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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 20

EASTERN CLAIMS SERVICE, INC.,

Plaintiff,

INDEX NO.: 010132/2002
MOTION DATE: 08/28/2003
MOTION SEQUENCE: 002

- against -

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DENISE GOLD,

Defendant.

The following papers read on this motion:

Notice of Motion, Statement Pursuant to Rule 19-A, Affidavit & Exhibits Annexed	1
Affirmation in Opposition, Affidavit & Exhibits Annexed	2
Exhibit A	3
Affidavit in Reply	4
Defendant's Memorandum of Law in Support	5
Defendant's Reply Memorandum	6

This motion by defendant, Denise Gold, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

Plaintiff Eastern Claims Service Inc., incorporated in September of 1999, administers Independent Medical Examinations on behalf of self-insured employers and insurance companies. Gabriel Fasciglione is its sole shareholder and officer.

Defendant Denise Gold is an attorney engaged in worker's compensation defense work for self insured employers and insurers. Her clients or employers include the

Towns of Hempstead and Oyster Bay, the Uninsured Employers Fund and American Transit.

Fasciglione and Gold met in 1999, and began a social relationship, living together for a time. Together they commenced an IME administration service, the plaintiff Eastern, which Fasciglione incorporated through an attorney other than Gold. Fasciglione avers that Gold was counsel to the plaintiff corporation, an allegation which Gold denies. It is undisputed that Gold received $140,000 from Eastern during its less than three year administration of IMEs, that she had IME administration interests before her association with Eastern as well as after, that all of Eastern's business came from Gold's legal employers or clients and that sometime prior to Gold's leaving Eastern, the personal and romantic relationship soured.

In March or April of 2002 Gold either left Eastern, or was directed to leave by Fasciglione. By mid-May Eastern had lost all of its IME business, and alleges in this law suit that Gold wrongfully interfered with its business relations and breached her fiduciary duty to the corporation. Gold avers that Eastern lost its clients because of poor performance, including producing late reports and failing to pay doctors, and on those grounds seeks summary judgment.

The complaint, although it contains only two causes of action, they are obscurely plead but may be read to assert causes of action sounding in tortious interference with business relationships, business disparagement, breach of fiduciary duty and prima facie tort. Gold has made out a prima facie defense that she was not the cause of Eastern's loss of its clients, by introducing affidavits from those individuals responsible for assigning the administration of IMEs, Gold's evidence regarding Eastern's deficient performance is almost superfluous, as plaintiff fails to offer sufficient evidence to make out a prima facie case in support of any of its claims.

Addressing them seriatim, first is INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS:

Plaintiff alleges that Gold interfered with the business relationships of the plaintiff by persuading its clients to do business with another entity with which she is now affiliated. Plaintiff has failed to state a cause of action for such interference.

Gold was associated with an IME administration service before her association with Eastern. Her association with Eastern provided her with a substantial income in addition to her earnings from worker's compensation litigation. Her subsequent association with a similar service renders her a "competitor" of Eastern, which status excuses her from the consequences of interference with its business relationships where "the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful". Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 NY2d 183, 190-191. Wrongful means include physical violence, fraud, civil suits and criminal prosecutions, and some degrees of economic pressure; it does not include persuasion alone even when "it is knowingly directed at interference" with the business. Id. . The only colorable evidence of wrongful conduct presented by plaintiff was a statement relayed to a business associate that Eastern principal Gabriel Fasciglione was "mean". This de minimis comment simply cannot meet the demanding threshold for wrongful conduct necessary to render interference by a competitor culpable . Id. At 91.

PRIMA FACIE TORT:

If it is plaintiff's intention to assert a cause of action for prima facie tort, i.e., that Gold intentionally inflicted harm without excuse or justification by a series of acts "that would otherwise be lawful", see Curiano v. Suozzi, 63 NY2d 113, 117, such assertion fails. In a cause of action for prima facie tort, any lawful act undertaken to protect business interests precludes a required element of the tort, i.e., a sole motive of "disinterested malevolence". Forken v. CIGNA Corp., 234 AD2d 992, 993; Quail Ridge Associates v. Chemical Bank, 162 AD2d 917, 919, app dsmd 76 NY2d 936. The papers submitted on the motion reveal an intent to preserve Gold's financial interests,

accordingly, a cause of action for prima facie tort cannot be made out.

BREACH OF FIDUCIARY DUTY:

Fasciglione alternatively alleges that Gold was an employee, or acted as counsel or a partner in the plaintiff corporation, and that she breached her fiduciary duty to the corporation by using her contacts to solicit business for another entity after she left or was asked to leave the business. Pursuant to the corporate opportunity doctrine, "a corporate fiduciary 'may not, without consent, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation' ". Ackerman v. 305 East 40th Owners Corp., 189 AD2d 665, 666. Assuming *arguendo* for purposes of this motion that Gold had a fiduciary duty to the corporation as counsel, or as a profit sharing, controlling, or undisclosed partner or shareholder, she had a duty not to divert corporate opportunity, she owed such duty only while she was associated with Eastern. The obligation of loyalty implied by the relationship "rests upon the rule that a person who undertakes to act for another shall not in the same matter act for . . . (herself)' ". Bankers Trust Co. v. Bernstein, 169 AD2d 400, 401. Once terminated, Gold no longer acted for Eastern, and thus was not prohibited from acting for herself. Eastern's loss of its four clients after Gold's departure, in the absence of any evidence that she acted against the corporate interests prior to her departure, does not create a factual issue. See, e.g., Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 NY2d 112, 119-120. An allegation in the complaint made upon "information and belief" and not upon personal knowledge is "insufficient to raise a genuine issue of material fact". Bitting v. Lee, 168 AD2d 836, 838; see Capelin Assocs. v. Globe Mfg. Corp., 34 NY2d 338.

Nor was Gold subject to any constraint against competing, as her services were not unique and she did not acquire any trade secret information while associated with Eastern. See Reed Roberts Assocs. v. Straumann, 40 NY2d 303, 306. The evidence indicates that Gold engaged in IME administration before her association with Eastern, that she introduced same to Fasciglione, and that the expertise brought to the IME endeavor was

hers, as were the clients. Whether or not her conduct in administering IMEs and defending worker's compensation cases implicates ethical considerations concerning a conflict of interest, as counsel for plaintiff suggests, and whether she improperly entered into a prohibited transaction with a client in violation of DR 5-104 of the Code of Professional Responsibility (22 NYCRR § 1200.23), are issues not relevant here, as violation of a disciplinary rule does not generate a cause of action. William Kaufman Organization, Ltd. v. Graham & James LLP, 269 AD2d 171, 173, lv app dsmd 94 NY2d 876.

BUSINESS DISPARAGEMENT:

To state a claim for business disparagement, the defamatory statements must be set forth in the complaint "in haec verba". Besicorp Ltd. v. Kahn, 290 AD2d 147, 150, lv app denied 98 NY2d 601. Plaintiff's complaint states only that "Gold spread false rumors concerning the principal of Eastern". In light of the failure to identify specifically the alleged defamatory statements in the complaint, any cause of action alleging business disparagement is dismissed, and as plaintiff has not submitted any evidence of a statement which could be characterized as business disparagement or could have affected plaintiff's business, the dismissal is with prejudice.

Accordingly, on the basis on the foregoing, it is

ORDERED that the complaint is dismissed.

Dated: October 1, 2003

J.S.C.

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