

Phillips Gold & Co., LLP v Speiser

2011 NY Slip Op 32555(U)

September 28, 2011

Supreme Court, New York County

Docket Number: 110661/2008

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHKE

PART 12

Index Number : 110661/2008

PHILLIPS GOLD & CO

vs

SPEISER, HERBERT

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

SEP 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

SEP 27 2011

Dated: Sept 27, 2011

HON. JUDITH J. GISCHKE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

PHILLIPS GOLD & COMPANY, LLP,
THEODORE GOETZ, AND DANIEL HOFFMAN

Plaintiffs,

-against-

HERBERT SPEISER,

Defendant.

-----X

Decision and Order
Index No. 110661/2008
Seq No. 002

Presiding:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m (3211 and 3212) w/BAW affirm, HS affid (sep back), exhs	1,2
Pltf's x/m (3212) w/ARL affirm, TG affid, exhs	3
Def's affirm (ARL) in further support, exh	4
Def's reply and in further support w/BAW affirm, HS affid	4
Pltf's affirm in further support w/ARL affirm, exhs	7
Various stips	8
Steno minutes 5/26/11	8

FILED
SEP 28 2011

Upon the foregoing papers, the decision and order of the court is as follows. NEW YORK
COUNTY CLERK'S OFFICE

Gische J.:

Plaintiffs in this action are Phillips Gold & Company, LLP (the Firm), a limited liability accounting partnership, and two partners of the Firm, Theodore Goetz (Goetz) and Daniel Hoffman (Hoffman). Hoffman retired after this action was commenced. Defendant, Herbert Speiser (defendant or Speiser) is also a retired partner of the Firm.

Defendant seeks dismissal of all three causes of action asserted against him which are for (1) a declaration that defendant has materially breached the Firm's Partnership Agreement; (2) breach of fiduciary duty and; (3) breach of the Partnership Agreement and a letter agreement. He

also seeks partial summary judgment on his 1st and 2nd counterclaims, each for a declaratory judgment. Plaintiffs have cross moved for summary judgment on their first cause of action.

Issue has been joined and the motions for summary judgment were timely brought after the filing of the note of issue (CPLR 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]). Consequently, the motion and cross motion will be decided on their merits.

Facts and Arguments Presented

The Partnership Agreement among the parties made December 14, 1999 (“Partnership Agreement”) contains a mandatory retirement clause (Section XI.B.1) requiring that all partners “shall retire at the end of the partnership’s fiscal year in which he reaches age sixty-five (65) unless each Partner requests to continue service and such request is approved ...” Speiser was a partner at the firm for 22 years before he retired at the end of 2007, the year he turned 65.

Section XI.C.1 of the Partnership Agreement provides that “Within sixty (60) days following the date of retirement ...of a Partner, the Partnership shall pay to such retired Partner...the amount of such Partner’s Cash Basis Capital.” Section XI.C.2 further provides that such payment “shall be paid by the Partnership to such retired Partner...in eighteen (18) equal monthly installments beginning on the first day of the month following the month in which such Partner retired...” The Partnership Agreement sets forth a comprehensive formula of how such retirement benefits are calculated. While the firm does not dispute that Speiser would be entitled to these payments pursuant to the Partnership Agreement, the firm contends that Speiser’s failure to make a certain payment to the firm in a timely manner is a material breach of the Partnership Agreement, excusing its payment to Speiser.

Section XIII.C applies to any partner who withdraws from the firm, “whether voluntarily or by retirement...” This section provides that if the withdrawing partner “provides Services to,

whether as employee, director, officer, consultant, independent accountant or in any other capacity, including referral of Firm clients, or joins in any capacity a firm which provides Services to, including referral of such clients, any Partnership Client ("Services"), such
Withdrawing partner shall pay the compensation to the Partnership provided for in Section XIII.B." Section XIII.B sets forth how such compensation – "Withdrawal Obligation" is determined. It provides that the

Withdrawing Partner shall pay the Partnership, on account of each Partnership Client for whom he or any firm he joins or refers Firm clients to provides Services during the sixty (60) month period described in Section XIII.A, an amount (the "Withdrawal Obligation") equal to the greater of (I) thirty-seven percent (37%) of the Partnership's aggregate billings to such Partnership Client during the thirty-six (36) months immediately preceding the date of such Partner's withdrawal from the Partnership. Withdrawal Obligations shall be paid to the Partnership upon the Withdrawing Partner's (or the firm he joins) commencement of rendering services to such Partnership Client.

Section XIII.A provides that:

If a Partner withdraws from the Partnership ... and, within the first sixty (60) months following his withdrawal (beginning with the first complete calendar month following withdrawal), provides Services to, whether as employee, director, officer, consultant, independent accountant or in any other capacity, including referral of such clients, any Partnership Client ("Services"), such Withdrawing Partner shall pay the compensation to the Partnership provided for in Section XIII.B.

Section XIII.C pertains to "Payments by Partnership to Withdrawing Partner." It provides that "the Partnership shall pay to the Withdrawing Partner...his Cash Basis Capital, his Accrual Basis Capital Adjustment and his pro rata portion of the Partnership's profits and losses for the year in which such withdrawal occurs in the same manner as retiring Partners under Section XI."
Section XIII.C provides further that

Any payments estimated in good faith by the Executive Committee to be due to the Partnership from the Withdrawing Partner as a result of the Withdrawal Obligation may be offset against any amounts due the Withdrawing Partner on account of this Capital Account, unpaid share of profits and retirement benefits. The Executive Committee shall send the Withdrawing Partner its calculations of the amount due such Withdrawing Partner and any offsets being made.

In the event the firm fails to pay any installment under Section XI, then pursuant to Section XI. (E).(7) of the Partnership Agreement, "the Partnership's obligation to pay unpaid installments...and any retirement...benefits to any Partner shall accelerate and become due and payable as a lump sum..."

In 2006, the year before Speiser was due to retire, the firm rehired former partner Robert Kornreich (Kornreich) to help service Speiser's clients. The parties planned to transition Speiser's clients to Kornreich and Barry Rosenbaum (Rosenbaum), an employee of the Firm. The parties orally agreed that Speiser would service four (4) of his clients for the Firm, on a part time basis, after his retirement.

By letter agreement dated February 18, 2007 (letter agreement), Speiser, Goetz and Hoffman agreed that Spenser's "compensation for 2007 will be \$325,000 plus or minus an adjustment based on fees billed to your client roster in 2007 and collected in 2007 or 2008." According to Speiser, the letter agreement was intended to compensate him for the billable time that the other accountants at the firm would be charging the clients, the net effect of which would be a reduction in his billable hours and, therefore, his income. In his sworn affidavit, Goetz states that Speiser had agreed to transition his clients to the Firm in exchange for the modification and that the plaintiffs agreed to those terms by compensating Speiser for 2007 under a method that was different from the method set forth in the Partnership Agreement so that Speiser would not be

“penalized economically.”

In September 2007, a malpractice lawsuit was commenced against the firm and, according to Hoffman, the Firm learned for the first time that Speiser, who was responsible for handling insurance matters, had not obtain suitable malpractice insurance. There were also disputes that arose with former partners of the Firm. Plaintiffs allege that Hoffman and Goetz drafted resolutions for the amendment of the Partnership Agreement which Speiser was strenuously opposed to.

On September 10, 2007, Goetz and Hoffman informed Speiser that they were calling a partnership meeting to vote on dissolution of the Firm and to amend the Partnership Agreement with regard to partner indemnity. Speiser commenced an arbitration proceeding, alleging inadequate notice of the proposed meeting and challenging the validity of the upcoming vote. Although plaintiffs ultimately prevailed at arbitration, the arbitrator did not render his decision until July 15, 2008, well after the date of the scheduled vote. On October 23, 2007, the other partners (but not Speiser, who abstained) voted in favor dissolution and the indemnity agreement.

Plaintiffs claim that in or about October 2007 Speiser, while still an active partner at the firm, began making plans to continue servicing Firm clients after his retirement. Such plans included surreptitiously soliciting Firm clients for his new venture, making false and disparaging statements about the Firm to the clients, recruiting Firm employees (Kornreich) to leave the Firm and surreptitiously “purloining” Firm books, records, and other information. Goetz and Hoffman stated in their respective sworn affidavits that they believed Speiser was going to continue working in 2008 to complete the transition of the clients he serviced. Plaintiffs provide the deposition testimony of Kornreich and Rosenbaum, each of whom testified that Speiser approached them about working with him after his retirement.

On November 26, 2007, all three partners (i.e. Goetz, Hoffman and Speiser) voted to rescind the dissolution. Notwithstanding that rescission, Speiser, according to plaintiffs, continued to secretly solicit Firm clients. Kornreich stated at his deposition that in December 2007, Speiser asked him to go look at office space with him in New Jersey which Kornreich did. Later, Kornreich changed his mind about leaving the Firm to go work with Speiser. According to Kornreich, once he told Speiser of his decision, Speiser moved on and tried to recruit Rosenbaum. At his deposition, Rosenbaum testified that Speiser had said to him something to the effect that "if I were 20 years younger, I would set up shop with you." Rosenbaum could not recall the dates of such conversations, but believed they were before 2007. Plaintiff also provide an unsworn memorandum that Rosenbaum wrote dated February 21, 2008 in which he "[narrates] to the best of my recollection ... the actions of Herb Speiser," stating that Speiser told him that he had no intention of retiring and that he was taking all my clients with him and "I want you to come with me."

Speiser retired at the end of 2007 and emptied his office, never to return to the Firm. Shortly thereafter, in early January 2008, plaintiffs state that Speiser's clients began calling the Firm to request that their files be returned to them. Plaintiffs provide a copy of a New Jersey Certificate of Formation for a domestic LLC formed January 28, 2008 under the name of "Speiser & Rollnick LLC" ("S&R"). S&R's stated business purpose is "accounting." Plaintiffs also provide correspondence from Speiser on S&R letterhead to a client they claim Speiser "took" with him. In the letter, sent in Febraury, 2008, Speiser provides the client with a copy of its tax return with instructions.

The Firm made Post-Retirement payments to Speiser in January and February of 2008, totaling \$29,000. In correspondence dated January 31, 2009, Goetz states, on behalf of the firm,

as follows:

Pursuant to Section XI.C.2 of the Partnership Agreement, we enclose a check in the amount of \$14,000 representing 1/18 of the Accrual Basis Adjustment, based on our current calculation...This payment, as well as the [\$15,000] payment made to you in January 2008 is made with full reservation of all rights against you in the Partnership and each Partner under the Partnership Agreement, including, without limitation, the right of the Partnership pursuant to section XIII.C of the Partnership Agreement to offset any payment to you against a good faith estimate of the amount of your Withdrawal Obligation. The Partnership has been informed by several of the Partnership clients for whom you were responsible that [they] are going to be served by you, and not the Partnership, beginning in 2008, thereby giving rise to a Withdrawal Obligation. We note your obligation to pay the Withdrawal Obligation is automatic, and you are required to account to the Partnership immediately without any action or demand on the part of the Partnership. We look forward to receiving the required information and payment from you.

Upon receiving this letter, Speiser filed an amended demand for arbitration dated February 19, 2008, stating that although the Firm had started to make post retirement payments to him, it had not provided him with an "accounting reflecting the calculations utilized in determining the amount." Speiser also stated that he was excused from paying the Withdrawal Obligation because plaintiffs had materially breached the Partner agreement by improperly amending it. Speiser challenged why the firm had sent him one payment for \$15,000 but the other payment was for the lesser amount of \$14,000. He also challenged the Firm's failure to let him inspect its books and records so he could see whether he was being treated fairly and being paid what he was entitled to. The July 15, 2008 arbitration award denied Speiser's amended demand for relief because the arbitrator found that the post retirement claims did not relate back to Speiser's original, pre-retirement, demand.

Plaintiffs then sent Speiser a letter dated February 29, 2008. In that letter, sent by Goetz

on behalf of the firm, reference is made to sections XIII.A, XIII.B and XIII. C. of the Partnership Agreement (see, *supra*). XIII.A and B deal with the "Withdrawal Obligation" a withdrawing (i.e. retiring) partner has to pay to the Firm, if the partner continues to service Firm clients after his withdrawal. Section XIII.C allows the Executive committee to offset the Withdrawal Obligation against any amounts due the Withdrawing Partner. In the letter, Goetz states the following:

In compliance with our agreement, we enclose our calculation of the amounts due to you as of March 1 for your capital account and unpaid share of profits (based on our current information and subject to adjustment) together with our calculation of our estimate of your Withdrawal Obligation that offsets the amount currently owed to you. As provided in our Partnership Agreement, you may present information with respect to your Withdrawal Obligation for reconsideration.

The meaning of this letter is at the heart of the parties' dispute. Plaintiffs allege that the letter was a notification to Speiser that he was not in compliance with his obligation to make a Withdrawal Obligation for the clients he had taken away from the firm and, that by repudiating his obligation to make that payment, the Firm was notifying him that it would not be making any further payments to him as long as he refused to meet his obligations. According to plaintiffs, as of February 2008 Speiser's estimated Withdrawal Obligation was approximately \$688,000 and the failure to pay was a material breach of the Partnership Agreement, excusing the Firm from any further performance.

Speiser argues that the January 31, 2008 letter was simply a reminder that if he owed a Withdrawal Obligation, he had to pay it and that the Firm reserved the right "to offset any payment to you against a good faith estimate of the amount of your Withdrawal Obligation." He claims that in its February 29, 2008 letter, the firm elected to offset its estimate of his Withdrawal Obligation against its calculation of the amounts currently owed to him for his Post Retirement

Payments because of the language used: "our calculation of our estimate of your Withdrawal Obligation that offsets the amounts you currently owed to you." Speiser points out the February 29th letter contains some schedules indicating the Firm offset the amount it owed him (\$155,502) against the amount they estimated he owed the Firm (\$533,149). In his sworn affidavit, Goetz denies the Firm exercised its right to offset its estimate of his Withdrawal Obligation against its calculation of the amounts currently owed to him, as of March 1, 2008, for his Post Retirement Payments. He states that the letter is notification to Speiser that he was in breach of the Partnership Agreement and that he would be receiving no further payments.

According to Goetz, the underlying purpose of the Withdrawal Obligation is to fund its retirement obligations and if the withdrawing partner takes clients, this decreases the Firm's billings. If the Firm's billable hours are decreased, then the Firm cannot make its retirement payments. Thus, Goetz claims the two obligations are symbiotic whereas Speiser claims they are two separate and independent obligations.

Although Speiser agrees the Firm has the right to offset monies one against the other, and he even concedes he is responsible for payment of the Withdrawal Obligation, he contends the Firm's calculations are incorrect because, among other reasons, some of the clients have been double counted or they are clients he is not, in fact, servicing.

Speiser seeks: (1) summary judgment in his favor on plaintiffs' first cause of action for declaratory relief pursuant to CPLR 3212 and 3001; (2) summary judgment and dismissal of plaintiffs' second cause of action for breach of fiduciary duty, pursuant to CPLR 3212 and 3211 (a) (7); (3) summary judgment and dismissal of plaintiffs' third cause of action for breach of contract, pursuant to CPLR 3212 and 3211 (a) (7); (4) partial summary judgment on the issue of liability for the first counterclaim of breach of contract, pursuant to CPLR 3212 (c) and (e); (5)

partial summary judgment on the issue of liability for the second counterclaim of breach of contract, pursuant to CPLR 3212 (c) and (e); and (6) to limit issues for trial, if the court denies parts of this motion, pursuant to CPLR 3212 (g). Plaintiffs cross-move for summary judgment in their favor on the first cause of action.

Applicable Law

When deciding a motion to dismiss, the court must give the pleadings a liberal construction, accept the facts alleged as true and accord plaintiffs the benefit of every possible favorable inference. If, after doing so, any allegation in the claim fits a cognizable legal theory, the motion must be denied (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Only the pleadings will be examined for a motion to dismiss; the likelihood of success on the claim is not a factor. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

“The proponent of a summary judgment motion 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” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]); *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts (*Zuckerman v. City of New York*, supra at 563-64).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (see, *Hindes v. Weisz*,

303 A.D.2d 459 [2nd Dept 2003]).

Discussion

I. Declaratory Judgment Action

Plaintiffs' first cause of action is for a declaration that Speiser materially breached the Partnership Agreement by (1) failing to pay the Withdrawal Obligation, (2) surreptitiously soliciting clients and Firm employees to his future venture before leaving the Firm, (3) making disparaging comments about the Firm to Firm clients, and (4) surreptitiously taking books, records and electronic data from the Firm for use in his future venture. Whereas Speiser contends he did not materially breach the Partnership Agreement, plaintiffs seeks summary judgment, declaring that he did materially breach it by failing to make payment of the Withdrawal Obligation.

“A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract” (*Apple Records, Inc., v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]; *see also Niagra Falls Water v City of Niagra Falls*, 64 AD3d 1142, 1144 [4th Dept 2009]; *Artech Info. Sys. v Tee*, 280 AD2d 117, 125 [1st Dept 2001]).

The plea for declaratory relief is premised on literally identical allegations as plaintiffs' second cause of action for breach of fiduciary duty and the nonpayment of Withdrawal Obligation allegation is duplicative of plaintiffs' third cause of action for breach of contract. There is no need for a declaration when the rights of the parties will be adjudicated by resolution of parallel claims. In fact, plaintiffs acknowledge that if the court does not “address the merits of plaintiffs' contract claims in connection with their declaratory judgment claim, the claim should be adjudicated in connection with resolution of plaintiffs' third cause of action for breach of

contract.” In light of the foregoing, the facts and claims set forth in the 1st cause of action for a declaration are deemed to be part of (and amplify) the remaining causes of action. Thus, to the extent that plaintiffs seek summary judgment, “declaring” the parties’ rights under the contracts at issue, and Speiser seeks summary judgment dismissing that cause of action, the facts alleged and arguments raised are more properly considered in connection with the remaining claims and the 1st cause of action for a declaration is severed and dismissed on the court’s own motion (see, Apple Records v. Capitol Records, supra).

II. Breach of Fiduciary Cause of Action

Plaintiffs’ second cause of action is for breach of fiduciary duty. Speiser moves for dismissal of this claim pursuant to CPLR 3211 (a) (7), failure to state a cause of action, and for summary judgment, pursuant to CPLR 3212.

A. Motion to Dismiss

If the court determines that any of the allegations in plaintiffs’ second cause of action constitute a breach of fiduciary duty, or any other discernible legal theory, then Speiser’s motion to dismiss this claim will fail. Plaintiffs allege that Speiser, while still a partner at the Firm, surreptitiously solicited Kornreich and Rosenbaum, to leave the firm and go work with him at a competing firm he planned to establish. Some of these actions are alleged to have taken place during business hours and using Firm facilities. Furthermore, plaintiffs claim Speiser agreed to transition his clients to the Firm and to work at the Firm after he retired, but he secretly never intended to live up to that agreement. Thus, plaintiffs contend that by making concrete proposals to Kornreich and Rosenbaum for employment, and making disparaging remarks to clients of the Firm about the Firm, he violated his fiduciary duties. Speiser denies he can be held to have breached his fiduciary duties for any actions taken by him after he retired and that the actions

allegedly taken by him before he retired were merely preparatory, in anticipation for his retirement. According to Speiser, he merely notified clients that he was retiring and approached Kornreich and Rosenbaum about whether they might be interested in working with him in the future.

A fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect and this is and this is an inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty (*Birnbaum v. Birnbaum*, 73 N.Y.2d 461 [1989] internal citations omitted). To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct (*Burry v. Madison Park Owner LLC*, 84 A.D.3d 699 [1st Dept. 2011]). It is well settled law that partners owe each other a fiduciary duty (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]; *Drucker v Mige Assoc. II*, 225 AD2d 427, 428[1st Dept 1996]).

To determine whether the acts allegedly taken by Speiser amount to misconduct, it is necessary to ascertain the nature of the duty. A fiduciary “owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect [internal quotation marks and citation omitted]” (*Drucker*, 225 AD2d at 428). A fiduciary must “single-mindedly pursue the interests of those to whom a duty of loyalty is owed” (*Birnbaum*, 73 NY2d at 466). Thus, plaintiffs' allegations must amount to disloyal and/or harmful conduct if the second cause of action is to survive.

Accepting all of plaintiffs allegations as true, as the court must on a motion to dismiss, Speiser's motion to dismiss must be denied. Plaintiffs' allegations, that Speiser, a partner of the

Firm, surreptitiously solicited clients and firm employees to his future venture before leaving the firm, and that clients left the firm to be serviced by S&R, delivering a crushing financial blow to the Firm, amply supports a claim for breach of fiduciary duty, because the pre-resignation surreptitious solicitation of firm clients for a partner's personal gain is actionable misconduct towards his partners. (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 119 [1995]; see also, *Weiser LLP v Coopersmith*, 51 AD3d 583 [1st Dept 2008]).

B. Motion for Summary Judgment

Speiser also moves for summary judgment in his favor, dismissing the second cause of action. In this regard, Speiser's burden is to set forth evidentiary facts to demonstrate a prima facie case that would entitle him to judgment in its favor, without the need for a trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Speiser maintains that he simply informed his clients that he was retiring and that he never solicited clients while at the Firm for any future venture. He contends further that it was only after he retired that he actively took steps to start up S&R, his new accounting practice. However, the deposition testimony of Hoffman and Goetz contradicts Speiser. Goetz testified he "suspected" Speiser was soliciting clients before he retired because so many of them called to have their files returned to them immediately after Speiser retired and Rosenbaum relates a conversation he had with Speiser before he retired. Reportedly Speiser told Rosenbaum "I am not retiring. I am taking all my clients with me and I want you to come with me."

Although a departing partner may inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice (*Muhlstock v Cole*, 245 AD2d 55, 59 [1st Dept 1997], quoting *Graubard*, 86 NY2d at 120), and Speiser contends his actions all took place after he retired, not while an active partner of the Firm, plaintiffs have

raised material triable issues of fact that (among other things) Speiser may have gone beyond just informing clients he was retiring. There is circumstantial evidence presented on these motions from which a finder of fact can conclude that Speiser, before he retired, surreptitiously solicited clients, tried to lure away employees of the firm, took the employees during business hours to see prospective office space, and even used Firm resources to accomplish these tasks. This evidence creates triable issues of fact that defeat Speiser's motion for summary judgment on the 2nd cause of action for breach of fiduciary duty.

III. *Breach of Contract*

Speiser has moved for dismissal of and summary judgment on plaintiff's third cause of action is for breach of the Partnership Agreement and the letter agreement. He also seeks partial summary judgment on the issue of liability on his 1st and 2nd counterclaims, each of which is for breach of contract.

Speiser has asserted two counterclaims for breach of contract. The first counterclaim is for an accelerated lump sum payment of all Post-Retirement payments due to him (for a total of \$1,452,656), pursuant to Section XI (E) (7) of the Partnership Agreement. The acceleration clause takes effect if a retired partner has not received Post-Retirement payments for over six months. Speiser's second counterclaim is for \$76,178 in unpaid compensation under the terms of the Letter agreement. Speiser has moved for dismissal of and summary judgment on the 3rd cause of action.

A. 3rd Cause of Action --Motion to Dismiss

As previously discussed, in the context of a motion to dismiss, the court must give the pleadings a liberal interpretation and accept the facts alleged as true (*Mandarin*, 16 NY3d at 178; *Leon*, 84 NY2d 83, supra). Section XIII.A of the Partner agreement states that if a retired partner

“within sixty (60) months following his withdrawal ... provides services to ... any Partner Client (“Services”), such Withdrawing Partner shall pay the compensation to the Partnership provided for in Section XIII.B.” Section XIII.B provides a formula for calculation of the Withdrawal Obligation and states “Withdrawal Obligations shall be paid to the Partnership upon the Withdrawing Partner's (or firm he joins) commencement of rendering Services to such Partnership Client.”

Plaintiffs' allegations, that Speiser breached the Partnership Agreement by failing to pay the Withdrawal Obligation he owes the Firm pursuant, supports the cause of action asserted because the Partnership Agreement requires that such payment be made in the event the withdrawing (retiring) partner continues to service clients upon departure. Although Speiser claims he has a defense to why he did not pay such sums; this is the subject of his 1st and 2nd counterclaims. Therefore, Speiser's motion to dismiss the 3rd cause of action for breach of contract is denied.

B. 3rd Cause of Action --Motion for Summary Judgment

There are two prongs to the 3rd cause of action for breach of contract: breach of the Partnership and breach of the Letter Agreement. The claims related to breach of the Letter Agreement are addressed separately below in connection with Speiser's motion for summary judgment on his 2nd counterclaim (infra). This section only deals with the claims related to the breach of the Partnership Agreement.

Speiser concedes that he has not made the Withdrawal Obligation payment to the firm, but claims that the Firm, in its letter to him dated February 29, 2008, elected to offset the Withdrawal Obligation by applying Post-Retirement payments due to him. He claims further that after the offset, the Firm still owes him an accelerated lump sum of all Post-Retirement payments because

plaintiffs have not made the required payments for over six months. Speiser also challenges the accuracy of the plaintiffs' calculations of his Withdrawal Obligation. To prevail on his motion for summary judgment, Speiser must make a prima facie case that he is entitled to judgment without the need for a trial.

The February 29, 2008 letter from the Firm states as follows:

In compliance with our agreement, we enclose our calculation of the amounts due to you as of March 1 for your capital account and unpaid share of profits (based on our current information and subject to adjustment) together with our calculation of our estimate of your Withdrawal Obligation that offsets the amount currently owed to you. As provided in our Partnership Agreement, you may present information with respect to your Withdrawal Obligation for reconsideration

The letter is accompanied by a schedule calculating the net amount owed to the Firm by Speiser as of March 1, 2008. According to the schedule, Speiser owed plaintiffs \$688,000 in Withdrawal Obligation payments, which was offset by \$155,502 in Post-Retirement payments owed to him, leaving a total of \$533,149 unpaid Withdrawal Obligation payments owed by Speiser to the Firm. At the bottom of schedule, it states: "Amount owed to Phillips Gold 3-01-08 (533,149)."

Speiser contends that the language in that letter -- "offsets the amount currently owed to you" -- indicates the Firm elected to offset the Withdrawal Obligations against the Post-Retirement payments not only through March 1, 2008, but on a continuing basis because Section XIII.C of the Partnership Agreement states that "the Withdrawal Obligation may be offset against any amount due the Withdrawing Partner" A clear and complete written agreement must be enforced according to the plain meaning of its terms (Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180 [1st Dep't 2006]), extrinsic evidence of the parties' intent may only be considered if

the agreement is ambiguous (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 163 [1990]).

Nothing in the partnership limits the plaintiffs to having to make a one time, binding and unchangeable election to offset the Withdrawal Obligation against any amount due the Withdrawing Partner. Even if, as Speiser claims, the plaintiffs offset the Withdrawal Obligation against the monies to be paid to Speiser, the correspondence contains statements of account only through March 1, 2008. The letter does not elect to make these offsets indefinitely, on an ongoing basis. Furthermore, had it been the parties' intention that once the plaintiffs elect to offset these monies one against another an such election is irrevocable, then such language would have been included in the Partnership Agreement (Blonder & Co., Inc. v. Citibank, N.A., supra). There being no such condition in the Partnership Agreement, plaintiffs have raised a triable issue of fact regarding whether they elected to offset monies and whether it was on a one time or ongoing basis.

A related triable issue of fact is whether monies are owed to Speiser and how much. Whereas Speiser claims he is owed a considerable sum of money, the plaintiffs disagree. This dispute is highlighted in the correspondence Speiser's attorney sent to the plaintiffs dated June 5, 2008, in which he urges plaintiffs to resolve this dispute. Having failed to offer evidence that he is entitled to summary judgment, as a matter of law, Speiser has not proved he is entitled to summary judgment. Therefore, Speiser's motion for summary judgment on plaintiffs' 3rd cause of action is denied insofar as they contend he breached the Partnership Agreement.

The court has considered other arguments by plaintiffs, that Speiser's failure to pay his Withdrawal Obligation is a material breach of the contract relieving them of their obligation to pay him post-retirement payments due to him under the Partnership Agreement. This claim is

supported by arguments that if a retiring partner services firm clients after he leaves (i.e. takes business) but does not pay his withdrawing obligation Firm billable decrease and the Firm cannot afford to pay him Post-Retirement benefits. While this may be the practical effect of a retiring partner not paying his Withdrawal Obligation, it is clear from the Partnership Agreement that the obligation to pay Post-Retirement benefits is separate from the retiring partner's obligation to pay the Withdrawal Obligation. Therefore, Speiser's breach, if any, in paying the Withdrawal Obligation does not relieve the Firm's own, separate, obligation to pay the Post-Retirement benefits.

C. *1st Counterclaim—Motion for Partial Summary Judgment*

Speiser's motion for partial summary judgment on the issue of liability on his 1st counterclaim for breach of payment of the post retirement payments must be denied because the counterclaim is so closely related to the breach of Partnership Agreement claim (supra) asserted by plaintiffs (*Created Gemstones, v Union Carbide Corp.*, 47 NY2d 250 [1979]).

D. *2nd Counterclaim—Motion for Partial Summary Judgment*

The Letter agreement, which is addressed to Speiser and signed by all three partners, provides that "[t]his will document our Partnership Agreement concerning your 2007 compensation from Phillips Gold and Company, LLP (the "Firm")." This recitation clearly establishes the parties' intention that the Letter agreement serve as the entirety of the parties' agreement with respect to Speiser's retirement year (2007) income. The letter also refers to "Article IV, B and C of the Firm's Partnership Agreement dated December 14, 1999," summarizing the contents of those provisions. Further, the Letter Agreement states "you will not be compensated under the provisions of Article IV." Article IV deals exclusively with compensation.

Plaintiffs allege that parol evidence should be admitted because Speiser orally promised to transition clients to the Firm but he breached that agreement. Plaintiffs separately allege that Speiser had no intention of honoring the agreement at the time he made it.

As already stated, a clear and complete written agreement must be enforced according to the plain meaning of its terms (Blonder & Co., Inc. v. Citibank, N.A., supra), extrinsic evidence of the parties' intent may only be considered if the agreement is ambiguous (W.W.W. Associates, Inc. v. Giancontieri, supra). By its express terms, the Letter Agreement did not modify any of the other terms of the Partnership Agreement, except compensation and how it would be calculated. The Letter Agreement contains no promise or representation by Speiser that he would transition his clients to the Firm upon retirement nor is there any recitation in the Letter Agreement that the modification was being made for that reason. "Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (W.W.W. Associates, supra, 72 NY2d at 163). The Letter Agreement contains no ambiguity that needs to be resolved. Therefore, extrinsic and parol evidence is inadmissible. Significantly, nothing in the Partnership Agreement prevents Speiser from servicing firm clients after he leaves the firm. The only consequence if he does this is that he will have to make Withdrawal Obligation payments to the Firm to compensate it for lost billable hours. Therefore, even if Speiser did not transition his clients to the Firm, this is not a breach of the letter agreement (or Partnership Agreement which it modifies).

Although plaintiffs also argue that parol evidence should be admitted because the Letter Agreement lacks consideration, that is also an unsuccessful argument. General Obligations Law § 5-1103 states, in substance, that a Partnership Agreement, promise or undertaking to change or modify any contract "shall not be invalid because of the absence of consideration, provided that

the Partnership Agreement ... be in writing and signed ...” The Letter agreement did not impose any obligations on Speiser, it only modified his compensation. Therefore, since the Letter agreement is a signed modification of the Partner agreement, there is no need for consideration.

Speiser has made proved that he did not breach the Letter agreement. Plaintiffs have not demonstrated a material triable issue of fact to defeat Speiser’s motion. Therefore, Speiser is entitled to summary judgment dismissing the third cause of action for breach of contract to the extent it alleges breach of the Letter agreement, and grants Speiser partial summary judgment as to liability only on his second counterclaim. The issue of damages will be decided at trial.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the facts and allegations set forth in the first cause of action for a declaratory judgment are deemed a part of and amplify the other two causes of action set forth in the complaint; to the extent that plaintiffs seek summary judgment, “declaring” the parties’ rights under the contracts at issue, and Speiser seeks summary judgment dismissing that cause of action, the facts alleged and arguments raised are more properly considered in connection with the remaining claims and the 1st cause of action for a declaration is severed and dismissed on the court’s own motion; and it is further

ORDERED that Speiser’s motion for the dismissal and summary judgment on the 2nd cause of action is denied; and it is further

ORDERED that Speiser’s motion for summary judgment on plaintiffs’ 3rd cause of action is denied; and it is further

ORDERED that Speiser’s motion for partial summary judgment on the issue of liability

on his 1st counterclaim is denied; and it is further

ORDERED that Speiser's motion for partial summary judgment on the issue of liability on his 2nd counterclaim is granted; and it is further

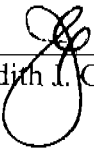
ORDERED that plaintiffs shall serve a copy of this decision and order on the Office of Trial Support so this case can be scheduled for trial; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 27, 2011

So Ordered:



Hon. Judith L. Gische, JSC

FILED

SEP 28 2011

**NEW YORK
COUNTY CLERK'S OFFICE**