SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

JOSEPH STANCO and NICHOLAS TOOMEY,

Plaintiffs,

-against-

RALLYE MOTORS HOLDING LLC

Defendant.

Decision and Order

MOTION SEQUENCE: 14, 15
INDEX NO.:612155/2017

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion (Sequence #14)
Memorandum of Law in Support
Affirmation in Support
Memorandum of Law in Opposition
Affirmation in Opposition
Memorandum of Law in Reply

Notice of Motion (Sequence #15)
Memorandum of Law in Support
Affirmation in Support
Memorandum of Law in Opposition
Affirmation in Opposition
Reply Memorandum of Law in Support

In an action to recover damages for, *inter alia*, breach of contract, Plaintiff Nicholas Toomey moves for an order pursuant to CLR 3211(a)(1), (5), and (7) dismissing each of the counterclaims asserted against him in the amended answer of Rallye Motors Holding LLC ("Rallye") (Motion Sequence Number 14); and Plaintiff Joseph Stanco moves for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing each of the counterclaims asserted against him in Rallye's amended answer (Motion Sequence Number 15).

Background

Approximately 60 years ago, Peter Terian ("Peter") founded the automobile business which today operates as Rallye, a holding company for several automobile dealerships.

Plaintiff Joseph Stanco joined Rallye in 1981 as Comptroller. In 2006, he became the President and Chief Executive Officer ("CEO") of Rallye.

Plaintiff Nicholas Toomey joined Rallye in 1990 as an Operations Director. In 2006, Toomey became Vice President of Rallye.

In 2002, Peter Terian died. At the time of his death, Peter owned 89% of Rallye and Plaintiffs Stanco and Toomey each owned 5.5% of Rallye.

Pursuant to Rallye's Limited Liability Company Agreement ("Operating Agreement") dated December 20, 2000, upon Peter's death, control of Rallye vested in Juliana who, thereafter, became the Manager of Rallye.

In 2011, Rallye's Operating Agreement was amended with the execution of an Amended and Restated Limited Liability Company Agreement ("Amended Operating Agreement").

The Amended Operating Agreement "ousted" Juliana as Manager of Rallye, "and for all intents and purposes handed over the management of Rallye LLC to Stanco and Toomey" and set forth the formation of a Board of Managers to manage the business and affairs of Rallye.

On July 31, 2017, Juliana became President and CEO of Rallye.

On September 18, 2017, Rallye terminated Stanco and Toomey's Employment Agreements and Supplemental Compensation Agreements.

Procedural History

On November 9, 2017, following their termination, Stanco and Toomey (collectively referred to as "Plaintiffs") commenced the instant action.

On May 11, 2018, Plaintiffs filed an amended complaint naming Rallye as the only Defendant and asserting causes of action for breach of contract (the Employment Agreement), unjust enrichment, accounting, and attorneys' fees.

Rallye served an amended anser with numerous affirmative defenses and seven counterclaims:

The Instant Motions

Toomey and Stanco separately move for an order pursuant to CLR 3211(a)(1), (5), and (7) dismissing each of the counterclaims asserted against them in Rallye's amended answer.

For the reasons that follow, Toomey's motion is granted in part and denied in part and Stanco's motion is granted.

The Court's Determination

"To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Gould v Decolator*, 121 AD3d 845 [2d Dept 2014]; *see also Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314 [2002]). To qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]; *Flushing Sav Bank, FSB v Siunykalimi*, 94 AD3d 807 [2d Dept 2012]). Documents reflecting out-of-court transactions, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case (*Datena v JP Morgan Chase Bank*, 73 AD3d 683 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 84-85, *supra*).

The sole criterion on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) is whether the pleading states a cause of action. If, from its four corners there are factual allegations which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2d Dept 2011] citing *Leon v Martinez*, 84 NY2d 83 [1994]; *Hense v Baxter*, 79 AD3d 814 [2d Dept 2010]). The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*Id.* citing *Leon v Martinez*, 84 NY2d at 87, *supra*; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). At the same time, "bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; *Morris v Morris*, 306 AD2d 449 [2d Dept 2003]).

On a motion to dismiss pursuant to CPLR 3211(a)(5), the movant must establish, prima facie, that the time to commence an action has expired. Once that showing has been made, the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable or that the plaintiff actually commenced the action within the applicable limitations period (*Quinn v McCabe, Collins, McGrough & Fowler, LLP*, 138 AD3d 1085 [2d Dept 2016]; *Barry v Cadman Towers, Inc.*, 136 AD3d 951 [2d Dept 2016]).

First Counterclaim (Return of Bonus Payments)

173. In respect of the years 2014 through 2017, Stanco and Toomey received substantial Incentive Bonus Awards that were not authorized, not in compliance with their employment agreements, and in excess of the amounts that they would have been due under their employment agreements.

174. Accordingly, Stanco and Toomey were not entitled to the payments they received and are not entitled to retain them.

175. Stanco and Toomey must therefore return to Rallye the unauthorized Incentive Bonus Awards, which were paid and received in derogation of their employment agreements, among other things.

In support of their motion to dismiss the first counterclaim, the Plaintiffs argue that "New York law prohibits an employer from recovering back wages or other forms of employee compensation paid during a period of employment, absent express agreement to the contrary" (Memorandum of Law in Support [Motion Seq No 15 at p 5]; Memorandum of Law in Support at p 5 [Motion Seq No 14]).[1]

"In the absence of a special agreement, an employer may not recover back wages or equivalent drawings paid during a period of completed employment" (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967 [2d Dept 2011] quoting *Kleinfeld v Roburn Agencies, Inc.*, 270 App Div 509, 511 [1st Dept 1946]; *Nationwide Mut. Ins. Co. v Timon*, 9 AD2d 1018 [4th Dept 1959] [under the settled law, "no recovery can be had for the excess of advances over commissions in the absence of an agreement, express or implied, by the agent or employee to repay such excess"]).

Rallye contends that "courts in both Delaware and New York order disgorgement of monies paid to officers in breach of their fiduciary duties" (Memorandum of Law in Opposition at p 7). However, the claim herein seeks the return of excess bonus payments as per the Employment Agreement and does not involve a claim for breach of fiduciary duty, as in the cases cited by Rallye.

The first counterclaim fails to state a cause of action and is dismissed.

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[1] Plaintiffs further argue that the counterclaim seeking the return of bonus payments must be dismissed pursuant to the "'voluntary payment doctrine' which "bars a party from recovering voluntarily made payments where the party had full knowledge of the facts and made no objections to the payment amounts" (Memorandum of Law in Support [Motion Seq No 15 at p 6]; Memorandum of Law in Support at p 5 [Motion Seq No 14]).

Second Counterclaim (Return of Excessive Distributions)

177. In respect of the years 2003 through 2017, Stanco and Toomey received excessive membership distributions in the amount of not less than $1,356,280 and $1,356,287, respectively.

178. Stanco and Toomey were not entitled to the payments they received and are not entitled to retain them.

179. Stanco and Toomey must therefore return to Rallye the excessive distributions, which were paid and received in derogation of the Original and Amended Operating Agreements, among other things.

The alleged excessive membership interests made to Stanco and Toomey were distributions of 7.48% and 12.22% each, in 2007 and 2010, respectively.[2] The statute of limitations for contract claims in Delaware is three years (Del Code Title 10, sec 8106) and six years in New York (CPLR 213).

Inasmuch as this action was commenced in 2017, seven years after the purportedly excessive distributions to Stanco and Toomey in 2010, the claim is untimely. [3]

This counterclaim for breach of the operating agreement is untimely and, therefore, is dismissed.

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[2] Stanco and Toomey each had a 5.5% membership interest in Rallye. The member distribution chart relied upon by Plaintiffs in support of their argument that the second counterclaim is untimely was actually submitted by Rallye in the related *Toomey* action (*Toomey v Rallye Motors Holding LLC, et al* (Index No 613005/19) as document number 50 and uploaded on January 8, 2020 in opposition to Toomey's order to show cause seeking tax distributions and an examination of Rallye's books and records. The membership distribution chart, of which its authenticity is not challenged by Rallye, qualifies as documentary evidence (especially given Rallye's reliance on same in the related Toomey action (*see Datena v JP Morgan Chase Bank*, 73 AD3d 683 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 84–85, *supra*)

[3] The parties dispute whether Delaware or New York's limitations period applies. The claim is untimely regardless of which state's limitations period applies.

Third Counterclaim (Breach of Fiduciary Duty for Excessive Payments for Medical Bills)

161. Moss is a former Member of Rallye. . . .[4] Until around 2000, he owned 50% of its membership interests. In or around 2000, he sold his interest as follows: 39% to Peter Terian (which interest today is owned by the Trusts) and 11% in equal shares to Stanco, Toomey, and a third individual.

162. In connection with his departure from Rallye, the company agreed to provide Moss with health insurance until his death.

163. In or around 2012, at the request of Stanco and/or Toomey, Moss became a member of Rallye's Board of Managers.

164. While they were running the company, and while Moss was an ally on the Board of Managers, Stanco and Toomey caused the company to pay not only for Moss's health insurance, but also for all his medical bills. Rallye was not obligated to pay any of Moss's medical bills aside from paying for his health insurance.

165. Stanco and Toomey caused Rallye to spend nearly $200,000 on Moss's medical bills, which Rallye had no obligation to pay.

* * *

181. As officers of Rallye, and, in the case of Stanco, as a member of Rallye's Board of Managers, Stanco and Toomey owed fiduciary duties to Rallye, including the duties of loyalty, care, and good faith.

182. Stanco and Toomey breached their fiduciary duties by causing Rallye to make payments to Moss for his medical bills, which payments Rallye was not obligated to make.

183. As a direct and proximate result of Stanco and Toomey's breaches of their fiduciary duties, Rallye has been damaged in an amount to be determined at trial.

Here, Rallye's allegations for breach of fiduciary duty are made collectively against both Stanco and Toomey. Under CPLR 3016(b), a claim for breach of fiduciary must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail

[4] Moss owned 50% of Rallye's membership interests until 2000 at which time he sold his interest as follows: 39% to Peter Terian (which interest today is owned by the Trusts) and 11% in equal shares to Stanco, Toomey, and a third individual.

(*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]; *Chiu v Man Choi Chiu*, 71 AD3d 621 [2d Dept 2010]). Rallye's group pleading falls short of this mark (*Shareholder Representative Servs. LLC v Sandoz, Inc.* 46 Misc3d 1228(A) [Sup Ct New York County 2015]; *CIFG Assur. N. Am., Inc v Bank of America, N.A.*, 41 Misc3d 1203[A] [Sup Ct New York County 2013] [a "claim involving multiple defendants must make specific and separate allegations for each defendant"]). Therefore, the third counterclaim is dismissed.

Fourth Counterclaim (Theft of Corporate Opportunity)

166. In or around 2016, Stanco and Toomey, in their capacities as officers and members of Rallye, learned that BMW planned to open another dealership on Long Island, where all of Rallye's dealerships including its BMW dealership are located, and was soliciting interest from existing BMW dealers, including Rallye, to open the new dealership.

167. Rather than pursuing that opportunity on behalf of Rallye, Toomey diverted and exploited it on behalf of and for the benefit of himself and other persons and/or entities not affiliated with Rallye.

168. Stanco knew that Rallye was offered the opportunity to open a new BMW dealership on Long Island and that Toomey diverted and exploited that opportunity for his own benefit, but Stanco did not disclose those facts to Rallye's Board of Managers.

* * *

185. As an officer of Rallye, Toomey owed fiduciary duties to Rallye, including the duty of loyalty.

186. While Stanco and Toomey were in control of Rallye, the opportunity arose for Rallye to open a new BMW dealership on Long Island. That opportunity was within Rallye's line of business, Rallye was financially capable of exploiting that opportunity, and Rallye would have sought to take advantage of that opportunity if Toomey had not appropriated it for himself.

187. Toomey breached his fiduciary duty of loyalty to Rallye by diverting and exploiting for his own benefit the opportunity to open a new BMW dealership on Long Island.

188. As a direct and proximate result of Toomey's theft of Rallye's corporate opportunity, Rallye has been damaged in an amount to be determined at trial.

Under Delaware law, a corporate opportunity has been usurped:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is . . . in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation . . . (*Yiannatsis v Stephanis by Sterianou*, 653 A2d 275 [Del 1995] quoting *Guth v Loft, Inc.*, 5 A2d 503 [Del 1939]).

Contrary to Toomey's contention, and granting Rallye the benefit of every possible favorable inference, the fourth counterclaim sufficiently pleads a cause of action that Toomey usurped a corporate opportunity available for Rallye (CPLR 3211(a)(7); CPLR 3016[b]). In this regard, the court notes Toomey's affidavit wherein he does not dispute that he has a "small equity position as an investor in a planned BMW dealership project in Long Island City" (Ex. "1"' to Affirmation in Support at ¶ 20 [Motion Seq No 14]).[5]

Fifth Counterclaim (Against Stanco for Aiding and Abetting Toomey's Theft of Corporate Opportunity)

> 190. Toomey breached his fiduciary duty of loyalty to Rallye by diverting and exploiting for his own benefit the opportunity to open a new BMW dealership on Long Island.
>
> 191. Stanco knew that Rallye was offered the opportunity to open a new BMW dealership on Long Island and that Toomey diverted and exploited that opportunity for his own benefit, but Stanco did not disclose those facts to Rallye's Board of Managers. Stanco thus substantially assisted Toomey in breaching his fiduciary duty of loyalty.
>
> 192. As a direct and proximate result of Toomey's theft of Rallye's corporate opportunity, accomplished with Stanco's substantial assistance, Rallye has been damaged in an amount to be determined at trial.

Under Delaware law, the elements of a claim for aiding and abetting a breach of fiduciary

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[5] It is of no moment that construction on the new dealership "has not even begun yet" or that the prospective dealership, as maintained by Toomey, is not "going to be a competitor of Rallye, because geographically it coves a different area of the market" (Ex. "1"' to Affirmation in Support at ¶ 20 [Motion Seq No 14]).

duty are "(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) *a defendant, who is not a fiduciary, knowingly participated in a breach*, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary" (*Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 172 [Del 2002] quoting *Fitzgerald v Cantor*, 1999 WL 182573 [Del Ch 1999]; *see also Malpiede v Towson*, 780 A2d 1075, 1096 [Del 2001]; *Stewart v Wilmington Trust SP Servs., Inc.*, 112 A23d 271 [Del Chan 2015] [emphasis added]).

Stanco was a member, President, and Chief Executive Officer of Rallye and, as such, was a fiduciary of Rallye. Inasmuch as Stanco was a fiduciary of Rallye, a claim for aiding and abetting Toomey's alleged breach of fiduciary duty cannot lie and the fifth counterclaim is therefore dismissed.

Sixth Counterclaim (Against Toomey for Breach and/or Repudiation)

> 170. After she was re-installed as President and CEO of Rallye, Juliana [Terian] asked Stanco and Toomey to write down their job duties. After requesting such written information for weeks, a meeting was scheduled for and held on September 6, 2017.
>
> 171. Toomey did not write down any job duties. Rather, at the meeting, he said that he did not write down any job duties and did not have any job duties because, as of approximately one year prior to the meeting, he had transferred all of his duties to other employees of Rallye because he was planning to retire.
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> * * *
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> 194. To the extent the employment agreement between Toomey and Rallye is a valid contract, it required Toomey to perform duties as Vice President of Rallye.
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> 195. Toomey failed to perform his duties and breached and/or repudiated the employment agreement by transferring all his duties to other employees of Rallye and failing to perform work on behalf of Rallye.
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> 196. Rallye performed all of its obligations under the employment agreement.
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> 197. As a result of Toomey's breach and/or repudiation, thereafter Rallye had no further obligation to perform under the employment agreement with Toomey.

While a recitation of the elements of a cause of action may meet that component of CPLR 3013 requiring that the statements in a pleading provide notice of "the material elements of a cause of action," the statute also requires that the pleading's statements be "sufficiently particular

to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved" (CPLR 3013). The sixth counterclaim fails to meet this standard.

Seventh Counterclaim (Faithless Servant Doctrine)

> 200. Stanco and Toomey acted adversely to Rallye interests by committing at least the following acts: (i) causing Rallye to make improper and unauthorized bonus payments to them; (ii) causing Rallye to make excessive distributions to them; (iii) causing Rallye to make excessive payments to Moss for medical bills; and (iv) exploiting Rallye's opportunity to open a new BMW dealership on Long Island.
>
> 201. Stanco and Toomey's disloyalty was related to the performance of their duties as officers of Rallye and, in the case of Stanco, as a member of Rallye's Board of Managers.
>
> 202. Stanco and Toomey's disloyalty permeated their service to Rallye in the most material and substantial part because they stole millions of dollars from Rallye and the opportunity to expand by opening another dealership.
>
> 203. Stanco and Toomey's misconduct and unfaithfulness substantially violated the contract of their service to Rallye because they stole millions of dollars from Rallye and the opportunity to expand by opening another dealership.
>
> 204. Rallye is entitled to return of all monies paid to Stanco and Toomey during the period of their disloyalty.

The Faithless Servant Doctrine is a common law doctrine that originated in New York State, under which an employee who is faithless in performance of his duties is not entitled to recover either salary or commission (*Feiger v Iral Jewelry*, 41 NY2d 928, 928 [1977]; *Maritime Fish Products, Inc. v World-Wide Fish Products, Inc.*, 100 AD2d 81 [1st Dept 1984] [employer is entitled to the return of compensation paid to the employee during his period of disloyalty]; Zachary D. Morahan, Justin St. Louis, Making the 'Faithless Servant Pay: Recovery for Betrayal of Trust, 23 No. 7 NY Emp. L. Letter 1 2016] ["Under the "faithless servant" doctrine, the law imposes a fiduciary duty on employees to be faithful and honest during their employment"]; *Application of "Faithless Servant Doctrine"*, 24 ALR 6th 399 [2007] ["faithless servant doctrine provides that an employee who violates his or her duty of loyalty or fidelity in the performance of his or her employment duties forfeits the right to compensation therefor"]).

Branches "i", "ii" and "iii" enunciated in paragraph 200 of Rallye's faithless servant counterclaim are dismissed.

Initially, it is noted that the faithless servant doctrine does not appear to be cognizable as an independent cause of action in Delaware (*ADG v Capital LLC v Stern*, 2009 WL 6019498 [Sup Ct New York County 2009] [although faithless servant doctrine exists in New York, "the parties have not indicated that such theory exists in Delaware, and independent research failed to disclose any Delaware decision on this issue"]).

Second, branches "i" and "ii" in Rallye's counterclaim for recovery under the faithless servant doctrine are identical to, and duplicative of, Rallye's failed breach of contract counterclaims (*Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]; *Edem v Grandbelle Intl., Inc.*, 118 AD3d 848, 849 [2d Dept 2014]; *Canzona v Atanasio*, 118 AD3d 841, 843 [2d Dept 2014]).

Third, branch "iii" of the counterclaim, alleging that Stanco and Toomey were faithless servants by "causing Rallye to make excessive payments to Moss for medical bills" is, as noted earlier (*see* pp 6-7 *supra*), not pleaded with sufficient particularity under CPLR 3016(b). In this regard, the faithless servant doctrine is a species of breach of fiduciary duty, and more specifically, a breach of the duty of loyalty, and, as such, must be pleaded with particularity under CPLR 3016(b)[6] ["Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, *breach of trust* or undue influence, the circumstances constituting the wrong shall be stated in detail"] [emphasis added]; *Bluebanana Group v Sargent*, 176 AD3d 408 [1st Dept 2019 citing *Riom Corp. v McLean*, 23 AD3d 298 [1st Dept 2005] [First Department "has applied the same standards for determining a breach of duty of loyalty claim to a breach of fiduciary duty claim against an employee"]; *Beach v Touradji Capital Management, LP*, 144 AD3d 556 [1st Dept 2016] [damages for breach of fiduciary duty could include compensation it paid to the breaching employee under faithless servant doctrine,]; *Visual Arts Foundation, Inc. v Egnasko*, 91 AD3d 578 [1st Dept 2012] ["Under faithless servant doctrine, employer was entitled to recover compensation paid disloyal employee during period of his fraud and breaches of fiduciary duty"]).[7]

Branch "iv" of Rallye's counterclaim seeks "monies paid" to Toomey during his period of disloyalty when he "exploit[ed] Rallye's opportunity to open a new BMW dealership on Long Island." Although recovery of compensation paid during the period of disloyalty is not recoverable in Delaware under the doctrine denominated as "faithless servant", the underlying

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[6] "Thus, the central issue in nearly all faithless servant cases is the employee's fiduciary duties to his or her employer -- particularly the duty of loyalty" (Robert B. Fitzpatrick, American Law Institute - American BAR Association Continuing Legal Education, *Faithless Servant Doctrine: Employer's Right to Recover Compensation for Disloyal Employees* [The American Law Institute 2011]).

[7] Moreover, 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 (*Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578 at 579, *supra*; *Soam Corp. v Trane Co.*, 202 AD2d 162, 162 [1st Dept 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]).

claim and damages sought in connection therewith nevertheless remain viable considering the continuing viability of the breach of fiduciary claim (in the fourth counterclaim) arising from the same alleged disloyal conduct [*see Citron v Merritt-Chapman & Scott Corp.*, 409 A2d 607 [Del Ch 1977] [Delaware court stated that "numerous decisions hold that corporation compensation is properly recoverable in a situation where the disloyalty of the officer or director constitutes the usurpation of a corporate opportunity"]; *Mayers v Stone Castle Partners, LLC*, 2015 WL 1941362 [Sup Ct New York County 2015] [internal citations and quotations omitted] ["While Delaware law does not recognize a faithless fiduciary doctrine . . . at least one Delaware court has held that corporate officers may be required to forfeit their compensation if their breach of fiduciary duty was of 'some detriment to the corporation or conflict of interest on the part of the officer"]).

Conclusion

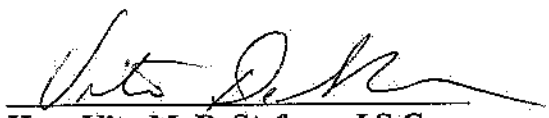
Based on the foregoing, it is hereby

Ordered that the motion of Plaintiff Nicholas Toomey for an order dismissing the counterclaims asserted against him in the Defendant's amended answer is granted to the extent that the first, second, third, fifth, sixth and branches "i", "ii" and "iii" of the seventh counterclaims are dismissed; and the motion is, in all other respects, denied (Motion Sequence Number 14); and it is further

Ordered that the motion of Plaintiff Joseph Stanco for an order dismissing the counterclaims asserted against him in the Defendant's amended answer is granted (Motion Sequence Number 15).

This constitutes the decision and order of the court.

Dated: October 13, 2020



Hon. Vito M. DeStefano, J.S.C.