

<b>BDO USA, LLP v Stiles</b>
2021 NY Slip Op 30064(U)
January 7, 2021
Supreme Court, New York County
Docket Number: 652352/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

BDO USA, LLP

Plaintiff,

- v -

JAMES STILES,

Defendant.

-----X

INDEX NO. 652352/2020
MOTION DATE 09/22/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 37, 38, 39, 40, 42, 43, 44

were read on this motion to/for DISMISS

Upon the foregoing documents and for the reasons set forth on the record (1/6/2020), James Andrew Stiles, Jr.'s motion to dismiss is granted with respect to the third (tortious interference with contract), fourth (tortious interference with prospective economic advantage), fifth (tortious interference with prospective economic advantage) and eighth (unjust enrichment) causes of action, but is otherwise denied because the well-pled amended complaint provides sufficiently particularized allegations as to Mr. Stiles' role in the scheme to divert his former employer's clients and employees to a competitor firm.

The Relevant Facts and Circumstances

This action concerns Mr. Stiles' alleged involvement in a scheme to divert business and employees from BDO USA, LLP (BDO) to a competitor, EverGlade Consulting (EverGlade). BDO is a national public accounting, tax, and advisory firm that Mr. Stiles joined in October

2012 after BDO acquired his previous firm, Argy, Wiltse & Robinson, P.C. (NYSCEF Doc. No. 20, ¶¶ 13-18).

Pursuant to a certain Manager Agreement (the **Manager Agreement**; NYSCEF Doc. No. 21), dated October 19, 2012, by and between BDO and Mr. Stiles, Mr. Stiles was prohibited from the disclosure of “Confidential Information,” including policies, practices, business, marketing, and information regarding current and prospective clients (*id.*, ¶¶ 4, 8). The Manager Agreement also prohibited Mr. Stiles from (i) causing clients or prospective clients from terminating their relationship with the firm and (ii) BDO employees from leaving the firm through unfair competition, business practices, or the unauthorized use of confidential information (*id.*, ¶ 7). In addition, the Manager Agreement imposed a fiduciary duty between Mr. Stiles and BDO due to the confidential information obtained in the course of his employment (*id.*, ¶ 6).

At BDO, Mr. Stiles was a member of the Industry Specialty Services Group (**ISSG**) and the Managing Director of the ISSG Biodefense and Government Contracts practice (NYSCEF Doc. No. 20, ¶ 26). In this position, Mr. Stiles was exposed to BDO’s confidential and proprietary information, including but not limited to BDO’s clients and potential clients, business plans and strategies, BDO personnel’s abilities and experience, and BDO policies, practices, and business and marketing information (*id.*, ¶ 30). Mr. Stiles allegedly developed a close working relationship with Eric Jia-Sabota, the national leader of ISSG and a former principal at Argy, Wiltse & Robinson, P.C. where Mr. Stiles had previously worked (*id.*, ¶¶ 27-29, 35).

When BDO began to expand its Public Sector practice in mid-2019, Mr. Jia-Sabota allegedly attempted to integrate the new practice into the ISSG (*id.*, ¶¶ 36-38). BDO alleges that when the integration did not occur, Mr. Jia-Sabota decided to leave BDO and to steal its business (*id.*, ¶ 39). The gravamen of BDO's allegations are that Mr. Stiles assisted Mr. Jia-Sabota in misappropriating BDO's Biodefense practice, BDO employees, and clients for EverGlade, a company that Mr. Jia-Sabota founded in February 2020 and publicly launched after leaving BDO in May 5, 2020 (*id.*, ¶¶ 34-80).

In particular, BDO alleges that Mr. Jia-Sabota "enlisted" Mr. Stiles to assist in the scheme to lure BDO employees to join EverGlade and that both individuals notified ISSG members of Mr. Jia-Sabota's plans to resign from BDO, which would result in a new opportunity at EverGlade (*id.*, ¶ 44-46). Even after Mr. Jia-Sabota disclosed his intent to withdraw from BDO, Mr. Stiles allegedly remained to solicit BDO employees to join EverGlade (*id.*, ¶ 48-49). As part of the Mr. Stiles efforts to facilitate the clandestine resignation of certain enumerated BDO employees so as to avoid detection, BDO alleges that he (i) falsely told members of the ISSG Biodefense practice that the entire team was joining EverGlade, (ii) advised employees that failure to join EverGlade would result in limited to no job prospects at BDO, (iii) directed BDO employees to apply to EverGlade through its website and avoid contacting Mr. Jia-Sabota directly, (iv) instructed employees on the timing and wording of their resignation notices to BDO, and (v) utilized confidential information to cause BDO employees to leave for employment at EverGlade (*id.*, ¶¶ 50-59). In sum, BDO claims that Mr. Stiles caused the following six employees to leave BDO for EverGlade: Andrew Albright, Paula Kim, Stephen Morris, Dan Paterson, Julie Roy, and John Wolfe (*id.*, ¶ 59).

In addition, BDO alleges that Mr. Stiles sought to steal a prospective BDO client for EverGlade and usurp BDO's business opportunities. In April 2020, a pharmaceutical company invited BDO to join the company's advisory board, which BDO accepted (*id.*, ¶¶ 65-66). Subsequently, BDO discussed engagement with the pharmaceutical company and began preparing and negotiating a contract for the same (*id.*). During this period, BDO introduced its contact at the pharmaceutical company to Mr. Stiles, still a BDO employee, in order to assist with obtaining grant funding but Mr. Stiles allegedly used the introduction to divert the pharmaceutical company's business to EverGlade (*id.*, ¶¶ 67-69). On June 1, 2020, the pharmaceutical company advised BDO that it wanted to work with EverGlade instead (*id.*). BDO also alleges that Mr. Stiles referred BDO team members to participate in a confidential request for proposal while knowing that the same employees would soon resign (*id.*, ¶¶ 44-88).

Mr. Stiles resigned from BDO on May 4, 2020 and BDO terminated his employment on May 26, 2020 (*id.*, ¶¶ 31-32). Mr. Stiles then went to work for one of BDO's clients, a pharmaceutical manufacturing company (*id.*, ¶ 33).

On September 2, 2020, BDO filed an Amended Complaint that alleges claims for (1) breach of contract, (2) breach of fiduciary duty, (3) tortious interference with contract, (4) tortious interference, (5) tortious interference, (6) breach of the duty of good faith and fair dealing, (7) faithless servant, (8) unjust enrichment, and (9) aiding and abetting breach of fiduciary duty. In response, Mr. Stiles moved to dismiss arguing, among other things, that the allegations are conclusory.

## Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

### A. First Cause of Action (Breach of Contract)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, the Manager Agreement provided that Mr. Stiles was not permitted to disclose confidential information, solicit clients or prospective clients of BDO through unfair competition or business practices, or solicit BDO employees to leave the firm through unfair competition or business practices (NYSCEF Doc. No. 21, ¶¶ 4, 7, 8). In the Amended Complaint, BDO has alleged that Mr. Stiles had access to BDO's confidential information, used such confidential information to solicit BDO employees to leave the firm for EverGlade or other opportunities (*id.*, ¶¶ 30, 59, 63). With respect to the solicitation of clients and prospective clients, BDO has alleged that Mr. Stiles was introduced to a pharmaceutical company while a BDO employee, that the pharmaceutical company was a prospective BDO client given discussions over engagement with BDO, and that Mr. Stiles used the introduction to transfer the pharmaceutical company's business to EverGlade (*id.*, ¶¶ 65-69). Moreover, Mr. Stiles allegedly solicited six identified BDO employees to leave

the firm and join EverGlade (*id.*, ¶¶ 49-59). Based on the foregoing, and according every favorable inference to the Amended Complaint as the court must on a motion to dismiss, BDO has adequately stated a claim for breach of contract and the branch of Mr. Stiles' motion to dismiss the first cause of action is denied.

### **B. Second Cause of Action (Breach of Fiduciary Duty)**

BDO sufficiently pleads that a fiduciary relationship exists because BDO entrusted Mr. Stiles with confidential and proprietary information by virtue of his position as a Managing Director of an ISSG practice, and that this relationship of trust led BDO to rely upon Mr. Stiles to assist with transitioning client assignments from employees that had resigned to those remaining with the firm (*id.*, ¶¶ 7, 30; *see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19-22 [2005] [finding fiduciary duty existed between underwriter and issuer because of allegations that there existed a relationship of higher trust than that arising from the underwriting agreement alone]). Stated differently, the allegations are not simply that he was just an employee. The allegations are that he was placed in a position of trust and confidence with certain confidential information and he was supposed to transition clients to other members of the BDO team when certain BDO employees left the firm and that by virtue of this assignment he was in a position to, and did, divert clients to Everglade (*cf. Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 439 [1st Dept 2017] [dismissing breach of fiduciary duty claim because an employer-employee relationship, without more, does not give rise to a fiduciary duty]). The claim is not duplicative of the breach of contract claim because the allegations in support of the breach of fiduciary duty claim are independent of, and collateral to, the allegations in support of the breach of contract claim (*see*

*Mandelblatt v Devon Stores, Inc.*, 132 AD2d 162, 167-68 [1st Dept 1987]). Accordingly, the branch of Mr. Stiles' motion to dismiss the second cause of action is denied.

### **C. Third Cause of Action (Tortious Interference with Contract)**

To establish a claim of tortious interference with contract, the plaintiff must demonstrate (1) the existence of its valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional and improper procuring of a breach, and (4) damages (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]). Interference with an "employee-at-will" agreement, such as the manager agreements attached as exhibits to the Amended Complaint (NYSCEF Doc. Nos. 22-27) cannot ground a claim for tortious interference with contract (*see American Preferred Prescription, Inc. v Health Mgmt.*, 252 AD2d 414, 417 [1st Dept 1998] [concluding that agreement for an indefinite term was terminable at will by either party and could not support a claim for tortious interference with contract]). Thus, and inasmuch as the other employees were employees at will, the third cause of action for tortious interference with contract must be dismissed.

### **D. Fourth and Fifth Causes of Action (Tortious Interference with Prospective Economic Advantage)**

The elements of a claim for tortious interference with prospective economic advantage are: (1) plaintiff had a business relationship with a third party, (2) defendant knew of that relationship and intentionally interfered with it, (3) defendant acted solely out of malice or used wrongful or illegal means amounting to a crime or independent tort, and (4) defendant's interference caused injury to the plaintiff's relationship with the third party (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]; *see also Guard-Life Corp. v S. Parker Hardware Mfg.*

*Corp.*, 50 NY2d 183, 191 [1980]). Wrongful means generally requires “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressures” (*Guard-Life Corp.*, 50 NY2d at 191). Conduct that is not criminal or independently tortious is deemed “lawful” and, thus, insufficiently culpable to create liability for interference with prospective contracts or other nonbinding economic relations (*Carvel Corp. v Noonan*, 3 NY3d 182 [2004]). Here, BDO alleges that Mr. Stiles falsely represented to BDO employees that the entire ISSG team was joining EverGlade and that failure to join EverGlade would result in limited job prospects at BDO (NYSCEF Doc. No. 21, ¶¶ 49-60, 98-103). This lacks the requisite allegation of wrongful or illegal means to sustain this claim under *Guard-Life* and *Carvel*, *supra*. (see, also, *M.J. & K. Co., Inc. v Matthew Bender & Co.*, 220 AD2d 448 [2d Dept 1995]; *Advanced Global Tech. LLC v Serious Satellite Radio Inc.*, 15 Misc 3d 776 [Sup Ct NY County March 8, 2007]). For the avoidance of doubt, with respect to the claim for tortious interference with prospective BDO clients, BDO alleges, among other things, that Mr. Stiles contacted prospective BDO clients and falsely advised that the ISSG team was leaving BDO to join EverGlade and staffed a confidential request for proposal with employees who would soon join a competitor firm (*id.*, ¶¶ 71-78, 104-109). These allegations also are insufficient to make out the requisite wrongful or illegal means. Thus, the fourth and fifth causes of action for tortious interference with prospective economic advantage are dismissed.

#### **E. Sixth Cause of Action (Breach of the Duty of Good Faith and Fair Dealing)**

The obligation of good faith and fair dealing implied in every contract requires that “neither party shall do anything which will have the effect of destroying or injuring the right of the other

party to receive the fruits of the contract” (*Dalton v Education Testing Serv.*, 87 NY2d 384, 389 [1995], citing *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]).

The Amended Complaint alleges that Mr. Stiles breached the implied covenant by creating working conditions that would encourage BDO employees to leave for other positions, including touting limited job prospects at BDO, advising BDO employees on how to apply to positions at EverGlade, and significantly, directing BDO employees on how to tender their resignations to avoid suspicion by BDO (NYSCEF Doc. No. 20, ¶¶ 49-57). This is sufficient to make out a claim of breach of the covenant of good faith and fair dealing which is not duplicative of is breach of contract claim (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265 [1st Dept 2008] [“a promise of good faith and fair dealing that is breached when a party acts in a manner that – although not expressly forbidden by any contractual provision – would deprive the other party of receiving the benefits under their agreement”]). Accordingly, the branch of Mr. Stiles’ motion to dismiss the sixth cause of action for breach of the covenant of good faith and fair dealing is denied.

#### **F. Seventh Cause of Action (Faithless Servant)**

The faithless servant doctrine provides that an employee that has usurped a corporate opportunity or actively stolen for an employer is not entitled to recover a salary (*Linder v Innovative Commercial Sys. LLC*, 2013 NY Slip Op 51695[U], \*6 [Sup Ct NY County 2013], *affd* 127 AD3d 670, 670 [1st Dept 2015]).

The Amended Complaint pleads with sufficient particularity that Mr. Stiles sought to divert BDO's employees and business to a competitor, EverGlade, and states a claim under the faithless servant doctrine. As discussed above, Mr. Stiles allegedly lured six employees from BDO to EverGlade and usurped a corporate opportunity by using an introduction by BDO to divert the business of a pharmaceutical company to EverGlade (NYSCEF Doc. No. 20, ¶¶ 44-80). Accordingly, the branch of Mr. Stiles' motion to dismiss the seventh cause of action pursuant to the faithless servant doctrine is denied.

#### **G. Eighth Cause of Action (Unjust Enrichment)**

The elements of unjust enrichment are "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The existence of a valid written agreement precludes recovery under quasi-contract because the unjust enrichment and breach of contract claims arise from the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). This claim must be dismissed because BDO fails to explain what benefits Mr. Stiles received from his purported misconduct other than what was due under the Manager Agreement (NYSCEF Doc. No. 20, ¶¶ 119-122).

#### **H. Ninth Cause of Action (Aiding and Abetting Mr. Jia-Sabota's Breach of Fiduciary Duty)**

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach"

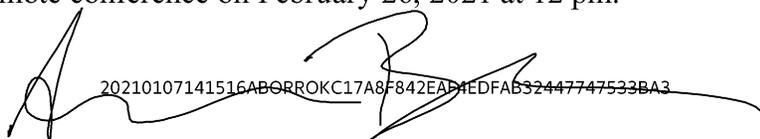
(*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). BDO sufficiently alleges that (i) Mr. Jia-Sabota breached his fiduciary obligations as a BDO partner by engaging in a scheme to draw BDO employees to EverGlade, (ii) that Mr. Stiles knowingly participated in the breach by staying at BDO after Mr. Jia-Sabota left to assist with the ongoing scheme, and that (3) BDO suffered damage because six of its employees left to work at EverGlade (NYSCEF Doc. No. 20, ¶¶ 44-80). To the extent that Mr. Stiles disputes that there was actual knowledge of Mr. Jia-Sabota's fiduciary duty and knowing participation in its breach, the argument fails. Mr. Jia-Sabota was a partner of BDO and a national leader of the ISSG. As such, he owed fiduciary duties to BDO. The allegations are that Mr. Stiles purportedly stayed at BDO in order to help implement Mr. Jia-Sabota's scheme to lure BDO employees to EverGlade (*id.*). This is adequate at this stage of the proceedings. Accordingly, the branch of Mr. Stiles' motion to dismiss the ninth cause of action for aiding and abetting breach of fiduciary duty is denied.

Accordingly, it is

ORDERED that Mr. Stiles' motion to dismiss is granted to the extent of the third cause of action for tortious interference with contract, the fourth and fifth causes of action for tortious interference with prospective economic advantage, and the eighth cause of action for unjust enrichment but otherwise denied; and it is further

ORDERED that Mr. Stiles shall file an answer within 20 days of this decision and order; and it is further

ORDERED that the parties shall appear for a remote conference on February 26, 2021 at 12 pm.

  
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1/7/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: