SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

R & G BRENNER INCOME TAX CONSULTANTS,

Plaintiff,

INDEX No. 16901/11

MOTION DATE: 9/17/20
Motion Sequence 007, 008,

-against-

RICHARD GILMARTIN,

Defendants.

The following papers read on this motion:

Notice of Motion.....XX
Affirmation in Support.....XX
Affidavit in Support.....X
Affirmation in Opposition.....X
Reply Affirmation.....XX
Reply Affidavit.....X

This motion by the plaintiff R & G Brenner Tax Consultants ("plaintiff") for an order pursuant to CPLR 3212 granting it, inter alia, partial summary judgment holding the defendant Richard Martin liable with respect to each of the causes of action advanced in its complaint (Sequence No. 8) is determined as provided herein.

This cross-motion by the defendant Richard Martin for an order pursuant to CPLR 3212 and New York Labor Law § 191-c granting him summary judgment dismissing the plaintiff's complaint and awarding him summary judgment on his first and second counter-claims including damages in the amount of $ 5,098 and an order pursuant to CPLR 3001 declaring that select portions of the parties' Confidentiality Nonsolicit and Noncompete Agreement ("CNNA") dated December 22, 2010 were unreasonable and are unenforceable (Sequence No. 7) is determined as provided herein.

**R & G BRENNER v GILMARTIN** **Index No.: 016901/11**

This cross-motion by the plaintiff for an order pursuant to CPLR 3025 (b) granting it leave to amend its Answer to the defendant's counterclaims to interpose a defense based on the Statue of Limitations and an order pursuant to CPLR 3212, 213 (2) granting it summary judgment dismissing the defendant's counterclaims as time-barred (Sequence No. 9) is determined as provided herein.

The plaintiff in this action seeks to recover damages from his former employee the defendant Richard Gilmartin ("the defendant") for, inter alia, his breach of the restrictive covenants in their agreements . It has advanced causes of action sounding in breach of contract and faithless servant and has sought declaratory relief as well. The defendant has cross-claimed to recover for breach of contract and damages under Labor Law ¶ 191-c based upon the plaintiff's failure to pay him commissions allegedly owed him pursuant to their agreements. While the defendant has alleged in his Answer as affirmative defenses that certain restrictive covenants in his agreements with the plaintiff are unenforceable, he has not sought declaratory relief of that nature.

Presently, the plaintiff seeks summary judgment holding the defendant liable for damages on its claims sounding in breach of contract and faithless servant. The defendant has cross-moved for summary judgment dismissing the plaintiff's first cause of action by which it seeks a declaration that the defendant has breached their contract as duplicative of its second cause of action whereby the plaintiff seeks to recover damages for breach of contract. The defendant also seeks summary judgment dismissing the plaintiff's second cause of action by which it seeks to recover damages for breach of contract and its third cause of action by which it seeks to recover for faithless servant based upon the plaintiff's alleged breach of their agreements insofar as he has failed to pay him commissions due him. He also seeks summary judgment imposing liability on the plaintiff on his first and second counterclaims whereby he seeks to recover for the plaintiff's breach of their agreements in that it has failed to pay him commissions owed and due. The defendant also seeks declaratory relief holding that portions of the restrictive covenants in the parties' agreements are unreasonable and therefor unenforceable as a matter of law. Lastly, the plaintiff seeks to amend his Answer to the defendant's counterclaims to advance a defense based on the Statue of Limitations as well as summary judgment dismissing the defendant's counterclaims as time-barred.

The facts relevant to the determination of these motions are as follows:

The plaintiff accounting firm prepares personal, corporate and business tax returns and aids clients in tax planning. It also provides financial planning including debt consolidation and mortgage brokerage services to its clients by contacting licensed providers. It has approximately 30 offices in the five boroughs and surrounding counties. It has undertook a wealth of advertisement, mailings, emails and discount letter promotions to attract its client base and has also offered referral incentives to current clients. It has placed its offices in strategically visible business locations. In addition to its full-time staff, it employs individuals to assist in preparing

tax returns, which is what the defendant did while employed by the plaintiff.

The defendant began working for the plaintiff in 2006, but only during tax season, i.e., from January 1st until a few weeks after April 15th in 2006. He did not bring any clients into the firm when he began working there. In 2009, 2010, and 2011, the defendant worked for the plaintiff during off-seasons, too, generally from May 1 through December 31st. The majority of the time at the plaintiff firm, the defendant worked at its busiest office which was located at 835 Second Avenue in NYC. In performing his job, the defendant would meet with clients, review their tax documents and ultimately prepare their tax returns. He served as the contact person between the client and whatever tax authorities were involved and handled any communications between the two, including audits. Guided by the plaintiff's minimum fee schedule, the defendant would set the fee owed by each client depending on the complexity of the tax return, the number of tax forms required, and the time needed to complete the return(s).

As was customary between them, the plaintiff asked the defendant to work at its Second Avenue office for the 2011 Tax Season and he accepted that offer. On December 10, 2020, the defendant allegedly signed the plaintiff's "General Employment Agreement" ("GEA"), CNNA and their "Agreement and Understanding" ("AU"). At his examination-before-trial, the defendant, a CPA who also went to law school, testified that he understood these agreements and that he voluntarily and knowingly accepted the restrictions in those agreements when he agreed to them. The defendant also accepted the plaintiff's offer for an off-season position in 2011 and entered into the same agreements applicable to that period. While the defendant now attests that he did not sign those documents for the 2011 year and alleges that his signature has been forged, as this court held in its 2016 order, "[i]n view of the non-compete provision of the prior years, a two year non-compete provision was clearly an implied term of [the defendant's] 2011 employment contract." In fact, the defendant admits that those agreements were a requirement of his employment each and every year he was employed at the plaintiff company. In any event, even if the 2011 CNNA was disregarded on the ground that it was forged as defendant now alleges, the results here would nonetheless be the same since the 2010 CNNA imposed the same restrictions and ran for a two year period.

Via his GEA, defendant was responsible for preparing all tax returns assigned to him, checking them, adhering to the plaintiff's policies and procedures and maintaining and ensuring that the internal controls and records were accurate. In addition, the defendant negotiated to receive 45% of all funds received by the plaintiff for his completed audits. Needless to say, the defendant agreed to devote his full time and best efforts in performing his duties at the plaintiff firm. He also agreed that "all files, records, lists of names of clients [and] copies of tax returns are the property of and confidential to [the plaintiff]"; that "[he] would at no time make any copies of same or use same except in the performance of [his] tax preparation duties;" and, that he "will not remove any ...[of the plaintiff's] files from any [of the plaintiff's] office[s]."

The defendant's CNNA repeatedly noted that the plaintiff was placing the defendant in a position of "trust and confidence" and that the plaintiff was relying on him to meet all of his

representations. The defendant acknowledged his exposure to all of the plaintiff's confidential matters and that he "will develop close, unique relationships with, gain special knowledge of and promote and develop the loyalty of the [plaintiff's] clients that [he] service[d]." Their CNNA provided that the plaintiff's business and good will "have been and will continue to be developed through [the plaintiff's] investment of substantial time, effort and money and that disclosure or use of confidential or proprietary information for any purpose, including competition with [the plaintiff] would be greatly prejudicial and detrimental to [the plaintiff] and would cause it to suffer immediate and irreparable injury." The defendant also acknowledged in their agreement that he was being placed in a position "to unfairly misappropriate and convert [plaintiff's] business, client accounts, and goodwill for use by [him] and other Persons in competition with [the plaintiff], and that this would be greatly prejudicial and detrimental to [the plaintiff], and would cause it to suffer immediate and irreparable injury." "Client" was defined in the defendant's CNNA as clients "with whom [the defendant] had contact while associated with [the plaintiff] (emphasis added)." 'Client" as defined in their Agreement did not include clients with whom the defendant had no contact or clients the defendant had contact with before joining the plaintiff's firm unless the plaintiff purchased the rights to said clients. Their agreements also allowed the defendant to continue servicing client's whose audits he was performing at the time of his departure.

The CNNA also provided that during his employ with the plaintiff, the defendant would not "directly or indirectly, alone and/or with others, engage in any activity which is or may be competitive with [the plaintiff's] business" or "sell to any [plaintiff's] client any service related to the preparation of tax returns and related documentation (Tax Prep. Services), or investment ...or any investment plan or service..." unless he obtained written authorization from the plaintiff and was licensed with one of the plaintiff's affiliates to sell such products or services.

Most importantly, their CNNA provided for the two year period after the defendant's services with the plaintiff terminated, he would not:

> "solicit, contact, meet with, visit, market, sell, send mailings or announcements for the purpose of preparing Tax Prep. Services and/or other services [offered by the plaintiff] to [plaintiff's clients], or attempt to sell to [a client of the plaintiff] any Tax Preparation Services or other [of the plaintiff's services], including but not limited to tax returns, financial planning, mortgages or other services and products provided by the [the plaintiff] or attempt or persuade any [of the plaintiff's] clients referral sources, individuals or entities to cease doing business with [the plaintiff] or to reduce their business with [the plaintiff];" that he would not "directly or indirectly ...solicit, hire, entice, induce, encourage or attempt to solicit, hire, induce or encourage any employee, associate, affiliate, referral source or business associate of [the plaintiff] to cease doing business with or reduce its business with [the plaintiff]...[and, that he] would notify [the plaintiff] of the name of any of [its] client[s] who contacts [him]."

The defendant's AU provided the defendant would "not tamper with any of [the

plaintiff's] programs or systems used in the provided computers;" "that no website may be created or maintained...which deals with Income Tax, Financial Planning or any other product offered through [the plaintiff's business] during the tenor of their contract;" and, "that no other non-[plaintiff's] addresses, phone numbers, fax numbers, business cards, e-mail or website addresses, or any other contact information may be given to [the plaintiff's] clients...."

The defendant resigned from the plaintiff firm on November 9,2011. At his examination-before-trial, the defendant admitted that the plaintiff had no reason to believe he was engaged in any other kind of work prior to his leaving. However, dating back to June 11, 2011, the defendant began communicating with two of the plaintiff's highest paying clients, Julian Barrowcliffe and David Mooney, via a personal email, Richard.Gilmartin @hofstra.edu, instead of his email at the plaintiff's firm, in clear violation of their CNNA. While defendant did not produce this e-mail, a copy was obtained from Barrowcliffe. In that email, defendant stated that the plaintiff had "permanently closed their Second Avenue office;" "[t]his was due to a lost clientele;" and, that "[n]o new Office has been open yet." At his examination-before-trial, the defendant not only admitted that he was never advised to inform the plaintiff's clients that its Second Avenue office had permanently closed, but that there was no basis for telling them it closed due to a loss of clientele; at best; that was his opinion, which he admitted was speculative. Defendant also could not explain why he failed to tell these clients that it was the plaintiff's plan to open a new office in the 2012 tax season. In fact, the plaintiff's CEO, Robert Brenner, issued the firm including the defendant an e-mail several weeks later in which he informed them that "it is essential that anyone who knows about our move...is not left with the impression that we are not returning to the immediate area." That e-mail further provided that the new office would be one block away and would be a "class act." When asked at his examination-before-trial why he did not share this information with Barrowcliffe and Mooney, the defendant replied, "no reason." Furthermore, in his June 11, 2011 email to Barrowcliffe and Mooney, the defendant stated that "during this interim period, I am considering alternative work in financing or trading" and he provided them with the details of his education and professional experience. Curiously, that email closes "[i]n the meantime, I will continue to help you both with all of your taxes" and provided the defendant's home phone number, which, again, was in clear violation of the parties' agreements. Most telling, the plaintiff's data base shows that those two clients profiles were changed in the plaintiff's electronic data base system by the defendant to the plaintiff's old Second Avenue address and telephone number, thereby disabling their contact with the plaintiff. In fact, at his examination-before-trial, the defendant admitted that he had already decided that he was leaving the plaintiff's firm when he made those changes. The plaintiff's investigation revealed that the defendant changed the plaintiff's email address to his private email address for a number of clients whom he had serviced. When asked at his examination-before-trial whether he had changed Brian Bowlin's email address before he left the plaintiff firm, he responded that he didn't know but he "doubted it." Obviously, these changes crippled the plaintiff's firms attempts to communicate with the parties whose email addresses the defendant had changed. As if this alone does not provide evidence of the defendant's breach of his employment agreements in an obvious attempt to coral these clients for himself, the defendant emailed Mooney on November 2, 2011- a week before he resigned- from a new email,

rgilmartin@manhattan-cpa.com, regarding his 2010 tax return which defendant had prepared as plaintiff's employee. Again, this email was not produced by the defendant but was obtained from Mooney when he was subpoenaed.

The plaintiff's President Benjamin K. Brenner further attests that while employed with the firm, the defendant was asked to assist in pending litigation with former clients and even met with the plaintiff's attorneys and the former clients' attorneys. Brenner attests that he subsequently learned from the firm's lawyers that opposing counsel had reported to them that the defendant had spoken in private to the former clients regarding their claims and went so far as to make statements contrary to the plaintiff's interests in that litigation disparaging the firm. In fact, the defendant admitted contacting opposing counsel on September 15, 2011, on which date he informed them that he no longer worked at the plaintiff's firm and he supplied them with his new business card. The business card reflects the name of the defendant's new firm, its address, phone number, fax number, business e-mail, address and a link to the firm's website. It also indicates that the defendant's new firm is associated with the American Institute of CPAs ("AICPA") as well as a LinkedIn account. That day, the defendant sought advice on how he could avoid his contractual obligations with the plaintiff, which renders his forgery claim all the more specious. This conduct which was undertaken while the defendant was still under the plaintiff's employ was another clear violation of the defendant's agreements with the plaintiff.

At his examination-before-trial, the defendant did not deny giving out his new business card to plaintiff's clients prior to his resignation from the firm. In fact, the plaintiff has submitted a copy of an email sent by one of its clients to the defendant the day after his resignation which was addressed to the defendant's firm email address but was cc'd to the defendant's new e-mail address: The defendant was unable to explain how that client had obtained his new e-mail address so soon after his resignation nor did he deny having given him his new business contact information before he resigned. In addition, the Internal Revenue Service was sending information regarding plaintiff's clients to the defendant at his new address nearly a month prior to his resignation. And, defendant did not deny that he also notified the New York State Department of Taxation and Finance to forward communications regarding the plaintiff's clients to his firm's new address over one month before he resigned. Similarly, Powers of Attorney executed by the defendant for the plaintiff's clients before he departed bore his new firm's address as well and when asked if he had engaged in such conduct at his examination-before-trial, he responded "possibly;" again, further evidence of clear violations of the defendant's contractual commitments to the plaintiff. In fact, the defendant's misconduct began back in MAY when he was having correspondence sent to his home. An e-mail was sent to the defendant at his firm e-mail address by one of the plaintiff's clients the day before he left asking "What's your new number?" giving further evidence that the defendant solicitated some of the plaintiff's clients before he left the plaintiff firm. In fact, Brenner attests that the defendant's email communications decreased 300% in November as compared to October.

Documentation produced by the defendant in this action evidences that he has serviced over 400 of the plaintiff's clients since he left the plaintiff's firm and he has admitted soliciting

plaintiff's clients within a year of leaving the firm and failing to notify the plaintiff about those communications. These actions also clearly constitute further violations by the defendant of his agreements with the plaintiff. Defendant admitted removing client files from the plaintiff's office before he departed which were never returned, again in clear violation of his employment agreements. In fact, defendant admitted at his examination-before trial that he returned to the office shortly after his departure to retrieve another client's file and that that not only was that violative of his agreements, but also constituted a criminal offense. The defendant did however testify that that client had requested that he continue working on her audit after he left the firm, but the plaintiff maintains that for that to have happened, the defendant must have told the client he was leaving the firm, which was also violative of their agreements. In fact, the defendant admitted at his examination-before-trial that he solicited audit clients.

The plaintiff maintains that the defendant continued contacting its clients even after this court temporarily enjoined him from "soliciting any of [its] clients whom [he] learned of or serviced during his employment" there. Julie Schwartzman-Morris, a client of the plaintiff, has attested in support of the plaintiff's motion that the defendant called her on her cell phone on March 17, 2012 to schedule an appointment to have her taxes done. Not aware that he had left the plaintiff's firm, she told him that she already had an appointment. At his examination-before-trial, defendant testified that he did not know how he had Schwartzman-Morris' cell phone number. Following that conversation, the defendant e-mailed Schwartzman-Morris allegedly confirming her appointment for March 24, 2012 @ 11:00 at his new address. When Schwartzman-Morris realized that the defendant had left the plaintiff firm, she emailed him that she had an appointment with the plaintiff's firm and that she did not know that he had left it. Defendant's reply is disturbing: He replied: "I hope you do not get audited over there in light of several key people being arrested and as a result the IRS setting up a task force to audit those returns. See attached and paragraph four of this link." Attached was an article published in the Syosset Jericho Tribune dated March 4, 2011 entitled "DA: Tax Preparers Arrested For Falsifying Tax Returns, Grand Larceny." A Criminal Information associated with a criminal case naming a tax preparer at the plaintiff's firm was also attached. Defendant testified that he couldn't deny that he tried to persuade Schwartzman-Morris to have him do her taxes at his examination-before-trial.

When the plaintiff reached out to Amira Dickinson, another client whom the defendant had also serviced, in January 2012, she informed it that the defendant had contacted her on December 27, 2012 trying to lure her to his new company and that he followed up a few weeks later, telling her that "he would be there for her in the upcoming tax season." At his examination-before-trial, the defendant did not contest those communications and he admitted that Dickinson did not have any audit work pending when he left the plaintiff's firm.

There is also undisputed evidence that the defendant contacted several more of the plaintiff's clients subsequent to his departure from the firm. Kevin Acevedo has attested in support of the plaintiff's application that he contacted two of the plaintiff's clients, Michael James and David Harrison, on December 19, 2011. They both told Acevedo that the defendant

had told them about the Gallagher scandal which concerned them about continuing to do business with the plaintiff and that they would be using the defendant's services moving forward. Acevedo also attests that there was no record of an ongoing audit in Harrison's file at the plaintiff's office. At his examination-before-trial, the defendant did not deny initiating contact with James or that he informed him about the Gallagher scandal and advised him that he should leave the plaintiff's firm and come with him. Defendant also couldn't deny that he initiated contact with another one of plaintiff's clients, Anne Burrell, on or about December 11, 2011 and Brenner attests that she did not have an audit pending at that time, either. In addition, defendant e-mailed plaintiff's client Steven Singh from his new firm on December 21, 2011 providing all of his new business information and he followed up with him in March 2012 asking if he would like to set up a meeting. When Singh responded that he was having his taxes done closer to home, the defendant offered to do them via mail or fax. Again, the defendant did not deny these contacts at his examination-before-trial although he did not know how he had Singh's contact information. Yet another client, Sandra Nolan, contacted the plaintiff in March 2012 for a copy of her tax return because she was refinancing her home. During that call, Nolan said that she too had received a new business card from the defendant less than a month earlier and that she thought he was still at the firm. On February 27, 2012, the plaintiff received an e-mail from one of its clients, Jin Oh, addressed to the defendant's old e-mail address there. Suffice to say, the e-mail makes clear that the defendant had prepared Oh's 2011 tax returns following his resignation from the plaintiff's firm. Finally, on January 10, 2012, an e-mail was received at the defendant's Brenner e-mail address from another one of the plaintiff's clients, Stephen Sano, which indicated that he received defendant's message when he called him which is clear evidence that the defendant reached out to him, too. At his examination-before-trial, the defendant yet again could not deny that he reached out to Sano and he acknowledged that Sano did not have an audit pending at that time and that that contact violated his agreements with the plaintiffs as well as this court's temporary restraining order.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (Ayotte v Gervasio, 81 NY2d 923 [1993]). If the movant makes a prima facie showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (Alvarez v Prospect Hospital, 68 NY2d at 324). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' " (Friends of Animals v Associated Fur Manufacturers, Inc., 46 NY2d 1065, 1067–1068 [1979], quoting CPLR 3212, subd. [b]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339 [2011]).

" 'The essential elements of a breach of contract cause of action are "the existence of a

contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" ' " (Gertler v Davidoff Hutcher & Citron LLP, 186 AD3d 801, 805 [2d Dept 2020], quoting Canzona v Atanasio, 118 AD3d 837, 838 [2d Dept 2014], quoting Dee v Rakower, 112 AD3d 204, 208–209 [2d Dept 2013]). "A written agreement that is complete, clear, and unambiguous on its face must be enforced to give effect to the meaning of its terms and the reasonable expectations of the parties" (Gertler v Davidoff Hutcher & Citron LLP, 186 AD3d at 805, citing South Rd. Assoc., LLC v International Bus. Machs. Corp., 4 NY3d 272, 277 [2005]; Belle Harbor Wash. Hotel, Inc. v. Jefferson Omega Corp., 17 AD3d 612, 612 [2d Dept 2005]).

" 'Agreements restricting an individual's right to work or compete are not favored and thus are strictly construed' " (Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d 575, 577 [2d Dept 2018], lv to appeal denied, 32 NY3d 913 [2019], quoting Goodman v New York Oncology Hematology, P.C., 101 AD3d 1524, 1526 [3d Dept 2012]; citing Morris v Schroder Capital Mgt. Intl., 7 NY3d 616, 620 [2006]; BDO Seidman v. Hirshberg, 93 NY2d 382, 389 [1999]). " ' "[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" ' " (Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d at 577, quoting BDO Seidman v Hirshberg, 93 NY2d at 389, quoting Reed, Roberts Assocs. v Strauman, 40 NY2d 303, 307 [1976], rearg denied, 40 NY2d 918 [1976]). "The determination of whether a restrictive covenant is reasonable involves the application of a three-pronged test" (Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d at 577). " 'A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public' " (Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d at 577, quoting BDO Seidman v Hirshberg, 93 NY2d at 388–389 [emphasis in original]; citing Ricca v Ouzounian, 51 AD3d 997, 998 [2d Dept 2008]). "The 'violation of any prong renders the covenant invalid' " (Long Is. Minimally Invasive Surgery, P.C. v St. John's Episcopal Hosp., 164 AD3d at 577, quoting BDO Seidman v Hirshberg, 93 NY2d at 389).

"[T]he legitimate purpose of an employer in connection with employee restraints is 'to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment (emphasis added)' " (BDO Seidman v Hirshberg, 93 NY2d at 391, quoting Blake, Employee Agreements Not To Compete, 73 Harv L Rev 625, 647 [emphasis ***859 supplied]). "Protection of customer relationships the employee acquired in the course of employment may indeed be a legitimate interest" (BDO Seidman v Hirshberg, 93 NY2d at 391, quoting Blake, Employee Agreements Not To Compete, 73 Harv L Rev at 653). " 'The risk to the employer reaches a maximum in situations in which the employee must work closely with the client or customer over a long period of time, especially when his services are a significant part of the total transaction' " (BDO Seidman v Hirshberg, 93 NY2d at 391-392, quoting Blake, Employee Agreements Not

To Compete, 73 Harv L Rev at 661).

> "Then, the employee has been enabled to share in the goodwill of a client or customer which the employer's over-all efforts and expenditures created. The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment (BDO Seidman v Hirshberg, 93 NY2d at 392, citing Technical Aid Corp. v Allen, 134 NH 1, 8, [1991]."

It is not disputed that in his CNNA(s), the defendant agreed that "all files, records, lists of names [clients] and copies of tax returns, are the property of and confidential to [plaintiff];" that "[he] would at no time make any copies of same or use same except in the performance of [his] tax preparation duties;" and, that he "will not remove any [of plaintiff's] equipment or ... files from any [of plaintiff's] office." It also provided that while employed by the plaintiff, he "would not engage in any activity which is or may be competitive with [the plaintiff's] business." The CNNA also provide "that no website may be created or maintained ...which deals with Income Tax, Financial Planning or any other product offered through [the plaintiff's business] during the tenor of their contract" and "that no other non-[plaintiff] addresses, phone numbers, fax numbers, business cards, e-mail or website addresses, or any other contact information may be given to [the plaintiff's] clients...." Their CNNA provided for the two year period after the defendant's services with the plaintiff terminated, he would not:

> "Solicit, contact, meet with, visit, market, sell, send mailings or announcements for the purpose of preparing Tax Prep. Services and/or other [of the plaintiff's] services, including but not limited to tax returns, financial planning, mortgages or other services and products provided by the [the plaintiff]" [and that he] "would notify [the plaintiff] of the name of any of [its] client[s] who contacts [him]."

The declarative relief sought via the plaintiff's first cause of action is denied as duplicative of the plaintiff's second cause of action.

The plaintiff has submitted overwhelming evidence that prior to his resignation as well as thereafter and even following this court's temporary restraining order, the defendant violated his agreements with the plaintiff repeatedly by setting up his own business while employed at the plaintiff firm, at times using the plaintiff's resources to his advantage and interfering with them insofar as they serviced the plaintiff and its clients. The evidence also establishes that the defendant removed plaintiff's proprietary property, diverted and solicited its clients while he still worked there as well as afterwards, and that he serviced plaintiff's clients and failed to inform the plaintiff of those contacts. The evidence is also clear that he disparaged the plaintiff to its clients, in violation of their agreements. The plaintiff's motion for summary judgment holding the defendant liable for damages on its second cause of action in which it seeks to

recover damages for breach of contract is granted.

"The faithless servant doctrine states that an employee who is faithless in performance of their duties is not entitled to recover either salary or commission" (Linder v Innovative Commercial Sys. LLC, 41 Misc 3d 1214(A) at *5 [Sup Ct NY County 2013] affd, 127 AD3d 670 [1st Dept 2015]; citing Feiger v Iral Jewelry, 41 NY2d 928, 928 [1977]). "While the phrasing of the rule may imply a broad proposition, courts apply the rule relatively narrowly" (Linder v Innovative Commercial Sys. LLC, 41 Misc 3d 1214(A)at * 5, citing W. Elec. Co. v Brenner, 41 NY2d 291, 295 [1977] [employee theft]; Maritime Fish Prods., Inc. v World–Wide Fish Prods., Inc., 100 AD2d 81, 88 [1st Dep't 1984] [employee usurping corporate opportunity). "Courts will usually only hold an employee liable under the faithless servant doctrine if the employee has usurped a corporate opportunity or actively stolen for the employer" (Linder v Innovative Commercial Sys. LLC, 41 Misc3d 1214(A) at * 5, citing Visual Arts Found., Inc. v Egnasko, 91 AD3d 578, 579 [1st Dep't 2012]; Soam Corp. v Trane Co., 202 AD2d 162, 162 [1st Dep't 1994] [employee promoted competitor's products over employer's]; Phansalkar v Andersen Weinroth & Co., L.P., 344 F3d 184, 203 [2d Cir 2003] [employee usurped corporate opportunity]). When proven, a claim of "faithless servant" results in a former employee forfeiting all compensation earned by him or her.

Based upon the detailed behavior that the defendant engaged in while employed for the plaintiff, the plaintiff has also established its entitlement to summary on its claim for faithless servant as a result of which the defendant has forfeited his claim to recover compensation including commissions (William Floyd Union Free School Dist. v Wright, 61 AD3d 856, 859 [2d Dept 2009] citing Feiger v Iral Jewelry, 41 NY2d 928 [1977]; Matter of Blumenthal [Kingsford], 32 AD3d 767, 768, supra; American Map Corp. v Stone, 264 AD2d 492, 492-493 [2d Dept 1991]; Soam Corp. v Trane Co., 202 AD2d 162, 163-164 [1st Dept]; see also, Dawes v J. Muller & Co., 176 AD3d 473, 474 [1st Dept 2019]; cf. Abreu v Barkin and Assoc. Realty, Inc., 115 AD3d 624 [1st Dept 2014] [defendants failed to establish their faithless servant defense. There was no evidence that plaintiff's husband actively solicited defendants' former clients, or that plaintiff personally knew of the alleged solicitations]). The plaintiff's motion for summary judgment imposing liability on the defendant for its third cause of action by which it seeks to recover damages for faithless servant is **granted**.

Turning next to the plaintiff's motion to amend its Answer to the defendant's counterclaims to advance the Statute of Limitations as a defense, the time line underlying those claims is as follows: The plaintiff filed his complaint on or about December 5, 2011 and the defendant filed his Answer on or about December 29, 2011. The defendant did not advance his counterclaims at that time nor did he set forth any facts which gave notice of them. The plaintiff thereafter sought leave to amend its complaint as well as summary judgment on it. In this court's order dated May 27, 2016, this court granted that motion in its entirety; that is, it granted the plaintiff's motion to amend its complaint and awarded it summary judgment. That order was reversed by the Appellate Division by order dated November 17, 2018 based on procedure, not the underlying merits. The Appellate Division held that this "court should not have awarded the

plaintiff summary judgment on the issue of liability on the causes of action in the amended complaint before the defendant had answered the amended complaint" (R & G Brenner Income Tax Consultants v Gilmartin, 166 AD3d 685, 688 [2d Dept 2018]). Issue had not been joined at that juncture nor was such relief available on alternative grounds. The defendant filed his Answer to the Amended Complaint in July 2019.

CPLR § 203(d) states, in relevant part, "[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed[.]" However, CPLR 203 (f) provides that a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading (emphasis added)." While the defendant's counterclaims were not time-barred in December of 2011 when the plaintiff's original complaint was interposed, the defendant's Answer did not give any notice whatsoever of his claims for breach of contract and/or lost commissions, therefore, those claims cannot relate back to his original Answer. "[T]he 'relation-back' provision of CPLR 203(f) does not apply since 'the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading' " (DeRossi v Rubinstein, 233 AD2d 220, 221 [1st Dept 1996]; see also, Boltin v Lavrinovich, 28 Misc 3d 1217(A) [Sup Ct NY County 2010], citing Mondello v New York Blood Ctr.-Greater N.Y. Blood Program, 80 NY2d 219, 226 [1992]; Duffy v. Horton Mem. Hosp., 66 NY2d 473, 477–478 [1985] ["Although counterclaim plaintiffs maintain that their claims should relate back to the initiation of the main action, in 2007, there is no basis for relating back when the issues underlying the main action did not put Movants on notice that this fraud claim was being raised against them"]; 390 W. End Assoc. v Nelligan, 35 AD3d 306 [1st Dept 2006] ["The court properly concluded that defendants are not entitled to application of the relation-back doctrine since the 1991 answer gave no notice of the counterclaims interposed in the 2002 amendment"]).

As for defendant advancing this claim as an setoff or recoupment, "[w]here an untimely counterclaim is interposed and the court's review of the counterclaim reveals that it does not arise from 'the transactions, occurrences, or series of transactions or occurrences' upon which the complaint is based, equitable recoupment will not save the counterclaim from an attack based upon the statute of limitations" (LaLoggia v Document Sec. Sys., Inc., 12 Misc 3d 1161(A) at *2-3 [Sup Monroe County Ct 2006] app dismissed, 41 AD3d 1031 [4th Dept 2007], citing Matter of SCM Corp., 40 NY2d 788, 791 (1976). " ' "Where the contract itself contemplates the business to be transacted as discrete and independent units, even claims predicated on a single contract will be ineligible for recoupment" ' " (LaLoggia v Document Sec. Sys., Inc., 12 Misc 3d 1161(A) at *3, quoting Westinghouse Credit Corp. v D'Urso, 278 F3d 138, 147 (2d Cir. 2002), quoting In re Malinowski, 156 F3d 131, 135 (2d Cir. 1998). "Thus, even where claims arise from the same contract, equitable recoupment will not be available where the claims do not arise from the same transaction: 'Claims that do not arise out of reciprocal contractual obligations or the same set of facts are not part of the same transaction for

recoupment purposes' " (LaLoggia v Document Sec. Sys., Inc., 12 Misc 3d 1161(A) at *3, quoting Global Crossing Bandwith, Inc. v. Centrix Telecom, LLC, 2004 WL 2284737, *2 [WDNY 2004]). Here, "[d]espite the fact that plaintiff's claims and defendant's counterclaims arise from the same agreement, ... 'defendan[t] . . . failed to show that . . . [its] claim aris[es] out of some feature of the transaction upon which the plaintiff's action is grounded' " (LaLoggia v Document Sec. Sys., Inc., 12 Misc 3d 1161(A) at *3, quoting Rochester Health Network, Inc. v. Rochester Hospital Service Corp., 123 AD2d 509, 510 [4th Dept. 1986], quoting Bull v United States, 295 US 247, 262 [1935]).

Accordingly, the plaintiff's motion for an order granting it leave to amend its Answer to Defendant's Counterclaims to advance a defense based upon the Statute of Limitations is granted and the plaintiff is granted summary judgment dismissing the defendant's first and second counterclaims as untimely.

The burden shifts to the defendant to establish the existence of material issues of fact with respect to the plaintiff's causes of action sounding in breach of contract and faithless servant and to establish grounds for permitting his counterclaims to advance.

The defendant maintains as a defense to the plaintiff's breach of contract and faithless servant claims that since the plaintiff breached their agreement by failing to pay him his commissions, it is precluded in whole or part from recovering of him for his breaches. "A covenant not to compete is not enforceable 'when the party benefited was responsible for the breach of the contract containing the covenant' " (Sussman Educ., Inc. v Gorenstein, 175 AD3d 1188, 1189 [1st Dept 2019], quoting Cornell v T.V. Dev. Corp., 17 NY2d 69, 75 [1966]; see also, DeCapua v Dine-A-Mate, Inc., 292 AD2d 489 [2d Dept 2002]; Elite Promotional Mktg., Inc. v Stumacher, 8 AD3d 525 [2d Dept 2004]). " '[T]he statute of limitations governs the commencement of an action, not the assertion of a defense (emphasis added)" (Matter of Jenkins v Astorino, 155 AD3d 733, 736 [2d Dept 2017], quoting Tauber v Village of Spring Val., 56 AD3d 660, 661 [2d Dept 2008]; citing CPLR 201, 217). Nevertheless, "if a defense 'arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed' " (Matter of Jenkins v Astorino, at 736, citing CPLR 203[d]). Here, the counterclaims even advanced as a defense do not arise from the claims asserted in the complaint. Therefore, the defendant is not entitle to an offset or recoupment based upon the plaintiff's alleged failure to pay him commissions.

The defendant also maintains that he did not breach his agreements with the plaintiff as the conduct he has been accused of engaging in is permissible. He relies on Walter Karl, Inc. v Wood (137 AD2d 22, 27 [2d Dept 1988]). The court set forth the following with respect to an employee's right to set up a business while still employed:

"It is fundamental that absent a restrictive covenant not to compete, an employee is free

> to compete with his or her former employer unless trade secrets are involved or fraudulent methods are employed (see, Reed, Roberts Assocs. v Strauman, 40 NY2d 303 [1976], rearg denied 40 NY2d 918 [1976]; Catalogue Serv. v Henry, 107 AD2d 783 [2d Dept 1985]; accord, Zurich Depository Corp. v Gilenson, 121 AD2d 443, 444 [2d Dept 1986]). 'Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing it cannot be said that a former employee "should be prohibited from utilizing his knowledge and talents in this area" ' (Catalogue Serv. v Henry, supra, at 784, quoting from Reed, Roberts Assocs. v Strauman, supra, at 309). Nor will trade secret protection attach to customer lists where such customers are readily ascertainable from sources outside the former employee's business (see, Catalogue Serv. v Henry, supra, at 784; Leo Silfen, Inc. v Cream, 29 NY2d 387, 392 [1972]) unless the employee has engaged in an act such as stealing or memorizing his employer's customer lists (Greenwich Mills Co. v Barrie House Coffee Co., 91 AD2d 398, 402 [2d Dept 1983]). Similarly, an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential (see, Catalogue Serv. v Henry, supra, at 784; Anchor Alloys v. Non-Ferrous Processing Corp., 39 AD2d 504, 507 [2d Dept 1972], lv denied 32 NY2d 612 [1973]).

Curiously, even the defendant notes that "so long as the defendants did not use plaintiff's time, facilities or proprietary secrets to build a competing business" (Metal & Salvage Ass'n, Inc. v Siegel, 121 AD2d 200, 201 [1st Dept 1986]), the defendant has not acted improperly. Here, however, the defendant's misconduct rose to a level far beyond that permitted to set up one's own business. Not only did the defendant engage in conduct directly sabotaging the plaintiff's business, while employed there, he used the plaintiff's resources directly to do so while he was working there. He even went so far as to mislead clients as to the firms status, to change client contact information in the plaintiff's computer and to tell client's that the firm was under criminal investigation. The conduct that the defendant has engaged in here is not entirely of the nature generally permitted.

The defendant's claim that the restrictive covenant is unenforceable due to its broad prohibitions is rejected, too. The defendant is not barred from doing business with all of the plaintiff's clients like the clauses did in Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina (9 AD3d 805 [3d Dept 2004], app denied 3 NY3d 612), but only those clients whom he serviced while employed at the plaintiff's firm, even then with certain exceptions: their covenant excludes the plaintiff's clients who were the defendant's clients prior to his employment by the plaintiff as well as those for whom he was performing audit work when he left the firm. The defendant's challenge to the notification provision of the parties' agreements suffers from the same infirmities. To the extent that the defendant has sought declarative relief via his motion, that relief was not sought in his Answer's counterclaims and is denied for that reason as well.

As for the defendant's counter claim (as opposed to his defense) for unpaid commissions, even had that claim survived, he has not established his entitlement to summary judgment as he has not established that the commissions he sought were actually earned. His

self-serving affidavit and prepared chart hardly constitute clear evidence thereof. His application is supported by only his own claim coupled with a handwritten note apparently prepared by him reflecting that a balance is owed him and copies of his paycheck stubs. Nowhere is there so much as a scintilla of evidence which reflects what type of services were provided, for whom, when they were done, or how the defendant calculated his allegedly owed commissions. His paycheck reflects hours worked and wages paid but his commissions were not based on those figures pursuant to the parties' agreement. Also, conspicuously absent is any evidence that the defendant ever advanced this claim to the plaintiff nor was there any mention of it in the defendant's original Answer which was interposed in December 2011, or any mention thereof by the defendant at his deposition.

In conclusion:

The plaintiff's motion for summary judgment is **granted** to the extent that it is granted summary judgment holding the defendant liable on its second and third cause of action sounding in breach of contract and faithless servant.

The plaintiff's motion for summary judgment on its first cause of action seeking declarative relief holding that the defendant has breached their contract is **denied** and the defendant's motion for an order granting it summary judgment dismissing the plaintiff's first cause of action is **granted**.

The plaintiff's motion for leave to amend its Answer to the defendant's Counterclaims is **granted** and the plaintiff's motion for summary judgment dismissing the defendant's counterclaims as untimely is **granted**.

The defendant's motion for summary judgment dismissing the plaintiff's second and third causes of action and for declarative relief is **denied**.

The issues of the amount of the damages that the plaintiff is entitled to based upon the defendant's breach of their Agreements is respectfully referred to the Calendar Control Part (CCP) for hearing.

Subject to the approval of the Justice there presiding, and provided that a Note of Issue has been filed at least ten days prior thereto, this matter shall appear on the calendar of CCP for February 24, 2021 at 9:30 a.m. for a hearing on damages that the plaintiff is entitled to from the defendant based upon its claim for breach of contract.

A copy of this order shall be served on the calendar clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in

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CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

So, ordered.

Dated December 4, 2020

J.S.C.