SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

----------x

CESAR RAMIREZ and ADRIANA RODRIGUEZ, individually and as stockholders of MANHATTAN FARE CORP., and in the right of MANHATTAN FARE CORP.,

Plaintiff, Decision and order

- against - Index No. 521206/2023

MONEER ISSA, MANHATTAN FARE CORP., and 431 FOOD MARKET CORP.,

Defendants, March 12, 2024

----------x

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #13

The plaintiffs have moved seeking to dismiss the affirmative defenses and counterclaims filed by the defendants. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders the defendant Manhattan Fare Corp., operated a restaurant called Chef's Table at Brooklyn Fare, which is located at 431 West 37th street, in New York County. The plaintiff, Cesar Ramirez, was employed as an executive chef by the defendants since 2009 and as of 2022 received twenty-five of all profits representing a twenty-five percent ownership interest in Manhattan Fare Corp. The plaintiffs instituted this lawsuit alleging that Ramirez was fired without any justification. The defendants answered and asserted affirmative defenses and counterclaims. Specifically, the defendants assert the plaintiff Ramirez and his wife,

plaintiff Adriana Rodriguez engaged in theft and fraud and sought to harm Manhattan Fare. The defendants have asserted counterclaims for fraudulent inducement, breach of fiduciary duty, conversion, breach of contract and breach of good faith and fair dealing, misappropriation of trade secrets, unfair competition, a violation of the Computer Fraud and Abuse Act, trespass against chattel and defamation. As noted, the motion seeking to dismiss the counterclaims and affirmative defenses has now been filed and the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the defendant can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the defendant (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

Preliminarily, the motion seeking to dismiss the affirmative defenses is denied at this time.

Turning to the first counterclaim alleging fraudulent inducement, it is well settled that to successfully plead fraud the claims must be plead with particularity (Lee Dodge Inc., v.

Sovereign Bank, N.A., 148 AD3d 1007, 51 NYS3d 531 [2d Dept., 2017]). Thus, the pleadings must contain allegations of a representation of a material fact, falsity, scienter, reliance and injury (Moore v. Liberty Power Corp., LLC, 72 AD3d 660, 897 NYS2d 723 [2d Dept., 2010]). Further, the allegations must be "stated in detail" (CPLR §3016(b)) and must include dates, details and items to the extent relevant (see, Orchid Construction Corp., v. Gottbetter, 89 AD3d 708, 932 NYS2d 100 [2d Dept., 2011]). Further, to succeed upon a claim of fraudulent concealment it must be demonstrated that in addition to the above requirements there was a fiduciary or confidential relationship which would impose a duty upon the party to disclose material information (Mitschele v. Schultz,36 AD3d 249, 826 NYS2d 14 [1st Dept., 2006], Wallkill Medical Development LLC v. Catskill Orthopaedics P.C., 178 AD3d 987, 115 NYS3d 67 [2d Dept., 2019]). Moreover, even absent a fiduciary relationship a duty to disclose may arise under the 'special facts' doctrine where one party maintains superior knowledge of essential facts as to render the entire transaction inherently unfair absent the disclosure (Jana L. v. West 129th Street Realty Corp., 22 AD3d 224, 802 NYS2d 132 [1st Dept., 2005]).

The counterclaim alleges that the plaintiff induced the defendant to change the operating agreement and reduce the defendant's share by giving a 25% share to both Cesar and his

wife. The counterclaim further alleges that "Ramirez, however, lied to Issa. He had no intention of staying with Chef's Table or faithfully executing his fiduciary duties as a Board member and as Executive Chef. He concealed and withheld from Issa that he was already making plans to start his own restaurant and to work full time for his own business venture in competition with Chef's Table" (see, Verified Answer with Counterclaims, ¶17 [NYSCEF Doc. No. 218]). Thus, essentially, this counterclaim alleges that Ramirez concealed the fact he intended to breach the operating agreement. However, the failure to disclose an intention to breach does not establish a claim of fraudulent concealment (Apotex Corp., v. Hospira Healthcare India Private Limited, 2019 WL 3066328 [S.D.N.Y. 2019]). This is true because such an omission really concerns the motive for any eventual breach and is therefore no different than the breach of contract claim itself (see, TVT Records v. Island Def Jam Music Group, 412 F.3d 82 [2d. Cir. 2005]). The tort of fraud cannot be alleged unless there is an assertion of a duty violated that is independent of any contractual obligations. In Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 NY2d 382, 521 NYS2d 653 [1987] the court explained that the independent duty "must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (id). In this case the concealment involves

Cesar's alleged intention to breach the operating agreement and open a competing restaurant. Even if true, those allegations support breaches of contract and other duties. That omission, which only concerns the motive for a breach of contract, cannot support a cause of action for fraud. Consequently, the motion seeking to dismiss the first counterclaim is granted.

The next counterclaim alleges a breach of a fiduciary duty. It is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties (McKinnon Doxsee Agency Inc., v. Gallina, 187 AD3d 733, 132 NYS2d 144 [2d Dept., 2020]). Further, an employee maintains a fiduciary duty to an employer. As the court noted in Nielson Co. (US) LLC v. Success Systems Inc., 2013 WL 1197857 [S.D.N.Y. 2013] "as a matter of law, an employee owes a fiduciary duty to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost faith and loyalty in the performance of his duties" (id). Current employees and owners of a corporation may not actively engage in competition at the expense of that corporation (Ritani LLC v. Aghjayan, 970 F.Supp2d 232 [S.D.N.Y. 2013]).

The plaintiffs argue there can be no violation of any fiduciary duty because the plaintiff did not announce his intention to open a competing restaurant until after he was

terminated. However, the counterclaim alleges significant acts undertaken by the plaintiff to undermine the defendant restaurant while he worked there. The counterclaim alleges the plaintiff tried to lure away other employees to work in his own restaurant and stole equipment and other items from the restaurant (see, Verified Answer with Counterclaims, ¶¶22, 24 [NYSCEF Doc. No. 218]). These allegations surely support claims of a breach of fiduciary duty which may be independent of any breach of contract. Therefore, the motion seeking to dismiss this counterclaim is denied.

The fourth counterclaim asserts breach of contract based upon the fact the plaintiff was a faithless servant. The faithless servant doctrine was first coined in Herman v. Branch Motor Express Co., 67 Misc2d 444, 323 NYS2d 794 [Civil Court of the City of New York, 1971] where the court stated "a servant who is faithless to his master on Tuesday thereby forfeits the wages he earned on Monday" (id). The doctrine states that an agent who owes a duty of fidelity to a principal and is faithless in that duty thereby forfeits compensation due (see, Phansalkar v. Anderson Weinroth & Company L.P., 344 F3d 184 [2d Cir. 2003]). Further, pursuant to the doctrine the employer is entitled to a return of any compensation paid to an employee during the period of her disloyalty (CARCO GROUP, Inc., v. Maconachy, 718 F3d 72 [2d Cir. 2013], see, also, Torres v. Gristede's Operating Corp.,

628 F.Supp2d 447 [S.D.N.Y. 2008]).

This counterclaim is based upon allegations, as noted, that the plaintiff stole from the restaurant and undermined its success by attempting to compete with it. At this stage of the litigation the counterclaim surely alleges such breach of contract on the part of the plaintiff. Therefore, the motion seeking to dismiss this counterclaim is denied.

The third counterclaim is for conversion. Where a conversion claim arises from the same circumstances as the breach of contract claim then such conversion claim is duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative, courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medequa LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract counterclaim essentially asserts the plaintiff breached his employment agreement with the defendants by engaging in various improper activities. The conversion counterclaim alleges that "Ramirez unlawfully and wrongfully took the Stolen Property in order, and with the intent, to deprive the owners of possession of said property, and by doing so, did deprive the owners of said property" (see, Verified Answer with Counterclaims, ¶48 [NYSCEF

Doc. No. 218]). That improper conduct is surely included within the wrongful acts that comprise the breach of contract claim and is thus duplicative. Thus, while it is surely true that conversion applies to the theft of computer data (see, Thyroff v. Nationwide Mutual Insurance Company, 8 NY3d 283, 832 NYS2d 873 [2007]) the duplicative nature of the conversion counterclaim demands its dismissal. The conduct of the plaintiff, including any theft of any information stored on a computer is surely included within the breach of contract counterclaim. Therefore, the motion seeking to dismiss the conversion counterclaim is granted.

Next, the counterclaim alleging a breach of the covenant of good faith and fair dealing is duplicative of the breach of contract claim (Logan Advisors LLC v. Patriarch Partners LLC, 63 AD3d 440, 879 NYS2d 463 [1st Dept., 2009]). Therefore, the motion seeking to dismiss this counterclaim is granted.

The next counterclaim alleges a misappropriation of trade secrets, specifically, the customer list which the defendants assert was, essentially, taken by the plaintiff.

In Parchem Trading Ltd., v. Depersia, 2020 WL 764211 [S.D.N.Y. 2020] the court noted that "'a customer list that contains such information as the identities and preferences of client contacts' may be a 'protectable trade secret" (id). The court explained that "a trade secret may exist in a combination

of characteristics and components, each of which, by itself is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage" (id). Therefore, customer lists will qualify as trade secrets where the list is within the exclusive knowledge of the company and cannot be "readily ascertained" by others in the industry without "extraordinary efforts" (Poller v. BioScrip Inc., 974 F.Supp2d 204 [S.D.N.Y. 2013]). However, contact information of customers that is "little more than a compilation of publicly available information" are not trade secrets (Art & Cook Inc., v. Haber, 416 F.Supp3d 191 [E.D.N.Y. 2017]). The counterclaim alleges that the customer list was the "result of Issa's and Manhattan Fare's compilation over many years of nonpublic information, including financial and contact information for each customer, and unique characteristics of certain customers. Manhattan Fare and Issa maintained the customer list as confidential and took steps to preserve the confidentiality of the data and information contained in that list" (see, Verified Answer with Counterclaims, ¶64 [NYSCEF Doc. No. 218]). At this stage of the litigation the defendants have presented sufficient allegations the plaintiff misappropriated a trade secret. Of course, further discovery will narrow these issues but at this juncture the counterclaim is proper and the motion seeking to dismiss the counterclaim is denied.

The counterclaim of unfair competition contains all the same allegations that are already covered in the breach of contract and misappropriation counterclaims. This counterclaim is duplicative and the motion seeking its dismissal is granted.

Next, in order to assert a cause of action under the Consumer Fraud and Abuse Act the defendants must demonstrate the plaintiff violated one of the provisions of 18 U.S.C.§1030(a)(1)-(7). Further, to succeed upon a claim pursuant to this act the conduct must involve one of the facts included within subclauses (I), (II), (III), (IV), or (V) of 18 U.S.C. §1030(c)(4)(A)(I) (see, Benistar Admin Services LLC v. Wallach, 2021 WL 1186352 [E.D.N.Y. 2021]). This counterclaim alleges the plaintiff intentionally accessed the defendant's computer without authorization, specifically social media accounts. Those allegations do not satisfy the requirements of this act. Therefore, the motion seeking to dismiss this claim is granted.

The next counterclaim is trespass to chattels. "To establish a trespass to chattels, the Plaintiff must plead an intentional and physical interference with the use and enjoyment of personal property in the Plaintiff's possession, without justification or consent" (AGT Crunch Acquisition LLC v. Bally Total Fitness Corporation, [Supreme Court New York County 2008]).

Further, "an essential element in pleading trespass to chattel is harm to the condition, quality or material value of

the chattels at issue" ("J. Doe No. 1" v. CBS Broadcasting Inc., 24 AD3d 215, 806 NYS2d 38 [1st Dept., 2005]). Moreover, "as applied to the online context, trespass does not encompass...an electronic communication that neither damages the recipient computer system nor impairs its functioning" (see, Mount v. PulsePoint, Inc., 2016 WL 5080131 [S.D.N.Y. 2016]). Thus, in this case there are allegations the plaintiff's conducted significantly impaired the processes necessary for the computers of the defendant to function and therefore, may have committed a trespass to chattels. Consequently, the motion seeking to dismiss this counterclaim is denied.

The last counterclaim alleges defamation. As noted in a prior decision, to successfully plead defamation the complaint must provide the time, place and manner of the defamation (Buffolino v. Long Island Savings Bank FSB, 126 AD2d 510, 510 NYS2d 628 [2d Dept., 1987]). The counterclaim merely states that "starting in 2022, Ramirez began to complain to Chef's Table staff and workers that Issa had cheated him and was cheating them as well" (see, Verified Answer with Counterclaims, ¶64 [NYSCEF Doc. No. 218]). That is wholly insufficient to allege any defamation. Therefore, the motion seeking to dismiss the last counterclaim is granted.

In conclusion, all the affirmative defenses and the counterclaims alleging a breach of fiduciary duty, breach of

contract, misappropriation of trade secrets and trespass to chattel remain. The other counterclaims are hereby dismissed.

So ordered.

ENTER:

DATED: March 12, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC