ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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RICHARD GILBERT,

Plaintiff,

-against-

NOEL WEINTRAUB,

Defendant.

----------x

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 602290-15
Motion Seq. Nos. 2 and 3
Submission Date: 11/16/15

Papers Read on these motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits...x
Memorandum of Law in Opposition.....x
Reply in Further Support and Exhibit.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the court on 1) the motion filed by Defendant Noel Weintraub ("Weintraub" or "Defendant") on November 4, 2015, and 2) the cross motion filed by Plaintiff Richard Gilbert ("Gilbert" or "Plaintiff") on November 10, 2015, both of which were submitted on November 16, 2015. For the reasons set forth below, the Court 1) grants Plaintiff's cross motion to amend and deems the proposed amended complaint (Ex. B to Zinner Aff. in Opp./Supp.) filed and served; 2) grants Defendant's application to address his motion to dismiss to the amended complaint; and 3) denies Defendant's motion to dismiss the amended complaint.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(3) and (7), to dismiss the Complaint (Ex. A to Bolton Aff. in Supp.).

Plaintiff opposes the motion and cross moves for an Order, pursuant to CPLR § 3025, granting Plaintiff leave to amend the complaint and to file the proposed amended complaint ("Amended Complaint") (Ex. B to Zinner Aff. in Supp./Opp.). In reply, counsel for Defendant affirms that Defendant consents to the service and filing of the Amended Complaint and asks that the Court address his motion to dismiss to the Amended Complaint. The Court grants that application and, accordingly, this decision addresses the sufficiency of the Amended Complaint.

B. The Parties' History

The parties' history is outlined in detail in a prior decision ("Prior Decision") of the Court dated November 24, 2015 and the Court incorporates the Prior Decision by reference as if set forth in full herein. In the Prior Decision, the Court denied Plaintiff's prior motion for injunctive relief.

As noted in the Prior Decision, the Complaint alleges as follows:

Plaintiff and Defendant are the sole members of Road Runners, LLC ("Road Runners") with equal ownership interests. There is no operating agreement for Road Runners. Plaintiff and Defendant are also the sole members of Road Runners TOLA, LLC ("Tola") with equal ownership interests. There is no operating agreement for Tola.

The LLCs are agencies that represent a wide variety of manufacturers selling merchandise including giftware, stationery, children's gifts and toys, greeting cards, gift books, jewelry, fashion accessories, home fragrance and personal care products. Plaintiff alleges that, by letters dated February 23, 2015 ("February Letter") and March 18, 2015 ("March Letter"), Defendant "threatened to establish a business that competes with the LLCs" (Comp. at ¶¶ 11 and 12). Plaintiff alleges that Defendant has established a business that competes with the LLCs and has undertaken additional actions in furtherance of that business. The Complaint contains two (2) causes of action: 1) breach of fiduciary duty, for which Plaintiff seeks damages of approximately $250,000, and 2) a request for a permanent injunction restraining, prohibiting and enjoining Defendant from engaging in any employment, association, business or venture involved in competition with the LLCs.

In the Prior Decision, the Court denied Plaintiff's prior motion for injunctive relief, ruling as follows:

> In the February and March Letters, Defendant expressed his desire to terminate his working relationship with Plaintiff, as was his right, and suggested ways to terminate that relationship that would obviate the need for litigation. Although Plaintiff responded to those Letters, no resolution was reached. Plaintiff is apparently taking the position that, notwithstanding the parties' inability to resolve their differences informally despite Defendant's good faith efforts to do so, and the absence of any operating agreement, non-solicitation agreement or non-competition agreement, Plaintiff has the right to prevent Defendant from moving on professionally in any way. The Letters reflect a reasoned approach to the termination of the parties' business relationship, and nothing in the numerous emails from the vendors (Ex. C to Gilbert Supp. App.) suggests that Defendant engaged in any improper conduct vis a vis Plaintiff, or withheld any material information from Plaintiff. Under these circumstances, Plaintiff has not established a likelihood of success on the merits on his cause of action for breach of fiduciary duty. Moreover, even assuming *arguendo* that Plaintiff has established a likelihood of success on the merits, Plaintiff has also not demonstrated that a balancing of the equities favor Plaintiff, in light of Defendant's ultimately unsuccessful efforts to resolve the parties' business disputes amicably, Defendant's affirmations regarding his need to work to earn his livelihood, and the absence of evidence that the decision of certain manufacturers to continue working with Defendant/NWA was attributable to any improper conduct by Defendant.

The Amended Complaint is captioned *Richard Gilbert, individually and on behalf of Road Runners LLC and Road Runners TOLA, LLC v. Noel Weintraub*. The Amended Complaint alleges as follows:

Plaintiff and Defendant are the sole members of Road Runners with equal ownership interests. There is no operating agreement for Road Runners. Plaintiff and Defendant are also the sole members of Tola with equal ownership interests. There is no operating agreement for Tola. Road Runners and Tola (the " LLCs") are agencies that represent a wide variety of manufacturers selling merchandise including giftware, stationery, children's gifts and toys, greeting cards, gift books, jewelry, fashion accessories, home fragrance and personal care products. Neither the LLCs nor their members ever entered into an operating agreement.

Prior to September 24, 2015, Gilbert and Weintraub were managers of the LLCs.

Effective September 24, 2015, Weintraub resigned in his role of manager and employee of the LLCs. On or about September 30, 2015, Weintraub established a new corporation, NWA, which, upon information and belief, engages in a business that competes with Road Runners and Tola. Beginning on or about September 30, 2015, Defendant began soliciting vendors who had been engaging in business with Road Runners and began soliciting the LLCs' sales representatives to become independent contractors of NWA. Beginning in October 2015, many vendors who were solicited by Defendant terminated their relationship with the LLCs "at the specific instance and request of Defendant" (Am. Comp. at ¶ 18). Beginning in October 2015, many independent contractors who were solicited by Defendant terminated their relationship with the LLCs "at the specific instance and request of Defendant" (*id.* at ¶ 19). Weintraub is alleged to be the sole owner of NWA.

The Amended Complaint contains (2) causes of action. In the first cause of action, alleging breach of fiduciary duty, Plaintiff alleges that 1) Weintraub, as a member of the LLCs, owed and owes a duty to act in good faith and in the best interests of the Plaintiff; 2) Weintraub's actual competition with the LLCs constitutes a breach of fiduciary duty owed to Plaintiff; 3) Gilbert and Weintraub have engaged in litigation concerning the issue of Weintraub's actual and threatened competition in violation of his fiduciary duty; 4) Weintraub has consistently maintained that he owes no fiduciary duty to Plaintiff; 5) by virtue of Weintraub's stance in the pending litigation, any further efforts to compel Weintraub to act would be futile; and 6) by virtue of the foregoing breach of fiduciary duty, Plaintiff is entitled to judgment in an amount not yet capable of determination, but anticipated to be not less than $250,000.

In the second cause of action, which seeks a permanent injunction, Plaintiff alleges that 1) Defendant's actual competition with the LLCs will result in serious and irreparable injury to Plaintiff; 2) the equities are balanced in Plaintiff's favor; 3) Plaintiff has no adequate remedy at law; and 4) by virtue of the foregoing, Plaintiff is entitled to a permanent injunction restraining, prohibiting and enjoining Defendant from engaging in any employment, association, business or venture involved in competition with the LLCs.

C. The Parties' Positions

Defendant submits that the Amended Complaint fails to state a cause of action because Defendant had, and has, no duty to refrain from competition. Defendant notes that Plaintiff does not allege that there is any non-compete agreement in place or trade secret at issue, or that Defendant has engaged in any misconduct. Moreover, Plaintiff has not cited any case law holding that a member of an LLC, particularly one who has withdrawn from any role in management as Defendant has done, owes an "implied-in-law duty to refrain from [competition] following such withdrawal" (D's Reply Memo. of Law at p. 2). Defendant contends that, even assuming *arguendo* that members owe each other a fiduciary duty, that duty does not include a promise to refrain from competition. Defendant submits that the Limited Liability Company Law ("LLCL") has left the decision of whether to impose restrictions on competition to the members who may incorporate any such restrictions into their operating agreement, which the parties did not do in this case. Moreover, pursuant to LLCL § 401(b), a member may, or may not, choose to exercise management powers, and Plaintiff has alleged that Defendant withdrew from management before he engaged in the alleged competition. Thus, Plaintiff's reliance on *Salm v. Feldstein*, 20 A.D.3d 469 (2d Dept. 2005) is misplaced because the defendant in *Salm* was the managing member of the LLC at issue and the Second Department's discussion of breach of fiduciary duty was in the context of defendant's role as the managing member.

Defendant contends further that, at a minimum, the Amended Complaint should be dismissed to the extent that it asserts a claim by Plaintiff in his individual capacity. Defendant submits that the claim for breach of fiduciary duty belongs to, and may only be asserted by the LLCs. Defendant also submits that the Amended Complaint impermissibly combines individual and derivative claims because Plaintiff has not articulated how his claim is individual and how it is derivative, or separated the claim he asserts in his individual capacity from the claim asserted in a derivative capacity.

Plaintiff opposes the motion submitting that applicable case law does not clearly hold that a member of a limited liability company who is not a manager does not owe a fiduciary duty to the LLC or the other member. Plaintiff argues that the circumstances in this action are "unique" and "totally dissimilar from cases wherein a member never had any management role" (D's

Memo. of Law in Opp. at p. 5). At a minimum, Plaintiff contends, there is an issue of fact regarding whether Defendant has breached a fiduciary duty by resigning as a managing member and participating in a competing business that precludes dismissal of this action.

RULING OF THE COURT

The Court grants Plaintiff's motion to amend his complaint (Motion Sequence No. 2), and deems the Amended Complaint filed and served. The Court further grants Defendant's application to apply his motion (Motion Sequence No. 3) to dismiss the Amended Complaint.

As to the merits of Motion Sequence No. 3, the Court is mindful of the following principles and their application to the present case: First, LLCL § 401(a) vests management powers in the members of an LLC unless the articles of organization or operating agreement provide to the contrary. Here, there is no operating agreement, and thus management powers are vested in Gilbert and Weintraub, who are the sole members of the LLCs. Second, LLCL § 401(b) further provides that, if management of an LLC is vested in its members (as it is here), then "any such member shall have and be subject to all of the duties and liabilities of a manager provided in this chapter." Third, LLCL § 415 (which is part of the same "chapter" as § 401), permits, unless otherwise prohibited by the operating agreement (which does not exist here), a manager to resign "at any time" upon written notice. There does not appear to be any dispute here that Weintraub resigned as a manager in accordance with these provisions. Fourth, the Court rejects Weintraub's claim that a person or entity with a fiduciary duty to another may nevertheless setting up a competing business with the person or entity to whom that duty is owed. *See Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (fiduciary owes "undivided and undiluted loyalty to those whose interests the fiduciary is to protect").

Nevertheless, the question remains whether Weintraub's fiduciary duty to Gilbert, which undoubtedly existed up to the moment of his resignation, ceased automatically upon his resignation. The difficulties that arise from such a conclusion are not difficult to fathom; a manager/member of a two-person LLC without any operating agreeement who may be unable to successfully seek judicial dissolution of the entity in light of *Matter of 1545 Ocean Ave. LLC v Ocean Suffolk Props. LLC*, 72 A.D. 3d 121 (2d Dept. 2010) could nevertheless create leverage by resigning his management position and immediately setting up a business competing with that

LLC upon his resignation as manager. Conversely, the manager/member of an LLC without any operating agreement who resigns his management position must, at some point, be able to make a living without being shackled by his now-former management role with the LLC. Here, Gilbert alleges that Weintraub was the "schmoozer" of the two members-managers (Opposition Brief at 5), and thus had closer relationships than Gilbert had with the LLCs' vendors and sales representatives. Gilbert thus essentially alleges that the LLCs were not "turnkey" operations, and thus perhaps Weintraub would be reasonably expected to cooperate with Gilbert for a brief period as the LLCs transitioned to Gilbert as the sole manager of the LLCs. That assertion does not appear worthy of summary disposition without further factual development, particularly where, as here, Weintraub formed a competing venture less than one week after resigning as a manager of the LLCs. In short, the fiduciary duty Weintraub undoubtedly owed to Gilbert until the moment of his resignation as a manager may have continued at least six days later when Weintraub formed the competing LLC. Discovery will shed light on whether it is reasonable, under the circumstances in this case, for such a duty to extend beyond Weintraub's resignation as manager, and if so, for how long it should extend. The Court thus denies Defendant's motion to dismiss the Amended Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on February 23, 2016 at 9:30 a.m.

ENTER

DATED: Mineola, NY
January 29, 2016

HON. TIMOTHY S. DRISCOLL
J.S.C.