

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

FIBONACCI GROUP, INC.	:	JANUARY TERM 2005
	:	
v.	:	NO. 1399
	:	
FINKELSTEIN & PARTNERS, LLP., et al.	:	CONTROL NOs. 071065, 071192, and 071198

OPINION

Presently before the Court are three motions for summary judgment filed by the respective parties in this case.¹ For the reasons discussed below, the parties’ motions are granted in part and denied in part.

FACTUAL BACKGROUND

The undisputed facts are as follows: prior to 1999, Keith Altman (“Altman”) owned a business in California which provided technical support to attorneys in mass tort cases, with a focus on pharmaceutical claims. In 1998, Carl Jaeckel (“Jaeckel”) and Ralph Zita (“Zita”), two New Jersey attorneys, introduced Altman to Mark Cohen (“Cohen”) and Mark Huo (“Huo”). Cohen and Huo owned MicroMedia, a corporation providing network integration services to the Philadelphia-area business community. Altman, Cohen, and Huo formed Fibonacci, a new company providing the Philadelphia area with services similar to those provided by Altman’s old company.² Altman worked remotely from Massapequa, New York. Cohen and Huo also were

¹ Defendants Keith Altman (“Altman”), Kelly Casey (“Casey”), Andrew Finkelstein (“Finkelstein”), Ari Kresch (“Kresch”), and Finkelstein & Partners, LLP (“the Firm”), have filed a motion for summary judgment under Control No. 071065; Defendant Thomas Schrack (“Schrack”) has filed a motion for summary judgment under Control No. 071192; and the plaintiff, Fibonacci Group, Inc. (“Fibonacci”), has filed a partial motion for summary judgment, under Control No. 071198.

² There is an issue of fact as to whether Fibonacci signed confidentiality agreements with some of or all of the clients for whom it provided services. There is also an issue of fact as to which Fibonacci representative signed the agreements.

involved in the management of Fibonacci, but continued to operate and work for MicroMedia. Fibonacci was a closely-held corporation located in the same office as MicroMedia. Altman, Cohen and Huo were the three majority shareholders in Fibonacci.

Huo managed the accounts of both Fibonacci and MicroMedia. Altman assisted clients in buying and using software sold by Fibonacci. By April 2003, the other shareholders of the company were Jaeckel and Zita; and employee/shareholders Kelly Casey (“Casey”), Jennifer Kerr (“Kerr”), Thomas Schrack (“Schrack”), and Richard Lucia (“Lucia”), Fibonacci’s president. Casey was a bookkeeper who had previously worked with Altman. Casey worked from a remote office in Temecula, California. Kerr managed accounts for Fibonacci. Schrack worked at a document depository in Philadelphia. The shareholders other than the three majority shareholders each held approximately three to five percent of the equity of Fibonacci. Fibonacci had no written shareholder or employment agreements.

On paper, Fibonacci appeared to be struggling financially. In May 2003, Kerr was fired, and Lucia asked Casey to take the Fibonacci books to California and be Fibonacci’s bookkeeper. Casey provided Lucia with weekly cash flow reports for the company and returned the Quickbooks software to Fibonacci’s main office in August 2003.

On or about June 18 through 20, 2003, Altman attended the Mass Torts Made Perfect Conference in Chicago. There, Altman met Andrew Finkelstein (“Finkelstein”) and Ari Kresch (“Kresch”). Finkelstein was the primary shareholder of Finkelstein & Partners, LLP (“the Firm”). Finkelstein and Kresch were interested in expanding their law practices to include mass pharmaceutical litigation, Altman was dissatisfied with Fibonacci, and the three discussed Altman coming to work at the Firm. Altman expressed that he no longer wanted to be employed by Fibonacci.

Around a week after the conference, Altman met with Finkelstein at the Firm's offices in Newburgh, New York. There, Altman reiterated his dissatisfaction with Fibonacci and suggested that he work at the Firm. Altman, Finkelstein, and Kresch talked about how Altman could disassociate himself with Fibonacci. Finkelstein agreed to hire not only Altman, but also Casey and Schrack. Finkelstein further agreed to allow Altman to continue to work with Fibonacci clients until he began to work for the Firm. On June 24, 2003, Altman emailed Lucia, Huo, and Cohen asking Huo and Cohen to resign from Fibonacci and surrender their shares, in exchange for which Altman would assume Fibonacci's liability for what may have been an outstanding business loan.³ Cohen rejected the proposal.

In early July 2003, Altman told Lucia he had spoken with Finkelstein and Kresch. On July 8, 2003, Kresch emailed Altman, Casey, and Schrack welcoming them to the Firm and instructing them on participating in a conference call. The next day, Altman and Schrack attended a barbecue at Lucia's home, where they participated on the conference call. Casey, Finkelstein, and Kresch also participated in the call.

After the call, Altman instructed Casey to send Finkelstein or Kresch a financial report on Fibonacci. On July 10, Casey sent the report and two other items: a letter to be sent to Fibonacci's clients to advise the clients that Altman, Casey and Schrack were leaving Fibonacci, and a public relations piece on a collaboration between Fibonacci and the Firm. Altman, Schrack, Finkelstein, and Kresch received the two items, reviewed them, and suggested edits.

In July 2003, before he left Fibonacci, Schrack was assigned a telephone extension at the

³ The facts do not conclusively show whether this \$250,000 deposit to Fibonacci from Dallas attorney Robert Kisselburgh was a business loan requiring repayment or a capital investment in Fibonacci, with no need of repayment. Kresch Dep. p. 7; Lucia Dep. pp. 233-35.

Firm.⁴ Kresch also allowed Casey to use the Firm's funds to buy software that had been used prior for Fibonacci's clients, so that the Firm could resell it to one of Fibonacci's current clients.

On or about July 16 through 19, 2003, Altman and Casey attended the ATLA conference in San Francisco. The conference booth was in Fibonacci's name and Fibonacci had paid for the booth in February 2003. Casey made all travel arrangements for ATLA through Fibonacci's travel agent and at its expense. These arrangements included hotel costs for Kresch. Before the conference, Finkelstein had business cards printed for Altman and Casey which stated that they were employees of the Firm. Both Altman and Casey handed out the cards at the conference. Also during the conference, Casey distributed literature on Drug Safety Research, a Fibonacci project. Neither the public relations piece nor the client letter was distributed at ATLA. Lucia learned that Altman and Casey were distributing the business cards at the conference.

On or about July 23 and 24, 2003, Altman, Casey, and Schrack traveled to the Firm's Newburgh, New York office. Casey charged her and Altman's travel expenses to Fibonacci. Schrack submitted an expense report to Fibonacci for his travel to Newburgh as well.

Fibonacci's board of directors met on July 28, 2003.⁵ Altman, Huo, Cohen, Lucia, Zita and Jaeckel were in attendance. Altman began the meeting by stating that he believed Fibonacci was losing money, and if Cohen and Huo were unwilling to surrender their shares he would resign. The board accepted Altman's resignation, and Casey and Schrack were contacted by speakerphone and also immediately resigned. After Altman's resignation had been accepted, a Fibonacci employee seized a bag containing confidential client information and some Fibonacci

⁴ At around the same time, Schrack reportedly began to use his Fibonacci corporate credit card for the first time, making non-business purchases at retail stores and restaurants. Cohen Dep. pp. 159-60.

⁵ The Minutes of the Board Meeting from July 28, 2003 list Casey and Schrack as members of Fibonacci's Board. Exh. D-56. The minutes indicate that they were prepared by Zita. *Id.* Altman, Lucia, and Huo asserted in depositions that Schrack was never a director of Fibonacci. Altman Dep. pp. 217-18, Lucia Dep. pp. 362-63, Huo Dep. pp. 166-67.

property, which Altman had brought to the meeting.

After the resignations of Altman, Casey, and Schrack, Kresch instructed Casey to send out a letter to inform Fibonacci's clients that Altman, Casey and Schrack had left Fibonacci. Casey submitted timesheets from the three former employees to Fibonacci so that Fibonacci could bill their clients for services rendered between the submission of the previous timesheets and July 28, 2003. Casey billed two items incorrectly, causing the Firm to bill and collect for services performed for Fibonacci's clients. Casey also sent back Fibonacci's current QuickBooks software and payroll information, as well as timesheets, in August 2003.⁶

Fibonacci's board did not seek to replace Altman, Casey, or Schrack but chose instead to hire consultants to implement the software. After the three left, Lucia attempted to undertake new initiatives to allow Fibonacci to continue operating. Fibonacci ceased operations in 2004 due to a lack of funds.

Two weeks after Schrack left Fibonacci, he left the Firm and began to work for Levin, Fishbein, Sedran & Berman, a law firm he had worked with during his tenure at Fibonacci. Altman and Casey are still employed by the Firm. After joining the Firm Altman continued to perform services for clients who he acquired at Fibonacci.⁷

PROCEDURAL HISTORY

On January 11, 2005 Fibonacci filed a complaint against Altman, Casey, Schrack, Finkelstein, Kresch, and the Firm. The complaint alleged ten counts against all defendants:

⁶ Casey admits to currently having some office equipment in her possession which she originally obtained during her tenure with Fibonacci. Dep. I pp. 286-87, Casey Dep. II p. 23. She also admits to having retained some Drug Safety Research materials until July 2006, when Fibonacci's attorney agreed to pay for shipping the materials. Casey Dep. I p. 275.

⁷ A question of fact exists as to whether, and how many, items owned by Fibonacci are currently in the possession of Altman and Casey. Casey Dep. I pp. 286-87, Casey Dep. II p. 23. It is admitted that Altman retains approximately two thousand CDs containing confidential client data. Altman Dep. pp. 52-53. However, it is disputed whether Altman is privileged to retain these CDs.

intentional interference with economic and business relationships (count I), unfair competition (count II), conversion (count III), fraud and misrepresentation (count IV), unjust enrichment (count V), trade libel and defamation (count VI), conspiracy (count VII), breach of fiduciary duty (count VIII), aiding and abetting breach of fiduciary duty (count IX), and negligence (count X). Altman, Casey, Finkelstein, Kresch, and the Firm filed preliminary objections to the complaint, which were overruled by the Court in their entirety. Schrack also filed preliminary objections to the complaint. The Court sustained Schrack's preliminary objections in part, and dismissed counts VI (trade libel and defamation) and X (negligence) of the complaint against him. All other objections were overruled. *See Fibonacci Group, Inc. v. Finklestein & Partners, LLP*, 2005 Phila. Ct. Com. Pl. LEXIS 302 (June 30, 2005).

On July 14, 2006, Altman, Casey, Finkelstein, Kresch, and the Firm filed a motion for summary judgment. Schrack filed a summary judgment motion on July 17, 2006. Also on July 17, 2006 Fibonacci filed a motion for partial summary judgment as to all defendants except for Schrack on count III (conversion) of the complaint; against Altman, Casey, and Schrack on count VIII (breach of fiduciary duty); and against Finkelstein, Kresch, and the Firm on count IX (aiding and abetting breach of fiduciary duty).

DISCUSSION

I. The Standard of Review for Summary Judgment.

A summary judgment motion may be granted where there is no genuine issue of material fact as to a necessary element of a cause of action or defense and where the movant is entitled to judgment as a matter of law. *Estate of Ghaner v. Bindi*, 779 A.2d 585, 588 (Pa. 2001), *citing* Pa.R.C.P. 1035.2(1). Summary judgment may also be granted where the non-moving party has the burden of proof and fails to produce evidence of facts essential to the cause of action.

Pa.R.C.P. 1035.2(2).

The record of fact to be used in determining a summary judgment motion consists of pleadings, depositions, answers to interrogatories, admissions, affidavits, and reports signed by an expert witness. Pa.R.C.P. 1035.1. Summary judgment cannot be granted if the motion is supported only by the movant's uncontradicted sworn testimony, where the court would have to determine the credibility of the movant. *Nanty-Glo v. Am. Surety Co.*, 309 Pa. 236, 238 (1932).

II. Defendants' Motion for Summary Judgment as to Count II of the Complaint (Unfair Competition) is Granted Only as to Schrack and Denied as to All Other Defendants.

Count II of the complaint purports to state a claim for unfair competition. The gist of an unfair competition claim is whether a party "passed off" its goods as the goods of another. *Pennsylvania State Univ. v. Univ. Orthopedics*, 706 A.2d 863, 870 (Pa. Super. Ct. 1998). A company entering a field occupied by a rival with an established reputation must not create unnecessary confusion between his business and the business of the established rival. *Id.* at 871.

Schrack's motion for summary judgment on the issue of unfair competition is granted. Schrack did not attend the ATLA conference and represent himself as a Firm employee while there. Schrack reviewed and suggested edits for the client letter, but that letter was only distributed after he, Altman and Casey left Fibonacci. Schrack was assigned a telephone extension at the Firm before he left Fibonacci, but there is no evidence to suggest that he told his Fibonacci clients that he had a telephone number at the Firm. Fibonacci has failed to raise sufficient issues of fact to indicate that Schrack's actions created unnecessary confusion.

As this count pertains to Altman, Casey, Finkelstein, Kresch, and the Firm, the motion for summary judgment is denied. Issues of fact exist as to whether these defendants "passed off" the Firm as Fibonacci's successor or engaged in other conduct constituting unfair competition.

III. Fibonacci's Motion for Summary Judgment as to Count III of the Complaint (Conversion) is Granted Only as to Casey, and Denied as to All Other Defendants; and All Defendants' Motions for Summary Judgment on Count III are Denied.

Count III of the complaint purports to state a claim for conversion. Conversion occurs where the defendant deprives the plaintiff of his right to a chattel, or interferes with the plaintiff's use or possession of the chattel, without plaintiff's consent and without lawful justification. *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 659 n.3 (Pa. Super. Ct. 2000). In Pennsylvania, conversion must be based on interference with a tangible form of property. *Pestco, Inc. v. Associated Prods.*, 880 A.2d 700, 708 (Pa. Super. Ct. 2005).

Fibonacci moves for summary judgment against Altman, Casey, Finkelstein, Kresch, and the Firm. Each of these defendants filed cross-motions for summary judgment on the issue. Additionally, Schrack moves for summary judgment on the issue of conversion. Fibonacci's summary judgment motion is granted on the issue of conversion as against Casey only. Casey admits that she currently has equipment originally provided to her by Fibonacci. There is no issue of fact alleged to contradict Casey's possession of the equipment or her three-year delay in returning the Drug Safety Research materials to Fibonacci. Therefore Fibonacci has sustained this count as against Casey.⁸

Fibonacci's motion for summary judgment as against Altman on the issue of conversion, as well as Altman's motion for summary judgment on the same issue, is denied. Altman admits to retaining the CDs. However, the following issues of fact must be decided to determine whether Altman was privileged to possess the information: whether Altman signed confidentiality agreements with clients whose data he possesses; and if he did, whether Altman signed the agreements in his individual capacity or as an employee of Fibonacci.

⁸ Damages will not be assessed at this time because of a lack of evidence. During trial, Fibonacci may present evidence to substantiate this claim.

As to Finkelstein, Kresch, and the Firm, it is undisputed that Casey's continued retention of the equipment in the California office benefited each of these defendants, because so long as she retained the equipment they did not have to supply her with more. If Finkelstein, Kresch, and the Firm actively encouraged Casey to retain the equipment, they could be liable for interfering with Fibonacci's use and possession of the equipment she retained. Therefore, Fibonacci's motion for summary judgment is denied on this issue, as is the motion by Finkelstein, Kresch, and the Firm. As to Schrack's summary judgment motion for conversion, an issue of material fact exists as to whether he returned all items owned by Fibonacci.

IV. Defendants' Motions for Summary Judgment as to Count VIII (Breach of Fiduciary Duty) are Granted Only as to Finkelstein, Kresch, and the Firm; Fibonacci's Motion for Partial Summary Judgment is Granted Only as to Altman, and All Other Motions for Summary Judgment on this Count are Denied.

Count VIII of the complaint purports to state a claim for breach of fiduciary duty. "A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accept or assume to accept the confidence, they cannot act so as to take advantage of the others' interests without their knowledge or consent." *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 539 Pa. 241, 254 (1992). A director of a corporation is a fiduciary to the corporation, and must serve in good faith. 15 Pa.C.S. § 512(a). An officer or director shall discharge his duties in good faith and with the diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances. *Wolf v. Fried*, 473 Pa. 26, 29 n.5 (1977) (citing 15 P.S. § 1408 (1968)).

Defendants Altman, Casey, Finkelstein, Kresch, and the Firm's motion for summary judgment on count VIII is granted only as it relates to Finkelstein, Kresch, and the Firm. The Court finds that the record fails to support a claim that Finkelstein, Kresch, or the Firm had a

fiduciary duty to Fibonacci. The Firm, acting through Finkelstein and Kresch, was a competitor of Fibonacci in that both organizations wanted to obtain or retain Altman's, Casey's, and Schrack's skills. A fiduciary duty arises where confidence is placed in another, or where there exists a special relationship under statute. No such duty arises where organizations compete. Fibonacci placed no confidence in Finkelstein, Kresch, or the Firm and hence no fiduciary duty existed.

Fibonacci's summary judgment motion against Altman is granted on this claim. Altman was a majority shareholder of Fibonacci and a director. As such he was a fiduciary of the corporation with a duty to act in good faith. *See Wolf, supra*. While as a Fibonacci employee he may have been privileged to leave and pursue other employment, his duty as a director was the one he breached. There is no dispute of fact that Altman passed out business cards at the ATLA conference which stated he was a Firm employee. Altman Dep. p. 146 ln. 5-10. Fibonacci has met its burden of proving that Altman breached his fiduciary duty towards Fibonacci. As to Fibonacci's, Casey's, and Schrack's summary judgment motions, there is a dispute of fact as to whether Casey and Schrack were on Fibonacci's board of directors and therefore whether they owed Fibonacci fiduciary duties, so the parties' cross-motions for summary judgment are denied.

V. Count IX of the Complaint Alleging Aiding and Abetting Breach of Fiduciary Duty is Dismissed.

Altman, Casey, Finkelstein, Kresch, the Firm, and Schrack move for summary judgment as to Fibonacci's claim for aiding and abetting a breach of fiduciary duty, which appears in count IX of the complaint. Additionally, Fibonacci moves for summary judgment on this claim, against Finkelstein, Kresch, and the Firm for aiding and abetting the other three defendants' alleged breach of fiduciary duty. Pennsylvania does not recognize the tort of aiding and abetting

a breach of fiduciary duty.⁹ Therefore, all parties' motions for summary judgment on this issue are denied, and count IX of the complaint is dismissed.

VI. The Parties' Motions for Summary Judgment on Count X (Negligence) are Dismissed.

Count X of the complaint purports to state a claim for negligence. The elements of negligence are (1) the existence of a duty requiring a person to conform to a standard of conduct; (2) the person's breach of the duty or his failure to conform to the standard; (3) actual harm; and (4) a causal connection between the breach of the duty and the harm. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 586 (2002). In a negligence action a claimant must establish the source of the legally-recognized duty alleged. *Bilt-Rite Contrs. v. Architectural Studio*, 581 Pa. 454, 470-71 (2005). Summary judgment may be granted where the non-moving party fails to meet its burden of producing evidence essential to the cause of action. Pa.R.C.P. 1035.2(2).

Count X of the complaint is dismissed. Fibonacci asserts in its complaint that the source of the duty in the negligence claim is the same fiduciary duty asserted in counts VIII and IX of the complaint; i.e., Altman, Casey, and Schrack's alleged fiduciary duty towards Fibonacci. For Fibonacci to assert a breach of fiduciary duty claim, *and* claim that the duty breached in the negligence claim was a fiduciary duty, means that the negligence claim duplicates the breach of fiduciary duty claim. Therefore count X of the complaint is dismissed.

VII. All Summary Judgment Motions Not Addressed In this Opinion are Denied.

As to all other counts upon which defendants moved for summary judgment, genuine

⁹ Fibonacci cites *Koken v. Steinberg*, 825 A.2d 723 (Pa. Super. Ct. 2003). In *Koken*, the Superior Court held that the tort of aiding and abetting a breach of fiduciary duty was not recognized under Pennsylvania law. *Koken* at 732. See also *WM High Yield Fund v. O'Hanlon*, 2005 U.S. Dist. LEXIS 33569, *49-50 (E.D. Pa. 2005) (holding that because the Pennsylvania Supreme Court has declined to recognize aiding and abetting a breach of fiduciary duty, the Eastern District of Pennsylvania would not expand Pennsylvania law by recognizing the tort).

issues of fact exist in the record and summary judgment cannot be granted.¹⁰

CONCLUSION

For the foregoing reasons, Fibonacci's motion for partial summary judgment is granted only as to count III as it relates to Casey and is otherwise denied; Schrack's motion for summary judgment is granted only as to count II and otherwise denied; and Altman, Casey, Finkelstein, Kresch, and the Firm's Motion for Summary Judgment is granted only as to Finkelstein, the Firm, and Kresch as to count VIII and otherwise denied. Counts IX and X of the complaint are dismissed. The Court will enter a contemporaneous order consistent with this opinion.

BY THE COURT,

Dated: January 31, 2007

HOWLAND W. ABRAMSON, J.

¹⁰ Defendants' summary judgment motions as they pertain to count I (intentional interference with economic and business relations), count IV (fraud and misrepresentation), count V (unjust enrichment), count VI (trade libel and defamation), and count VII (conspiracy) are denied, since genuine issues of fact exist for trial.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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FIBONACCI GROUP, INC.	:	JANUARY TERM 2005
	:	
v.	:	NO. 1399
	:	
FINKELSTEIN & PARTNERS, LLP., et al.	:	CONTROL NOs. 071065, 071192, and 071198

ORDER

AND NOW, this 31ST day of January, 2007, upon consideration of Plaintiff, Fibonacci Group, Inc.'s Motion for Partial Summary Judgment (Control No.071198), Defendant Schrack's Motion for Summary Judgment (Control No. 071192), and Defendants Altman, Casey, Finkelstein, Kresch, and Finkelstein & Partners's Motion for Summary Judgment (Control No. 071065), and all responses thereto, it is hereby ORDERED and DECREED that:

Plaintiff's Motion for Partial Summary Judgment is GRANTED as to Count III of the Complaint as against Casey; and DENIED as to all other counts and defendants;

Defendant Schrack's Motion for Summary Judgment is GRANTED as to Count II of the Complaint and DENIED as to all other counts; and

The other Defendants' Motion for Summary Judgment is GRANTED only as to Count VIII of the Complaint, to Finkelstein, Kresch, and Finkelstein & Partners; and DENIED as to all other counts and all other defendants.

FURTHER, Counts IX of the Complaint (aiding and abetting a breach of fiduciary duty) and X (negligence) are DISMISSED.

BY THE COURT,

HOWLAND W. ABRAMSON, J.