Ethans Plumbing] to rig its bid" (*id.* at ¶¶ 37-40). Plaintiff asserts that the use of this information, as well as Pinto's solicitation of existing and potential customers of Plaintiff, "constituted [breaches] of Defendant Pinto's fiduciary duty and duty of loyalty to Plaintiff" (*id.* at ¶¶ 41-42).

For its Second Cause of Action, Plaintiff reasserts its allegations that Pinto, in breach of his fiduciary duties, diverted the confidential and proprietary information concerning the RR2 project for the purpose of having Ethans Plumbing undercut Plaintiff's bid, and that "Pacheco and Ethans Plumbing colluded with Defendant Pinto to unfairly compete with Plaintiff . . . and benefitted from the disclosure of that confidential information" (*id.* at ¶¶ 43-46).

For its Third Cause of Action, Plaintiff reasserts its previous factual claims, and states that "Defendant Pinto in good conscience and equity is not entitled to retain the business which [he] diverted to Defendants Pinto Plumbing, Pacheco and Ethans Plumbing . . . [as] [s]uch business was obtained [] using confidential information . . . by soliciting Plaintiff's customers while Defendant Pinto was employed by Plaintiff" (*id.* at ¶¶ 47-51).

### ***B. Pinto Defendants' Answer***

The “Pinto Defendants” filed their Verified Answer on April 3, 2024 (NYSCEF Doc. No. 23 [the “Pinto Answer”]). In their Answer, the Pinto Defendants deny the material allegations of the Complaint (Pinto Answer at ¶¶ 1-2) and interpose eight affirmative defenses: (1) a First Affirmative Defense for culpable conduct; (2) a Second Affirmative Defense invoking estoppel; (3) a Third Affirmative Defense invoking equitable share; (4) a Fourth Affirmative Defense asserting the Complaint fails to state a cause of action against the Pinto Defendants; (5) a Fifth Affirmative Defense asserting the Complaint fails to name all necessary parties; (6) a Sixth Affirmative Defense asserting that Plaintiff’s claims are barred by the rules of documentary evidence and/or the Statute of Frauds; (7) a Seventh Affirmative Defense invoking the unclean hands doctrine; and (8) and an Eighth Affirmative Defense asserting Plaintiff lacks standing to maintain the action (*see id.*).

### ***C. Pochecho Defendants' Answer***

Pochecho and Ethans Plumbing (together, the “Pochecho Defendants”) filed their Verified Answer on May 21, 2024 (NYSCEF Doc. No. 32 [the “Pochecho Answer”]). In their Answer, the Pochecho Defendants deny the material allegations of the Complaint (Pinto Answer at ¶¶ 1-3) and interpose fourteen affirmative defenses: (1) a First Affirmative Defense for failure to state a cause of action; (2) a Second Affirmative Defense asserting failure to plead with particularity; (3) a Third Affirmative Defense asserting Plaintiff has not joined all necessary parties; (4) a Fourth Affirmative Defense asserting the claims are time-barred; (5) a Fifth Affirmative Defense invoking the doctrine of laches; (6) a Sixth Affirmative Defense invoking the unclean hands doctrine; (7) a Seventh Affirmative Defense invoking promissory estoppel; (8) an Eighth Affirmative Defense invoking equitable estoppel; (9) a Ninth Affirmative Defense invoking estoppel in pais; (10) a Tenth Affirmative Defense invoking the doctrine of impossible performance; (11) an Eleventh Affirmative Defense invoking the doctrine of frustration of purpose; (12) a Twelfth Affirmative Defense asserting Plaintiff’s breach of the implied covenant of good faith and fair dealing; (13) a Thirteenth Affirmative Defense asserting Plaintiff’s oppressive misconduct; and (14) a Fourteenth Affirmative Defense asserting apportionment of damages (*id.* at ¶¶ 4-17).

## **THE PINTO DEFENDANTS’ MOTION**

### ***A. The Pinto Defendants' Contentions in Support of Their Motion***

In support of their motion for summary judgment, the Pinto Defendants submit: (1) an affirmation of Matthew R. Kreinces, Esq. dated February 6, 2025 (NYSCEF Doc. No. 81 [“Kreinces Aff.”]), together with accompanying exhibits (NYSCEF Doc. Nos. 82-131); and (2) a Statement of Material Facts (NYSCEF Doc. No. 80 [“Defs’ SMF”]).<sup>1</sup>

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<sup>1</sup> The paragraphs referenced coincide with Defendants’ Rule 19-a Statement of Material Facts dated February 6, 2025 (NYSCEF Doc. No. 80) and Plaintiff’s Response to Defendants’ Rule 19-a Statement of Material Facts dated March 21, 2025 (NYSCEF Doc. No. 132) (“RSMF”).

Following a summary of the relevant procedural background of this case, Kreinces argues that the Pinto Defendants should be granted summary judgment on all causes of action because Plaintiff has not provided any documents, evidence or causal connection sufficient to support a prima facie case on its First and Second Causes of Action for breach of fiduciary duty with respect to Stoneleaf and the RR2 project (Kreinces Aff. at ¶¶ 10-20). Kreinces argues that in its First and Second Causes of Action concerning the RR2 project, Plaintiff “claims that Pinto had access to financial details about RR2 project, disclosed said confidential and proprietary information to the co-defendant, Pacheco, and that, as a result, plaintiff was not awarded the RR2 project” (*id.* at ¶¶ 10-12). Kreinces attaches what he purports are all of the documents provided by Plaintiff during discovery and contends that there is nothing contained within these documents that supports Plaintiff’s claims that Pinto breached any fiduciary duty to his former employer (*id.* at ¶¶ 13-14, Exs. A-Z). Kreinces asserts that, even assuming there was evidence showing that Pinto provided confidential and proprietary information to Pacheco, Plaintiff “has not provided a single document, or testimony from anyone with personal knowledge, that plaintiff lost the RR2 project because of Pinto” and, moreover, Plaintiff has failed to provide any evidence or testimony as to what actual damages resulted from any of Pinto’s alleged actions relating to the RR2 project (*id.* at ¶¶ 15-16). Kreinces then summarizes the purportedly relevant portions of Plaintiff’s deposition testimony as follows:

- A. Thuesen is the president of Residential Energy.
- B. Residential Energy is in the business of home and heating mechanical, fire sprinklers and everything that Thuesen Mechanical was doing.
- C. Silo Ridge is a resort community for the wealthy.
- D. Silo Ridge became a customer of the plaintiff in 2015.
- E. Thuesen first believed that Pinto was being disloyal when he “heard rumors from a bunch of employees and then things went adding up on what we are billing out monthly up there and what it was actually costing us to operate.”
- F. Thuesen put a tracking device on Pinto’s vehicle but said device does not tell you what Pinto is doing at that address.
- G. Project RR2 was a Stoneleaf Construction project that plaintiff was bidding on.
- H. Thuesen was initially told that it got the project but then was advised the project went to Ethans Plumbing.
- I. Thuesen does not recall who he spoke to at Stoneleaf Construction about losing the Project RR2 bid (*id.* at ¶ 17 [citations omitted]).

According to Kreinces, based upon these “gaps” in Plaintiff’s proof, there are no issues of material fact to be decided by a jury and Plaintiff has merely provided hearsay and speculation as to what happened and why it did not receive the RR2 project (*id.* at ¶ 18). Kreinces contends that Pinto testified that he is not familiar with a property known as RR2 and did not perform any work on it, and, therefore, Plaintiff has failed to make out a prima facie case against Pinto relating to the RR2 project (*id.* at ¶¶ 19-20 [citations omitted]).

Second, Kreinces argues that Plaintiff has not provided any documents, evidence or causal connection to make out a prima facie case on its Third Cause of Action for unjust enrichment with

respect to Stoneleaf and the RR2 project (*id.* at ¶¶ 21-31). Kreinces asserts that, at paragraph 48 of the Complaint, Plaintiff alleges that “Defendant Pinto in good conscience and equity is not entitled to retain the business which Defendant Pinto diverted to Defendants Pinto Plumbing, Pacheco and Ethans Plumbing” and that this paragraph requires Plaintiff “to identify which business was precisely retained after being diverted” but that Plaintiff’s production of documents and deposition testimony fail to support that any such actions occurred (*id.* at ¶¶ 21-23). According to Kreinces, the allegation contained in paragraph 49 of the Complaint that “[s]uch business was obtained by using confidential information to undercut Plaintiff’s proposal to RR2” requires providing the confidential information that was purportedly used/exchanged and proof that Plaintiff’s figures were actually undercut, but that the discovery provided by Plaintiff and testimony elicited from Plaintiff fail to disclose that any such actions took place (*id.* at ¶¶ 24-25). Kreinces argues that, at paragraph 50 of the Complaint, Plaintiff alleges that “business obtained by soliciting Plaintiff’s customers while Defendant Pinto was employed by Plaintiff also constitutes gains which in equity and good conscience cannot be retained” but this allegation requires Plaintiff to identify which customers were solicited while Pinto was Plaintiff’s employee and that these customers were actually retained, but the discovery provided by Plaintiff fails to disclose any such information (*id.* at ¶¶ 26-27). Kreinces contends that, at paragraph 51 of the Complaint, Plaintiff alleges that “Defendants Pinto Plumbing, Pacheco and Ethans Plumbing participated in that breach of fiduciary duty by profiting from Defendant Pinto’s breach of fiduciary duty” but that this allegation requires Plaintiff to prove that Pinto actually profited from any of the alleged breaches and not only did Plaintiff fail to do so, but has provided testimony from Pinto which specifically denies this assertion and shows that he is currently employed by the co-defendant (*id.* at ¶¶ 28-29). Kreinces reiterates that Pinto testified that he is not familiar with a property known as RR2 and did not perform any work on it and, therefore, Plaintiff has failed to make out a prima facie case against Pinto for unjust enrichment (*id.* at ¶¶ 30-31).

Third, Kreinces contends that there is no proof as to how or why Plaintiff did not get the Estate Lot 4 project, nor that Pinto diverted the “Silo Ridge Maintenance Contracts” to the co-defendants, nor that Pinto solicited “homeowners who are or were customers of Plaintiff ....” (*id.* at ¶¶ 32-36). According to Kreinces, Plaintiff’s deposition testimony (summarized below) supports dismissal of these claims:

- A. Thuesen concludes that plaintiff was underbid on the Estate Lot 4 project.
- B. Thuesen does not recall who he spoke to at Silo Ridge about being underbid on the Estate Lot 4 project.
- C. Thuesen was not told anything about how Silo Ridge received the information about a lower bid.
- D. Thuesen does not recall the names of homeowners that Pinto solicited.
- E. Thuesen does not recall how many homeowners were solicited nor over what time frame.
- F. Thuesen helped Pinto pull permits to do jobs on the side.
- G. Thuesen does not recall how often he pulled permits for side jobs for Pinto, nor when the first time this occurred, nor for how many years (*id.* at ¶¶ 32-33 [citations omitted]).

Kreinces states there “is nothing ambiguous about the plaintiff’s own testimony that it/he has no idea what happened, why it happened, who was involved and why the results were not favorable for the plaintiff” (*id.* at ¶ 34). In addition, Kreinces cites Pinto’s testimony that:

- A. Pinto never sent any bids regarding Estate Lot 4 that Paraco had prepared to Ethans Plumbing.
- B. Pinto does not know who was performing the service work for the units and associated facilities at Silo Ridge (*id.* at ¶ 35 [citations omitted]).

He concludes that, based on Plaintiff’s submissions, there is no evidence of wrongdoing (*id.* at ¶ 36).

Fourth, Kreinces asserts that Plaintiff has not provided any proof of any alleged damages nor any damages that can be connected to Pinto’s alleged improper conduct (*id.* at ¶¶ 37-62). He asserts that in the Pinto Defendants’ first Notice for Discovery and Inspection dated April 3, 2024, they demanded, in their ninth demand: “Any and all documentation/evidence to support plaintiff(s) claims for damages in the pleadings,” but that there was no response to this demand by Plaintiff (*id.* at ¶¶ 37-38 [citations omitted]). Kreinces also asserts that, in the Pinto Defendants’ second Notice for Discovery and Inspection dated June 10, 2024, the Pinto Defendants again demanded, in their ninth demand: “Any and all documentation/evidence to support plaintiff(s) claims for damages in the pleadings” and instead of producing the demanded documentation/evidence, Plaintiff objected on the grounds that the demand was unduly broad, vague and burdensome (*id.* at ¶¶ 39-40 [citations omitted]). Kreinces represents that, at a status conference held on December 13, 2024, the Court specifically asked Brodnick if any proof of damages had been provided and Brodnick responded that this proof had not “been specifically requested,” and argues that this statement was “inaccurate” (*id.* at ¶ 41). Kreinces asserts that, as of the date of the filing of this motion, Plaintiff has “still has not provided anything responsive to said demands” (*id.* at ¶ 42). According to Kreinces, none of the discovery documents exchanged by Plaintiff show actual financial damages and none of the documents that Plaintiff claims show lost revenue by Plaintiff demonstrate any causal connection to anything allegedly improperly done by Pinto (*id.* at ¶¶ 43-44). Therefore, Kreinces contends, Plaintiff has not proven any element of any alleged cause of action (*id.* at ¶ 45).

Fifth, Kreinces contends that Plaintiff cannot introduce anything not provided prior to the filing of the Note of Issue (*id.* at ¶¶ 46-50). Kreinces represents that, at this Court’s Trial Readiness Conference held on January 24, 2025, the Court was advised that the Pinto Defendants would be moving for summary judgment and that “certain proof had not been provided,” to which he asserts the Court responded that “You know, I’ll look at your stuff, but I - - anyway, at trial if he tries - - or if he even tries in opposition to the summary judgment motion to introduce documents that were not provided during discovery, they will be ignored and they will not be admitted into evidence, period, end of story” (*id.* at ¶ 48). Kreinces represents that, based upon the Court’s ruling at the Trial Readiness Conference, the only documents and testimony that should be considered are those attached to this motion, and that Plaintiff cannot come forward with anything additional in opposition (*id.* at ¶¶ 49-50).

After summarizing the relevant standards, Kreinces contends that, assuming Pinto was an employee and owed Plaintiff a fiduciary duty, Plaintiff must still prove misconduct by Pinto, and Plaintiff has failed to provide evidence demonstrating any misconduct, as well as failed to provide evidence of damages caused by the alleged misconduct (*id.* at ¶¶ 51-62).

#### **D. Plaintiff's Contentions in Opposition**

In opposition, Plaintiff submits: (1) an affirmation of Andrew Brodnick, Esq. dated March 21, 2025 (NYSCEF Doc. No. 146 ["Brodnick Opp. Aff."]), together with its attached exhibits (NYSCEF Doc. Nos. 133-146); and (2) a Counter-Statement of Material Facts (NYSCEF Doc. No. 132).

In his affirmation, Brodnick affirms that, from 2020 to March 2024, Pinto was the manager of Silo Ridge, a "highly exclusive residential development in Dutchess County with extensive recreational and other facilities catering to the residents," which broke ground in 2016 and remains in the process of building residential units and, in 2021, Paraco earned revenue of \$1,700,000 from project and service work in Silo Ridge (Brodnick Opp. Aff. at ¶¶ 3-5). Brodnick claims that "[u]nbeknownst to Paraco, Defendant Pinto was competing with Paraco beginning in 2021, which resulted in Silo Ridge revenue plummeting nearly 50% from 2021 to 2023" and that Paraco "discovered extensive evidence of Defendant Pinto's unfair competition when, after firing him, Paraco examined Defendant Pinto's company cell phone and company email" (*id.* at ¶ 7). This evidence showed, inter alia, regular contact by text with Ethans Plumbing, a competitor of Paraco, which is owned by Pochecho (*id.* at ¶¶ 7-8). Brodnick asserts that Pinto incorporated Pinto Plumbing while employed by Paraco and was paid for work he performed through that corporation while an employee of Paraco (*id.* at ¶ 9). Brodnick contends that, on March 22, 2024, Paraco fired Pinto and commenced this action against Defendants for unfairly competing with Paraco, but that the Pinto Defendants' motion is predicated on the claim that the documents provided by Paraco fail to establish its claims when, in fact, the documents submitted by the Pinto Defendants and Paraco establish that Pinto was a disloyal employee (*id.* at ¶¶ 10-12). Brodnick argues that the Court should "search the record" and grant summary judgment in favor of Paraco: (i) finding that Defendant Pinto was a disloyal employee; and (ii) limiting the trial to the issue of Defendant Pinto's liability" and that, at a minimum, the documents raise issues of fact regarding Pinto's disloyalty requiring a trial (*id.* at ¶¶ 13-14).

Following a summary of the procedural background, Brodnick represents that, as of 2020, Pinto was working as a supervisor at an office which Paraco had onsite at Silo Ridge and created Pinto Plumbing on September 28, 2023 (*id.* at ¶¶ 17-18). Brodnick states that Pinto told Paraco that he created Pinto Plumbing for a single side job and that, although Pinto Plumbing "thereafter performed work inside and outside of Silo Ridge, Defendant Pinto did not tell Paraco that he was going to perform other jobs through Pinto Plumbing" (*id.* at ¶¶ 19-20). Brodnick states that Pinto sent several Pinto Plumbing invoices to Silo Ridge for work performed prior to the termination of his employment with Paraco (*id.* at ¶ 21). He further affirms that, from March 6, 2021 to March 21, 2024, Pinto's "company phone reflects hundreds of texts between him and Defendant Pochecho, owner of Ethans Plumbing, which demonstrate that they were working together on many projects both in and outside of Silo Ridge" (*id.* at ¶ 22).

According to Brodnick, the “texts and attachments are replete with invoices, receipts and delivery notices, estimates prepared by Defendant Ethans Plumbing, certificates of insurance, punch lists, addresses of properties, permit checklists, texts from individuals seeking plumbing work, pictures of plumbing fixtures, invoices from plumbing equipment providers, pictures of plumbing work and work sites, building plans, a picture of Defendant Ethans Plumbing’s credit card, a picture of Defendant Pinto Plumbing’s credit card, proof of payment to Defendant Ethans Plumbing, a portion of a municipal code regarding plumbing requirements, and handwritten lists of plumbing material” (*id.* at ¶ 23). Brodnick states that Pinto emailed two Paraco proposals to potential customers of Paraco to Defendant Ethans Plumbing (*id.* at ¶ 24). Brodnick further asserts that Ethans Plumbing produced in discovery a \$10,000 check from Ethans Plumbing paid to Pinto Plumbing on December 7, 2023 (*id.* at ¶ 25). Brodnick asserts that Ethans Plumbing provided proof that Defendant Pinto has been employed by Defendant Ethans Plumbing since May 25, 2024 (*id.* at ¶ 26). Brodnick argues that this evidence establishes that there were acts of disloyalty by Pinto and that, additionally, Paraco’s financial report regarding project and service work at Silo Ridge reflect revenue of \$1,712,309 it received in 2021, which decreased by almost 50% to \$805,685 in 2023 (*id.* at ¶¶ 27-28).

Regarding Brodnick’s argument that the Court should search the record and grant summary judgment in favor of Plaintiff based on Pinto’s breaches of fiduciary duty, Brodnick asserts that the Pinto Defendants’ motion is based upon the claim that “the discovery provided fails to make out a prima facie case” with respect to the claims involving the RR2 and Estate Lot 4 properties, but that the claims made by Paraco are not limited to the allegations regarding the RR2 and Lot 4 properties (*id.* at ¶¶ 29-31). In this regard, Brodnick points out that Paraco’s claims against the Pinto Defendants also include: “(i) Siphoning away Paraco’s clients; (ii) Scheming with Defendants Pochecho and Ethans Plumbing to underbid Paraco’s proposals; (iii) Soliciting and diverting Paraco’s existing and potential customers; (iv) Unfairly competing with Paraco; and (v) Diverting business from Paraco” (*id.* at ¶ 32). Brodnick argues that while the Pinto Defendants claim that “[t]here is nothing contained within any . . . documents [produced] that supports the claims that Pinto breached any fiduciary duty;” this is incorrect and the documentary evidence supports Plaintiff’s claim and confirms that Pinto was disloyal (*id.* at ¶¶ 33-35).

Next, Brodnick argues that the Pinto Defendants’ claim that Paraco is required to provide proof of damages and provide proof that Pinto actually profited from any of the alleged breaches is wrong because it misconstrues summary judgment procedure in that Plaintiff only has to establish that there is an issue of fact which needs to be tried, it need not prove that it will prevail at trial (*id.* at ¶ 36). Second, Brodnick asserts that if Pinto were a disloyal employee, then the damages awarded to Plaintiff would at least entitle Plaintiff to repayment of the salary paid to Pinto (*id.* at ¶ 41). Third, Brodnick argues that proof of damages is a question of fact and the Pinto Defendants are not entitled to summary judgment on that issue (*id.* at ¶ 42). Fourth, Brodnick contends that Pinto provided invoices showing that he was paid for work he performed through Pinto Plumbing while an employee of Paraco and that Plaintiff is therefore entitled to damages because “such conduct clearly ‘rose to the level of actual competition with Paraco’” (*id.* at ¶¶ 43-44). Fifth, Brodnick argues that Paraco has demonstrated that its profits decreased nearly 50% from 2021 to 2024 (i.e., the period that Pinto and Pochecho were working together based on texts

between them from 2021 through March 2024) and therefore, there are issues of fact regarding the damages sustained by Paraco (*id.* at ¶¶ 45-46).

Finally, Brodnick states that the fact that Pinto's testimony contradicts some of the allegations made by Plaintiff is irrelevant because the Court does not weigh the credibility of witnesses in the context of a summary judgment motion, and the Pinto Defendants have submitted evidence during discovery demonstrating Pinto's disloyalty (*id.* at ¶¶ 47-48). Brodnick requests the Court search the record and award Plaintiff summary judgment finding that Pinto was a disloyal employee and reserve the issue of damages for trial (*id.* at ¶ 49). He asserts that Courts have not hesitated to grant employers summary judgment when the evidence demonstrates that the employee acted in a disloyal manner (*id.* at ¶ 52).

#### ***D. Pinto Defendants' Contentions in Further Support of Their Motion***

In further support of their motion, the Pinto Defendants submit a reply affirmation of Matthew R. Kreinces, Esq. dated March 27, 2025 (NYSCEF Doc. No. 147 ["Kreinces Reply Aff."]), together with accompanying exhibits (NYSCEF Doc. Nos. 148-153). Kreinces first argues that the Pinto Defendants' motion for summary judgment should be granted because Plaintiff's affirmation is not properly before the Court because it fails to comply with CPLR 2106 (Kreinces Reply Aff. at ¶ 3). Kreinces asserts that this requirement is not inconsequential or de minimus and, as the language in the affirmation does not comply with the amended statute, the Court should not consider the affirmation in opposition (*id.* at ¶¶ 3-4). In support, Kreinces relies on *Matter of Grandsard v Hutchinson* (227 AD3d 491 [1st Dept 2024]), in which the court affirmed the dismissal of a petition because the attorney verified the petition but failed to comply with the amended CPLR 2106 (*id.* at ¶ 5).

Kreinces argues that an affirmation should strictly comply with the statutory language and that the failure to utilize the language of CPLR 2106 renders statements inadmissible (*id.* at ¶¶ 6-7). He asserts that, as a matter of law, the affirmation of Plaintiff's counsel should be disregarded because it fails to comply with a statute that was amended more than a year ago (*id.* at ¶¶ 7-8).

Second, Kreinces asserts that Plaintiff has still not provided any documents, evidence or causal connection to make out a prima facie case on its First and Second Causes of Action asserting a breach of fiduciary duty with respect to Stoneleaf and the RR2 project (*id.* at ¶¶ 9-11). Kreinces argues that Plaintiff's counsel's affirmation is not sufficient to raise any issue of fact, nor is it able to connect any alleged losses by Plaintiff to any conduct by the Pinto Defendants (*id.* at ¶ 12). According to Kreinces, Thuesen, the only person with "any knowledge," failed to provide an affidavit in opposition that contradicts any of the evidence submitted in support of the Pinto Defendants' motion (*id.* at ¶ 13). According to Kreinces, Plaintiff's Counter-Statement of Material Fact asserts the following misconduct:

- a. Siphoning away Plaintiffs' clients. Defendants' Notice of Motion dated February 6, 2025
- b. Schemed with Defendants Melquin Pocheco and Ethan's Plumbing & Heating LLC to underbid Plaintiff's proposals.
- c. Solicitation and diversion of existing and potential customers.

- d. Defendants Pinto and Pocheco unfairly competed with Plaintiff (*id.* at ¶ 14 [citations omitted]).

However, Kreinces asserts that in its opposition, Plaintiff has failed to answer the following questions:

- a. Defendant did not siphon any clients away from plaintiff. There is no evidence/ proof of any kind that this actually happened.
- b. Mr. Pinto did not scheme with Mr. Pocheco to underbid plaintiff's proposals. There are no documents evidencing the proposals that were underbid. Mr. Thuesen's own testimony submitted previously contradicts this assertion as he testified he did not remember nor provide any documents to substantiate these claims.
- c. Mr. Pinto did not solicit and divert existing and potential customers. Not one document shows any solicitation/ diversion from an existing client. Nothing submitted in opposition actually names a "potential" customer who was solicited and diverted nor is there any documentation of any kind revealing this happened.
- d. Defendants Pinto and Pocheco did not unfairly compete with the plaintiff. No substantive evidence has been provided that these defendants "unfairly" competed with the plaintiff (*id.* at ¶ 15).

Kreinces argues that, where opposition papers to a motion for summary judgment consist solely of attorney affirmations or affidavits, the opponents have, as a matter of law, failed to submit evidence in admissible form to raise a triable issue of fact and that, here, Plaintiff has not provided anything legally valid to create a question of fact (*id.* at ¶ 16).

Third, Kreinces asserts that Plaintiff has still failed to prove damages that were directly caused by Defendants' misconduct (*id.* at ¶¶ 19-38). Kreinces contends that the only document before the Court is a chart showing falling revenue and an email (Exhibit 7) but Plaintiff has not provided any connection between Pinto's alleged conduct and the alleged losses (*id.* at ¶¶ 19-21). According to Kreinces, the "email and proposal submitted as Exhibit 7 only add up to \$53,800.00, not the millions claimed to have been lost because of the defendant's conduct" (*id.* at ¶ 21). Kreinces argues that Plaintiff merely speculates as to why it lost revenue and fails to provide a deposition of any party or non-party witness connecting the lost revenue to any disloyal conduct (*id.* at ¶ 22). Kreinces argues that, even if the Court accepts Exhibit 7 as evidence of losses totaling \$53,800.00, Plaintiff has still failed to provide any evidence that Plaintiff lost this job because of a lower bid by Pacheco (*id.* at ¶ 23). Kreinces also argues that the second problem is that the rules of the Commercial Division require all controversies in Westchester County to be in excess of \$100,000.00 and Exhibit 7 fails to meet this threshold dollar amount (*id.* at ¶ 24). Kreinces argues that, in the Counter-Statement of Facts, relying on Exhibit 13, Plaintiff claims that "Plaintiff's financial report regarding project and service work at Silo Ridge reflect revenue of \$1,712,309 it received in 2021, which decreased by almost 50% to \$805,685 in 2023," but that Plaintiff fails to state why this is the case and no answer has been provided by anyone with personal knowledge of the reason (*id.* at ¶¶ 25-26).

Kreinces claims that at multiple conferences the Court advised Brodnick that his proof as to “why” was lacking (*id.* at ¶ 27). Kreinces then cites to the transcript of an April 17, 2024 conference at which the Court informed Plaintiff that it was its burden to show that each of the customers left because Pinto gave Poheco proprietary information, as well as to a conference held on September 10, 2024, at which the Court asked Brodnick where there was evidence of solicitation and, in response to Brodnick’s statement that he did not at that point have anything from the individual saying that he was solicited, the Court stated he should try to get it because the Court “[doesn’t] have anything right now. Nothing” (*id.* at ¶¶ 28-30). Kreinces then cites to the transcript of a conference held on October 23, 2024, at which the Court again explained to Brodnick that he would have to subpoena Silo Ridge and its employees, as well as the homeowners, to say that they have been using Pinto (*id.* at ¶ 31). Kreinces argues that Plaintiff has not submitted anything in opposition to the Pinto Defendants’ summary judgment motion or in the case from an actual client/customer to substantiate its claims and that Thuesen testified that he could not recall the names of any such clients (*id.* at ¶ 32). Kreinces then cites to the transcript of a conference held on December 13, 2024, at which the Court informed Brodnick he was going to have a problem proving damages if he didn’t know how much money the company was making (*id.* at ¶ 34). Kreinces asserts that, after this conference, he emailed Brodnick with copies of Defendants’ demands for all proof of damages and, in response, Plaintiff provided a chart of lost revenues that Kreinces contends “still fails to answer the dispositive question, ‘why?’” (*id.* at ¶ 36). Kreinces argues that Plaintiff has not provided any proof connecting any lost revenue to the alleged actions of any defendants, which is fatal to Plaintiff’s case (*id.* at ¶¶ 37-38).

Fourth, Kreinces argues that the affirmation and exhibits filed in opposition to Defendants’ motion for summary judgment ignored the Court’s directives stated at a conference held on January 24, 2025, at which the Court advised all counsel that it didn’t take cross-motions and, therefore, everyone who intended to move for summary judgment needed to move at the same time (*id.* at ¶ 39). Kreinces states that, rather than make an actual cross-motion, Plaintiff asks the Court to “search the record” and grant Plaintiff summary judgment without a notice of motion or proper and timely service (*id.* at ¶ 40). Kreinces further states that Brodnick made this request one day late without including a submission as to why, for good cause, a motion should be accepted, as well as improperly filing the full deposition transcript of Pinto instead of attaching only deposition excerpts (*id.* at ¶¶ 41-45).

### STANDARD OF REVIEW

The legal standards to be applied on a motion for summary judgment are well settled. The proponent of a motion for summary judgment “bears the initial burden of demonstrating its *prima facie* entitlement to the requested relief” (*Reyes v Arco Wentworth mgt. Corp.*, 83 AD3d 47 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce

sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, 83 AD3d 47; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must “affirmatively demonstrate the merit of its claim or defense” (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

“It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega*, 18 NY3d at 504). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc.*, 22 NY3d 470). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]; *Collado*, 126 AD3d 927). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion “if there is any doubt as to the existence of a triable issue” (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

### DISCUSSION

#### *A. The Pinto Defendants' Reliance on the Gaps in Plaintiff's Proof is Insufficient to Establish Their Prima Facie Entitlement to Summary Judgment on Plaintiff's First and Second Causes of Action*

In its Verified Complaint, Plaintiff alleges that “Pinto used his position with Plaintiff to siphon clients away from Plaintiff to Defendant Pinto Plumbing, which he incorporated September 28, 2023 unbeknownst to Plaintiff” (Complaint at ¶ 18). Plaintiff further alleges that “Pinto, upon information and belief, schemed with Defendant Pochecho, owner and operator of Defendant Ethans Plumbing, to undercut bid proposals made by Plaintiff for work in the Amenia area” (*id.* at ¶ 19). The Complaint goes on to detail how: (1) in Summer 2023, Plaintiff bid on the RR2 project with Stoneleaf the general contractor and that based on Pinto’s improper transfer of Plaintiff’s bid to Ethans Plumbing, Ethans Plumbing was able to undercut Plaintiff’s bid and win the job, and that based on a GPS tracker placed on Pinto’s vehicle, Pinto was at the RR2 jobsite in February 2024 (*id.* at ¶¶ 20-27); (2) in 2023, Plaintiff bid on a project for Estate Lot 4 in Silo Ridge but, on information and belief, Pinto again assisted Ethans Plumbing in rigging its bid to undercut Plaintiff’s bid causing Ethans Plumbing to win the bid (*id.* at ¶¶ 28-30); (3) Plaintiff had been retained by Silo Ridge’s Residential Services annually to provide heating system maintenance contracts to homeowners in Silo Ridge and the contract was not renewed in 2023 and upon information and belief, Pinto diverted that business from Plaintiff to either Pinto Plumbing or Ethans Plumbing (*id.* at ¶¶ 31-33); and (4) Pinto diverted work from Plaintiff’s individual customers by telling them that he could do their work independent of Plaintiff and he could be called on personally to perform their plumbing work and that he used Plaintiff’s supplies in servicing these customers (*id.* at ¶¶ 34-36).

In his First and Second Causes of Action, Plaintiff incorporates by reference the above allegations and while the First Cause of Action for breach of fiduciary duty discusses the RR2 project specifically, it is clear that Plaintiff's breach of fiduciary duty claim is based on all of these alleged breaches as Plaintiff concludes by stating that "Pinto's solicitation and diversion of existing and potential customers of Plaintiff is a further breach of Defendant Pinto's duty of good faith and loyalty as an employee of Plaintiff" (*id.* at ¶ 42). As such, the Court does not credit the Pinto Defendants' overly myopic view of this claim as relating solely to the RR2 project.

Likewise, while the Second Cause of Action for unfair competition discusses the RR2 project specifically, it is clear that Plaintiff's unfair competition claim is based on all of the alleged collusions between Pinto, Pacheco and Ethans Plumbing as Plaintiff concludes by stating that "Defendants Pacheco and Ethans Plumbing colluded with Defendant Pinto to unfairly compete with Plaintiff, aided, assisted and abetted Defendant Pinto, and benefitted from the disclosure of that confidential information" (*id.* at ¶ 46). As such, the Court does not credit the Pinto Defendants' attempt to also limit this cause of action to the RR2 project.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Matter of Caton*, 206 AD3d 993, 994 [2d Dept 2022], quoting *Celauro v 4C Foods Corp.*, 187 AD3d 836, 837 [2d Dept 2020]). "In New York, a fiduciary relationship arises, 'where one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relations'" (*Suthers v Amgen*, 441 F Supp 2d 478, 487 [SD NY 2006], quoting *Flickinger v Harlod C. Brown & Co.*, 947 F2d 595, 599 [2d Cir 1991]). "New York courts have not hesitated to find fiduciary duty claims deficient when a plaintiff has not pled or proved facts demonstrating a fiduciary duty or 'any relationship approaching privity'" (*Suthers*, 441 F Supp 2d at 487, quoting *Columbia Mem. Hosp. v Barley*, 16 AD3d 748, 749 [3d Dept 2005]).

To establish a claim of unfair competition, "a plaintiff must demonstrate that the defendant wrongfully diverted the plaintiff's business to itself" (*CSI Group, LLP v Harper*, 153 AD3d 1314, 1319 [2d Dept 2017], *lv denied* 31 NY3d 1061 [2018]). "It is well settled that 'the primary concern in unfair competition is the protection of a business from another's misappropriation of the business' "organization [or its] expenditure of labor, skill, and money"" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015], quoting *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 671 [1981], quoting *International News Serv. v Associated Press*, 248 US 215, 239 [1918]). "Indeed, 'the principle of misappropriation of another's commercial advantage [is] a cornerstone of the tort,'" (*Macy's Inc.*, 127 AD3d at 56, quoting *Ruder & Finn*, 52 NY2d at 671) 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.*, 127 AD3d at 56, quoting *Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008]).

In attempting to establish their prima facie showing, the Pinto Defendants attach all of the documents produced by Plaintiff during discovery and argue that there are no documents "that support[] the claims that Pinto breached any fiduciary duty to his former employer" and even if "there is something showing that Pinto provided 'confidential and proprietary' information to

Pacheco,” Plaintiff “has not provided a single document, or testimony from anyone with personal knowledge, that plaintiff lost the RR2 project because of Pinto” (Kreinces Aff. at ¶¶ 14-15). The Pinto Defendants proceed to argue that “[b]ased upon all of these gaps in plaintiff’s proof, there are no issues of material fact to be decided by a jury. Plaintiff has not provided anything other than hearsay and speculation about what happened and why it did not receive the RR2 project” and, therefore, Plaintiff “has failed to make out a *prima facie* case against Pinto relating to the RR2 project” (*id.* at ¶¶ 18-20). The Pinto Defendants also submit Plaintiff’s Verified Complaint, which was verified by Thuesen and thus is the functional equivalent of an affidavit (*see, e.g.*, CPLR 105[u]; *Zino v Jacob Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005]; *Gibson v D’Avanzo*, 99 AD2d 766 [2d Dept 1984]). While the Pinto Defendants also rely on Thuesen’s deposition testimony which reflects that he could not remember who told him about Defendants’ allegedly wrongful acts,<sup>2</sup> the only affirmative evidence on which the Pinto Defendants rely is: (1) Pinto’s testimony that he is not familiar with a project known as RR2 and did not perform any work on RR2; (2) his testimony that he never sent any bids regarding Estate Lot 4 that Paraco had prepared to Ethans Plumbing; and (3) his testimony that he does not know who was performing the service work for the units and associated facilities at Silo Ridge (NYSCEF Doc. Nos. 130, 131). This is entirely insufficient evidence to establish, *prima facie*, that Pinto did not engage in any breaches of fiduciary duty or unfair competition. The Pinto Defendants also point out that there is no evidence in the record, such as affidavits or deposition testimony from any specific existing or potential customer stating that they had been solicited or their business diverted, or other admissible documentary evidence of such conduct. However, it is not essential to Plaintiff’s case that Plaintiff obtain testimony from existing or potential customers given the other evidence Plaintiff has produced and submitted by the Pinto Defendants in support of their motion, reflecting: (1) ongoing projects Pinto and Pochecho/Ethans Plumbing worked on together during the time Pinto was supposed to be devoting his full-time attention to his employment with Plaintiff; (2) Pinto’s emails to Ethans Plumbing transferring Plaintiff’s bids on projects while he was employed by Plaintiff;

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<sup>2</sup> Defendants rely on Thuesen’s deposition testimony that he first believed that Pinto was being disloyal and engaging in misconduct when he “heard rumors from a bunch of [his] employees and then things went adding up on what we are billing out monthly up there and what it was actually costing us to operate” (NYSCEF Doc. No. 112). Thuesen also testified that he put a GPS device on Pinto’s truck, from which he learned that Pinto spent two hours at an address where Thuesen was not doing any work and not billing, but Thuesen admitted that the GPS information did not tell him what the actual activity at the address was (NYSCEF Doc. No. 113). With respect to the RR2 project, Thuesen testified that it was a Stoneleaf Construction project that Plaintiff was bidding on and that he was initially informed that Plaintiff had gotten the project but was subsequently advised that Plaintiff had been underbid and the project went to Ethans Plumbing, but that he did not recall who he spoke to at Stoneleaf Construction about losing the bid for the RR2 project (NYSCEF Doc. Nos. 114, 115). Thuesen testified that, while he concluded that Plaintiff was underbid for the Estate Lot 4 project based on the price, he does not recall who he spoke with at Silo Ridge or any of those conversations and he was never told anything about how the information came to him about the lower bid (NYSCEF Doc. No. 116). Thuesen further testified that he does not recall the names of homeowners that Pinto purportedly solicited nor how many were solicited and over what time period (NYSCEF Doc. No. 117).

and (3) other circumstantial evidence that confidential information was given to Ethans Plumbing to permit Ethans Plumbing to undercut Plaintiff's bids on the RR2 project and the Estate Lot 4 project and succeed in winning those bids.

Regarding the Pinto Defendants' argument concerning the gap in Plaintiff's proof concerning its damages, the Pinto Defendants point out that Plaintiff's proof consists of: (1) an email and proposal evidencing a total of \$53,800.00 in purported losses, but there is no deposition testimony or otherwise admissible evidence connecting these purported losses to Pinto's alleged misconduct (NYSCEF Doc. No. 104); and (2) Plaintiff's financial report regarding project and service work at Silo Ridge reflecting revenue of \$1,712,309 Plaintiff received in 2021, which decreased to \$805,685 in 2023 but there is no evidence establishing that the loss in revenue is attributable to the Pinto Defendants' actions (NYSCEF Doc. No. 104).<sup>3</sup>

Based on the foregoing, it is evident that the Pinto Defendants have not submitted evidence establishing prima facie, that there are no issues of fact as to Plaintiff's claims such that they are entitled to dismissal of Plaintiff's First and Second Causes of Action as a matter of law. "It is well settled that in order to be entitled to summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case' . . . 'It is a defendant's burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff's proof'" (*Iannucci v Kucker & Bruh LLP*, 161 AD3d 959, 960 [2d Dept 2018] [citations omitted]; see also *Strough v Incorporated Vil. of W. Hampton Dunes*, 98 AD3d 607 [2d Dept 2012]). Here, the crux of the Pinto Defendants' motion is just as they say: "[b]ased upon all of these gaps in plaintiff's proof, there are no issues of material fact to be decided by a jury" (Kreinces Aff. at ¶ 18). This is insufficient to establish the Pinto Defendants' prima facie showing. Furthermore, the documents annexed to the Pinto Defendants' moving papers, as well as Plaintiff's Verified Complaint which is the functional equivalent of Thuesen's affidavit, actually show that there are triable issues of fact concerning Pinto's disloyalty to Plaintiff

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<sup>3</sup> While Defendants contend that Plaintiff has failed to provide adequate evidence that this purported decline is due to Pinto's misconduct, this is an issue of fact. Furthermore, Plaintiff is correct that if Pinto is found to be a disloyal employee, damages awarded to Plaintiff would include repayment of the salary Plaintiff paid to him (*Bon Temps Agency, Ltd. v Greenfield*, 212 AD2d 427 [1st Dept 1995] [holding that questions of fact existed as to whether and when employee was disloyal so as to warrant forfeiture of all commissions earned by defendant while working in plaintiff's name subsequent to the time she first placed plaintiff's employee]; § 5:197. Damages, 13A NY Prac, Employment Law in New York § 5:197 [3d ed.]). There is also proof in Plaintiff's document production annexed to the Pinto Defendants' moving papers which shows that Pinto was paid for work he performed through Pinto Plumbing while an employee of Paraco (NYSCEF Doc. No. 95).

and his collusion with Defendants Pacheco and Ethans Plumbing to divert bids and customers to Ethans Plumbing and Pinto Plumbing.<sup>4</sup>

Given the Pinto Defendants' failure to submit evidence establishing prima facie their entitlement to summary judgment dismissing Plaintiff's claims for breach of fiduciary duty and unfair competition, the Court need not address the sufficiency of Plaintiff's opposition.<sup>5</sup> Accordingly, the branches of Defendants' motion seeking dismissal of Plaintiff's First and Second Causes of Action shall be denied.

*B. Plaintiff's Third Cause of Action for Unjust Enrichment*

The elements for a claim of unjust enrichment are that (1) the defendant was enriched (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]). A claim for unjust enrichment "is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running

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<sup>4</sup> Among the documents attached to Defendants' moving papers that support the existence of triable issues of fact as to Plaintiff's First and Second Causes of Action are: (1) Pinto Plumbing invoices sent by Pinto to Silo Ridge for work performed prior to the termination of Pinto's employment with Paraco (NYSCEF Doc. No. 95); (2) 2599 text messages and 341 images from Pinto's company phone between Pinto and Pochecho dated between March 6, 2021 and March 22, 2024 reflecting that they were working together on multiple projects both in and outside of Silo Ridge (NYSCEF Doc. No. 85 [287 pages of text messages]), as they include invoices, receipts and delivery notices, estimates prepared by Defendant Ethans Plumbing, certificates of insurance, punch lists, addresses of properties, permit checklists, texts from individuals seeking plumbing work, pictures of plumbing fixtures, invoices from plumbing equipment providers, pictures of plumbing work and work sites, punchlist, building plans including Silo Ridge Plan, a picture of Defendant Ethans Plumbing's credit card, a picture of Defendant Pinto Plumbing's credit card, proof of payment to Defendant Ethans Plumbing, a portion of a municipal code regarding plumbing requirements, and handwritten lists of plumbing material (see, e.g., NYSCEF Doc. Nos. 83 at 14-18; 85 at 48, 58, 109; 102 at 420); (3) Pinto's emails of Paraco proposals to potential customers to Ethans Plumbing (NYSCEF Doc. No. 83); (4) a \$10,000 check from Ethans Plumbing paid to Pinto Plumbing on December 7, 2023 (NYSCEF Doc. No. 83).

<sup>5</sup> As the Court is not considering Plaintiff's opposition, it shall not search the record and grant summary judgment to Plaintiff, particularly given the various technical defects in Plaintiff's opposition including: (1) the infirmity in Plaintiff's counsel's affirmation in complying with the amendment to CPLR 2106; (2) Plaintiff's response to the Pinto Defendant's Rule 19-a Statement where Plaintiff oftentimes merely states "not admitted" and fails to cite to evidentiary proof in the record to support that what the Pinto Defendants are contending is an undisputed fact is actually a disputed fact; and (3) Plaintiff's attachment of Pinto's full deposition transcript despite this Court's direction at the Trial Readiness Conference that full deposition transcripts were not to be attached to moving or opposition papers.

from the defendant to the plaintiff” (*Corsello v Verizon N.Y. Inc.*, 18 NY3d 777, 790 [2012]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]).

Here, Plaintiff bases its unjust enrichment claim on the same set of facts upon which it bases its claims for breach of the duty of good faith and loyalty and unfair competition and seeks the same damages; therefore, it is duplicative of these claims (*see Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum & Vitulli*, 215 AD3d 699 [2d Dept 2023] [dismissing unjust enrichment claim held duplicative of defective fraud and breach of fiduciary duty claims]; *Emic Corp. v Barenblatt*, 226 AD3d 502, 503 [1st Dept 2024] [dismissing unjust enrichment claim as duplicative of breach of fiduciary duty claim where it arose from the same facts and seeks the same damages]). Additionally, because Plaintiff fails to oppose the branch of the Pinto Defendants’ motion seeking to dismiss Plaintiff’s claim for unjust enrichment, this branch of the Pinto Defendants’ motion shall be granted.

Accordingly, the branch of Defendants’ motion seeking the dismissal of Plaintiff’s claim for unjust enrichment shall be granted.

### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Pinto Defendants’ motion is granted in part and denied in part; and it is further

ORDERED that the branches of the Pinto Defendants’ motion seeking dismissal of Plaintiff’s First Cause of Action for breach of the duty of good faith and loyalty against Defendants Pinto and Pinto Plumbing and Plaintiff’s Second Cause of Action for unfair competition against all Defendants are denied; and it is further

ORDERED that the branch of the Pinto Defendants’ motion seeking dismissal of Plaintiff’s Third Cause of Action for unjust enrichment against all Defendants is granted and the Third Cause of Action is dismissed; and it is further

ORDERED that counsel shall appear for an in-person conference on May 30, 2025 at 11:00 a.m., the purpose of which is to set a trial date in this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
May 23, 2025

ENTER:

  
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HON. GRETCHEN WALSH, J.S.C.

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