

Frosch Intl. Travel, Inc. v Botbol

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January 9, 2026

Supreme Court, New York County

Docket Number: Index No. 653071/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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FROSCH INTERNATIONAL TRAVEL, INC., N/K/A
FROSCH INTERNATIONAL TRAVEL, LLC,

Plaintiff,

- v -

MICHEL BOTBOL,

Defendant.

INDEX NO. 653071/2020

MOTION DATE --

MOTION SEQ. NO. 008 012 013

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 261, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 315, 318, 320, 325, 334, 335, 336, 337, 338, 419, 420, 421, 472, 473, 474, 491

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 012) 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 432, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 471, 495

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 013) 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 433, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 470, 496

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In motion sequence 008 plaintiff Frosch International Travel, Inc. (Frosch) moves pursuant to CPLR 3212 for summary judgment against defendant Michel Botbol on Frosch's cause of action for breach of contract. (See NYSCEF 188, Notice of Motion [mot. seq. no. 008].)

In motion sequence 012 defendant Botbol moves pursuant to CPLR 3212 for summary judgment in its favor dismissing Frosch's causes of action for fraud, violation of the faithless servant doctrine, and breach of contract. (NYSCEF 357, Notice of Motion [mot. seq. no. 012].)

In motion sequence 013 plaintiff Frosch moves pursuant to CPLR 3212 for summary judgment against Botbol on Frosch's causes of action for common law fraud and violation of the faithless servant doctrine. (NYSCEF 368, Notice of Motion [mot. seq. no. 013].)

Background

In June 2018, Botbol's employment with Ultramar Travel Management, Inc. (UTM) came to an end. Upon such termination, Botbol contacted Bryan Leibman, the Chief Executive Officer (CEO) of Frosch, offering his services. (NYSCEF 190, Botbol tr 34:23-24, 36:12-16; NYSCEF 191, Leibman tr 11:15-21.) During the summer of 2018, Botbol and Leibman had several meetings. (NYSCEF 191, Leibman tr 12:7-13.) Botbol also retained Herrick, Feinstein LLP to review operative agreements with UTM, including a Confidentiality, Non-Disclosure, Non-Solicitation and Non-Diversion Agreement (Non-Solicitation Agreement) that Botbol had signed with UTM in January 2016. (NYSCEF 439, January 8, 2019 Email and Invoices; NYSCEF 438, Botbol tr 185:20-25, 186:11-21; NYSCEF 375, Sequence of Events.) Frosch agreed to reimburse Botbol's legal fees. (NYSCEF 439, January 8, 2019 Email and Invoices; NYSCEF 444, Leibman tr 37:16-21.)

On July 3, 2018, Botbol emailed Leibman a copy of his employment agreement with UTM that ended in October 2017. (NYSCEF 377, July 3, 2018 Email.) Leibman

responded that he would have his labor attorney “review asap.” (NYSCEF 378, July 3, 2018 Email.) On July 5, 2018 Liebman emailed Botbol asking “[w]hat was the arrangement when your agreement expired in October?” (NYSCEF 147, July 5, 2018 Email Chain.) Botbol responded that “[t]here was no arrangement when my agreement expired . . . in their mind I became an employee at will.” (*Id.*)

On July 11, 2018, Botbol emailed Leibman the first draft of a proposed employment agreement. (NYSCEF 198, July 11, 2018 Email.) On July 20, 2018, Botbol sent Leibman a revised contract with changes “[a]s discussed.” (NYSCEF 199, July 20, 2018 Email.) One of the changes included a provision to “[a]dd one year option to end the employment.” (*Id.*) On July 24, 2018, Botbol again emailed Leibman regarding the contract, stating “I need it signed so I can revoke my non solicit clauses before Friday July 27th.” (NYSCEF 381, July 24, 2018 Email.) In the morning of July 27, 2018, Botbol followed up with Leibman providing that “if you are ok with everything, please sign the clean version and send it to me. Once I receive it I will revoke my severance/release package.” (NYSCEF 382, July 27, 2018 Email.) In the afternoon of July 27, 2018, Botbol again emailed Leibman saying “I have little more than an hour to revoke my severance . . . I need the contract signed by you to be in a position to revoke my severance package.” (NYSCEF 383, July 27, 2018 Email.)

On July 29, 2018, Leibman emailed Botbol a signed copy of the Employment Agreement, set to go into effect on August 13, 2018. (NYSCEF 401, July 29, 2018 Email; NYSCEF 3, Employment Agreement.) Pursuant to the Agreement, Botbol was hired as Frosch’s President of New York for a five-year term. (NYSCEF 3, Employment Agreement at § 1 [A].)

Soon after the Employment Agreement took effect, on August 17, 2018, Frosch received a letter from UTM's legal counsel informing that Botbol was subject to the Non-Solicitation Agreement. (NYSCEF 361, August 17, 2018 Letter at 3/12 [NYSCEF pagination].) The Agreement prohibited Botbol, for a period of 18 months¹, from soliciting UTM clients and employees, and further prohibited Botbol from using UTM's confidential and proprietary information for the benefit of any subsequent employer. (*Id.*) Upon receiving the letter from UTM, Frosch took no action; Enrique Espinoza, Frosch's Chief Financial Officer (CFO), stated in an email to Leibman that it was "[a]s expected" and Leibman provided in response that there was "no need to respond. it was expected." (NYSCEF 359, August 17, 2018 Email Chain.) Leibman also testified that "Mr. Botbol had shared with us the agreements he had, we had counsel review it, we felt we had addressed it, believing we had all the information to make this decision." (NYSCEF 453, Leibman tr 30:12-20.) Furthermore, Leibman testified that "[i]t was not uncommon for [Frosch] to receive some type of communication from previous employer because of Mr. Botbol's senior position and potential concerns about confidentiality . . . it was expected of the industry." (NYSCEF 429, Leibman tr 33:21-25, 34:2.)

On August 24, 2018, counsel for UTM sent Frosch a cease-and-desist letter demanding "that Frosh take immediate action to prevent Mr. Botbol from using or disclosing UTM's Confidential Information." (NYSCEF 445, August 24, 2018 Letter at 2.)

¹ Botbol's employment with UTM terminated in June 2018. Accordingly, the prohibition on solicitation was in effect until December 2019. (See NYSCEF 361, Non-Solicitation Agreement § 4 [B].)

Ahead of the one-year anniversary of the Employment Agreement, in July and August of 2019, Botbol and Leibman had several meetings. (NYSCEF 191, Leibman tr 61:6-10, 15-19; NYSCEF 190, Botbol tr 64:3-22; NYSCEF 203, July 1, 2019 Email; NYSCEF 204, July 1, 2019 Calendar Invite; NYSCEF 205, July 3, 2019 Calendar Invite; NYSCEF 206, August 8, 2019 Email Chain; NYSCEF 207, August 12, 2019 Email; NYSCEF 208, August 13, 2019 Email.) During these meetings, Botbol and Leibman discussed reducing Botbol's salary. (NYSCEF 191, Leibman tr 88:9-20; NYSCEF 190, Botbol tr 64:11-22.) On August 26, 2019, Botbol emailed Leibman a proposed "First Amendment to Employment Agreement." (NYSCEF 273, August 26, 2019 Email.) Leibman responded, "I haven't reviewed but lower salary of 180k needs to go into effect next week." (NYSCEF 335, August 26, 2019 Email.) Botbol's salary was subsequently reduced to \$180,000, effective September 1, 2019. (NYSCEF 210, September 4, 2019 Email Chain.) Botbol continued working for Frosch at the reduced salary. (NYSCEF 211, Botbol Payroll Records.)

On March 6, 2020, Frosch terminated Botbol's employment, as part of a company layoff brought about by the COVID pandemic. (See NYSCEF 191, Leibman tr 163:24-25, 164:2-19; see also NYSCEF 212, March 6, 2020 Email; NYSCEF 213, March 11, 2020 Email; NYSCEF 302, March 11, 2020 Email; NYSCEF 300, March 6, 2020 Email.) The same day, Leibman emailed Sridhar Belaji, Frosch's Chief Technology Officer (CTO), requesting "the team forward [Botbol's] email and phone to Preston." (NYSCEF 299, March 6, 2020 Email Correspondence.) Frosch's IT department quickly confirmed that Botbol's account had been disabled. (*Id.*)

On July 13, 2020 Frosch filed this action, alleging breach of contract and common law fraud. (See NYSCEF 1, Summons; NYSCEF 2, Complaint.) On January 12, 2022, this court dismissed Frosch's second cause of action for fraud. (NYSCEF 14, Decision and Order [mot. seq. no. 001] at 4.) On July 31, 2023, Frosch moved for leave to amend its complaint to add two new causes of action. (NYSCEF 107, Notice of Motion [mot. seq. no. 004].) The motion was granted (NYSCEF 247, Decision and Order [mot. seq. no. 004]), and Frosch set forth a renewed claim of fraud and a cause of action for violation of the faithless servant doctrine. (See NYSCEF 112, Amended Complaint [AC]. Botbol and Frosch both move for summary judgment on the three causes of action for breach of contract, fraud, and violation of the faithless servant doctrine. (NYSCEF 188, Notice of Motion [mot. seq. no. 008]; NYSCEF 357, Notice of Motion [mot. seq. no. 012]; NYSCEF 368, Notice of Motion [mot. seq. no. 013].)

Discussion

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (See *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "[S]ummary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." (CPLR 3212 [e].)

Breach of Contract

Frosch alleges that Botbol breached the Employment Agreement by (i) failing to return to Frosch items used or developed by Botbol upon his termination (NYSCEF 311, AC ¶ 67), (ii) misappropriating Frosch's confidential information (*id.* ¶ 68), (iii) disclosing Frosch's confidential information to Frosch's competitors (*id.* ¶ 69), (iv) accepting employment with one of Frosch's competitors in or around December 2020 (*id.* ¶ 70), (v) soliciting Frosch's customers and prospects (*id.* ¶ 71), and (vi) pursuing and accepting consulting jobs with third parties while employed by Frosch without Frosch's knowledge or consent.² (*id.* ¶ 72).

To establish a cause of action for breach of contract, a plaintiff must evidence "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Lebedev v Blavatnik*, 193 AD3d 175, 182-83 [1st Dept 2021] [internal quotation marks and citation omitted].) Frosch moves for summary judgment on its breach of contract claims against Botbol on the grounds that it has evidenced the requisite elements to establish entitlement as a matter of law.

Botbol also seeks summary judgment on Frosch's breach of contract claim. Frosch argues that Botbol's motion is untimely because the court's January 27, 2024 Conference Order limited filings of summary judgment motions to "the new allegations in the amended complaint." (NYSCEF 309, Conference Order.) Frosch is correct that Botbol is precluded from moving for summary judgment on the breach of contract

² Frosch does not address its allegation that Botbol breached the Employment Agreement by pursuing and accepting consulting jobs with third parties during his employment with Frosch. (*See generally*, NYSCF 231, Frosch's MOL.) Accordingly, summary judgment is denied as to this claim.

allegations set forth in ¶ 67 of the AC (NYSCEF 311) because these are not new allegations, but identical to the allegations set forth in ¶ 44 of the original complaint (NYSCEF 2). However, Botbol's motion for summary judgment on the new breach of contract allegations stated in ¶ 68 (NYSCEF 311, AC) is timely.³ For the reasons set forth below, material issues of fact exist as to whether Botbol breached the Employment Agreement and, therefore, both Frosch and Botbol's motions for summary judgment are denied.

Disclosing Frosch's Confidential Information

Frosch alleges that Botbol breached the Employment Agreement by disclosing Frosch's confidential information to Frosch's competitors in violation of § 12 of the Employment Agreement. (NYSCEF 311, AC ¶ 69; NYSCEF 3, Employment Agreement § 12.) To evidence this, Frosch has first provided email correspondence between Botbol and Jenny Genge, the Vice President of Human Resources at Corporate Travel Management (CTM), one of Frosch's competitors, which includes a copy of Botbol's resume and a PowerPoint presentation prepared by Botbol for his interview at CTM. (NYSCEF 214, June 5, 2019 Email; NYSCEF 215, May 29, 2019 Email.) Frosch alleges that the resume and slides contain Frosch's confidential information.⁴ Botbol disputes that the information contained in these documents belongs to Frosch's,

³ In the AC, Frosch alleges breach of contract in ¶¶ 68-72. (NYSCEF 112, AC.) Because Botbol only addresses the new allegations in paragraph ¶ 68 (see NYSCEF 367, Botbol's MOL at 8; NYSCEF 471, Botbol's Reply MOL at 9), Botbol's motion for summary judgment is denied as to the allegations in ¶¶ 69-72.

⁴ Specifically, Frosch alleges that these documents include: "(i) the amount of the commissions FROSCH had received from certain counterparties, (ii) the size of its hotel program and the amount of the marketing fees FROSCH had received from that program, and (iii) the size (by dollar amount) of FROSCH's pipeline of New York accounts." (NYSCEF 231, Frosch's MOL at 20.)

because the commissions were “an estimate” and the size of the hotel program was Ultramar’s information, not Frosch’s. (NYSCEF 267, Botbol tr 297:16-25, 298:2-25, 299:2-3.) Moreover, Botbol disputes that the information is confidential, pointing to the same information being mentioned in public filings in this action and Frosch taking no action to protect the information from public disclosure. (NYSCEF 267, Botbol tr 52:24-25, 53:2-7; 67:20-23, 271:8-18, 298:9-19; NYSCEF 252, Lifshitz tr 17:18-25, 18:2-13; NYSCEF 277, January 24, 2024 Letter at 2.) Because a question of material fact exists as to whether the information contained on Botbol’s resume and PowerPoint slides is confidential Frosch information, summary judgment is denied.

Further, Frosch has provided an email from Botbol to Bottom Line Concepts, LLC, another company where Frosch sought employment, containing a list of accounts. (NYSCEF 220, July 8, 2020 Email.) Frosch alleges that the list contains Frosch’s clients and prospects. (*Compare* NYSCEF 236, July 2020 Bottom Line Email Correspondence, *with* NYSCEF 232, February 26, 2019 Frosch Email.) Similarly, Frosch has provided an email from Botbol to Partnership Travel Consulting (PTC), containing “a list of potential targets,” as well as Botbol’s deposition transcript in which he affirms that he identified clients/prospects for PTC. (NYSCEF 218, November 10, 2020 Email; NYSCEF 190, Botbol tr 144: 21-23, 145: 7-9.) Again, Frosch alleges that the list identifies Frosch’s clients and prospects. (*Compare* NYSCEF 234, November 10, 2020 PTC Email; NYSCEF 235, PTC Sales Pipeline, *with* NYSCEF 232, February 26, 2019 Frosch Email.) Though Frosch has established similarities between its client/prospect list and Botbol’s lists, a question of material fact exists as to whether the information contained on the customer lists is confidential Frosch information.

New York courts have held that

“A customer list will be treated as a trade secret when the names and addresses of the customers are not known in the trade or can be obtained only through extraordinary effort. . . However, trade secret protection will not be accorded to customer lists where the names of customers and potential the customers are readily ascertainable.” (*Bev. Mktg. USA v S. Beach Bev. Co.*, NYLJ Apr. 11, 2007 at 20, col 3, 2007 NYLJ LEXIS 2869, *14-15 [Sur Ct, Nassau County 2007] [citations omitted]; see also *Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972] [“where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers.” (citations omitted)].)

Botbol explains that the entities in question are “large companies seeking travel related services [] known to those who work in the travel industry and are thus not secret. I knew the companies on these documents were companies that sought travel related services prior to when I worked for Frosch by virtue of my experience in the industry.” (NYSCEF 265, Botbol aff ¶ 3.) To further evidence that the information on the customer lists is publicly available, Botbol offers a list generated on Zoominfo, a tool “to easily get the publicly available information of the contacts at the desired companies.” (*Id.* ¶ 4; NYSCEF 269, Zoominfo List.) Botbol also points to Leibman’s testimony that Botbol’s role at Frosch was to “bring[] in new clients with his relationships,” as evidence that Botbol had knowledge of these large companies prior to joining Frosch. (NYSCEF 320, Leiman tr 152:9-13.) A question of fact exists as to whether the customer list contain confidential Frosch information and summary judgment must therefore be denied.

Accepting Employment with Frosch’s Competitor

Frosch alleges that Botbol breached the Employment Agreement by accepting employment with one of Frosch’s competitors in December 2020. (NYSCEF 311, AC ¶

70.) Specifically, Frosch's evidence establishes that Botbol joined Partnership Travel Consulting (PTC), one of Frosch's competitors, in December 2020, nine months after his termination from Frosch. (NYSCEF 190, Botbol tr 135:20-21; NYSCEF 216, Botbol Resume; NYSCEF 217, November 26, 2020 PTC Press Release.) Section 11(B) of the Employment Agreement imposes an 18-month long non-compete period post-termination. (NYSCEF 3, Employment Agreement § 11 [B].) Nevertheless, § 11(C) provides that "[i]f employment is terminated for any reason prior to September 1, 2019, the provisions of Sections 11(B) and (D) shall not apply to [Botbol]." (*Id.* § 11 [C].) Because a question of fact exists as to whether the Employment Agreement was terminated in August 2019,⁵ a question of material fact also exists as to whether Botbol was bound by the non-compete provision in § 11(B). Accordingly, Frosch is not entitled to judgment as a matter of law.

Soliciting Frosch's Customers and Prospects

Frosch further alleges that Botbol breached the Employment Agreement by soliciting Frosch's customers and prospects in violation of § 11(B) of the Employment Agreement. (NYSCEF 311, AC ¶ 71; NYSCEF 3, Employment Agreement § 11 [B].) Specifically, Frosch alleges that Botbol scheduled a meeting with Blackstone, one of Frosch's clients, in February 2021 to recruit Blackstone as a client for his new employer, PTC. Documentary evidence shows that a meeting was scheduled between Blackstone and Botbol/PTC. (NYSCEF 221, February 1, 2021 Email Correspondence; NYSCEF 222, February 4, 2021 Acceptance Zoom Invite; NYSCEF 223, February 4, 2021 Email.)

⁵ See analysis in motion sequence 007 in related action captioned *Botbol v Frosch International Travel, Inc.*, Index No. 652006/2020.

However, a question of fact exists as to whether the purpose of such meeting was to solicit Blackstone and whether the meeting ever took place. Moreover, as set forth above, questions of fact exist as to whether the Employment Agreement was terminated in August 2019 and accordingly, whether Botbol was bound by the non-solicitation provision in § 11(B). Accordingly, Frosch has not demonstrated it is entitled to judgment as a matter of law.

Failing to Return Frosch's Property Post-Termination

Frosch alleges that Botbol breached the Employment Agreement by failing to return to Frosch items used or developed by Botbol upon his termination. (NYSCEF 311, AC ¶ 67.) Section 12(F) of the Employment Agreement sets forth that upon termination "Employee will deliver to [Frosch] all copies of Confidential Information and Company property in Employee's possession, custody or control . . . including . . . Employee's smartphone [and] laptop computer." (NYSCEF 3, Employment Agreement § 12 [F]: *see also* § 13.) Botbol's testimony establishes that he was aware of this provision. (NYSCEF 190, Botbol tr 220:13-25, 221:2-5.) Nevertheless, Botbol continued to retain his Frosch laptop and cellphone long after his termination from Frosch in March 2020. (*Id.* at 80:17-25, 81:2-12.) Not until January 2021 did Botbol send his laptop via FedEx back to Frosch. (NYSCEF 224, January 11, 2021 Email; NYSCEF 190, Botbol tr 222:6-16.) Botbol does not dispute that he failed to return his laptop and cellphone to Frosch upon his termination in March 2020. (NYSCEF 190, Botbol tr 222:6-16.) However, a question of fact exists as to whether Botbol returned his cellphone to Frosch together with his laptop in January 2021. (NYSCEF 224, January 11, 2021 Email; NYSCEF 190, Botbol tr 223:3-6.) While Frosch establishes

Botbol's breach, Frosch has not offered evidence of damages resulting from such breach. The First Department has sustained breach of contract claims in the absence of injury or actual damages on the ground that nominal damages are available for those claims. (See *NGM Mgt. Group, LLC v Bareburger Group, LLC*, 224 AD3d 600, 602 [1st Dept 2024] [defendant attempted to demonstrate that plaintiff suffered no damages, but the court denied the motion to dismiss on the ground that nominal damages are available].) Accordingly, summary judgment is granted on liability and the issue of nominal damages will be determined at the jury trial; Frosch's damages are limited to nominal damages. (NYSCEF 331, Note of Issue.)

Unauthorized Use and Misappropriation of Information Post Termination

Frosch also alleges that Botbol breached §§ 12 and 13 of the Employment Agreement by misappropriating Frosch's confidential information. (NYSCEF 311, AC ¶ 68.) Specifically, Frosch argues that a forensic analysis of Botbol's computer conducted by forensic expert, Wes Johnson, concludes that Botbol (i) accessed files on the laptop after his termination on March 6, 2020, (ii) saved a folder, "which appear to be Frosch data," on an external storage device connected to the laptop, and (iii) connected 13 external storage devices to the laptop between September 2, 2019 and March 19, 2020 but none were returned to Frosch. (NYSCEF 225, Expert Report at 6, 8.) Botbol does not address the expert report. (See *generally* NYSCEF 276, Botbol MOL.)

Though Frosch has offered evidence that Botbol breached the Employment Agreement by accessing Frosch's files on his laptop post-termination, Frosch has not shown any damages suffered because of such breach. However, "the improper acquisition of confidential information *alone* is sufficient to establish damages." (See

NYSCEF 304, Frosch's Reply MOL at 5.) Since Frosch has failed to show damages resulting from Botbol accessing files on his laptop post-termination, Frosch's damages are limited to nominal damages. (See *NGM Mgt. Group, LLC v Bareburger Group, LLC*, 224 AD3d 600, 602 [1st Dept 2024] [defendant attempted to demonstrate that plaintiff suffered no damages, but the court denied the motion to dismiss on the ground that nominal damages are available].) Accordingly, summary judgment is granted on liability, and the issue of nominal damages will be determined at the jury trial. (NYSCEF 331, Note of Issue.)

Furthermore, questions of material fact exist as to Botbol's liability for accessing files in a folder on an external storage device and similarly for connecting 13 external storage devices. First, Johnson notes in his report that "[t]he only way to confirm if an external storage device contains a copy of the identified data would be to perform a forensic examination of identified external storage devices connected to the laptop." (NYSCEF 225, Expert Report at 10.) Because Botbol did not return any external storage devices to Frosch, there is also no evidence that these devices contained Frosch data.⁶ That the folder Botbol opened/accessed "**appear** to be Frosch data based on the file name and the drive letter associate with the file path" is a question for the trier of fact. (*Id.* at 8 [emphasis added].) Second, the parties do not dispute that Botbol was employed by Frosch between September 2, 2019, and March 6, 2020. Relatedly, neither party allege that Botbol was not permitted to access or save Frosch's

⁶ Botbol's failure to return the external storage devices may be a breach of § 12(F) of the Employment Agreement. (NYSCEF 3, Employment Agreement § 12 [F] [requires the Botbol to return "any [] electronic device" that was "utilized by [Botbol] during his employment with [Frosch].".])

information on external storage devices during his employment. Accordingly, Frosch fails to evidence how Botbol breached the Employment Agreement by connecting external storage devices between September 2, 2019, and March 6, 2020. Again, because the external storage devices connected to the laptop *after* March 6, 2020, have not been examined, a question of fact exists as to whether these devices contain Frosch information that Botbol accessed post-termination in breach of the Employment Agreement. Accordingly, summary judgment is denied.

Fraud

Frosch alleges that it was defrauded into signing the Employment Agreement due to its reliance on Botbol's misrepresentations about (i) not being subject to any ongoing restrictive covenants and (ii) being free to solicit his former employer's corporate clients and employees. (See NYSCEF 112, AC ¶¶ 75-80.) Botbol seeks summary judgment in its favor dismissing Frosch's fraud claim on the grounds that Frosch's continued performance under the Employment Agreement upon learning of Botbol's misrepresentations constituted a ratification of the Agreement that waived any claims of fraud. Meanwhile, Frosch seeks summary judgment on its fraud claim against Botbol on the grounds that it has evidenced the requisite elements to establish fraudulent inducement.

Botbol cites to *Persaud v Persaud* (2012 WL 10027986, *3 [Sup Ct, Bronx County Nov. 28, 2012, No. 307477/2009]) and *Scharf v Idaho Farmers Mkt. Inc.* (115 AD3d 500, 501–02 [1st Dept 2014]), for the proposition that “[w]hen a party continues to perform on a contract after learning of the facts by which it was defrauded into signing

the contract, that party waives the fraud.” (NYSCEF 367, Botbol’s MOL [mot. seq. no. 012] at 2-3.) However, this is not a complete and accurate recitation of the law. Rather,

“[a]lthough the right to rescind a contract on the ground of fraud may be lost by a ratification or affirmance thereof, the affirmance of a contract is not necessarily an affirmance and ratification of fraud inducing it. In other words, the doctrine that any act in affirmance of a contract, after the discovery of fraud, defeats the right of rescission is not necessarily applicable to an action for damages founded in fraud, and thus, a plaintiff is not precluded from bringing an action for damages for deceit although he or she has affirmed the contract subsequent to discovering the fraud.” (*Cooperman v Criterion 360, Inc.*, 2021 NY Misc LEXIS 32353, *7-8 [Sup Ct, NY County Aug. 25, 2021, No. 151009-2020]; see also *Matter of Schleifer v Yellen*, 158 AD3d 512, 513 [1s Dept 2018] [“[t]he fact that petitioner ratified the agreement does not bar them from seeking damages for having been fraudulently induced into it.” (citations omitted)].)

Because Frosch only seeks monetary damages for fraudulent inducement as opposed to rescission of the Employment Agreement (NYSCEF 112, AC at 19-20), Frosch’s ratification or affirmance thereof, does not automatically waive Frosch’s cause of action for fraud. Therefore, Botbol’s motion to dismiss this is denied.

Frosch also seeks summary judgment on its fraud claim, but on the grounds that it has evidenced the requisite elements to establish fraudulent inducement. “To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury.” (*Genger v Genger*, 144 AD3d 581, 582 [1s Dept 2016] [internal quotation marks and citation omitted].)

Here, Frosch offers that in June 2018, Botbol contacted Leibman, offering to provide his services to Frosch. (NYSCEF 372, Botbol tr 36:15-16.) Botbol represented that “[h]e would bring business, a lot of corporate relationships and customers he had from his days at [UTM] and he would grow that business.” (NYSCEF 373, Leibman tr 14:3-11.) To ensure that Botbol was not subject to any restrictions based on

agreements with UTM, Frosch engaged outside counsel to review Botbol's employment agreement, which Frosch received from Botbol. (*Id.* at 15:9-24, 16:4-7; NYSCEF 377, July 3, 2018 Email; NYSCEF 378, July 3, 2018 Email; NYSCEF 379, July 5, 2018 Email.) Botbol also assured Leibman that he was not subject to any restrictive covenants and represented in the Employment Agreement with Frosch that "there are no restrictions, agreements or understandings whatsoever to which [Botbol] is party that would prevent or make unlawful his execution of performance of this Agreement or his employment hereunder." (NYSCEF 373, Leibman tr 16:4-5; NYSCEF 380, July 5, 2018 Email, NYSCEF 3, Employment Agreement § 24 [a].) Based on its due diligence and Botbol's representations, Frosch decided to hire Botbol. (NYSCEF 374, Leibman tr 28:2-14.)

In fact, Botbol had signed a Non-Solicitation Agreement with UTM in January 2016, which prevented Botbol from soliciting UTM's clients and employees. (NYSCEF 375, Sequence of Events; NYSCEF 372, Botbol tr 185: 20-25, 186: 2-21.) On August 17, 2018, four days after Botbol's Employment Agreement with Frosch went into effect, Frosch received a letter from UTM's legal counsel, informing Frosch that Botbol was subject to a Non-Solicitation Agreement. (NYSCEF 384, August 17, 2018 Letter.) The Non-Solicitation Agreement prevented Botbol from performing the job he was hired to do and Frosch was injured by way of having agreed to provide Botbol a lucrative compensation and benefits package and Botbol being precluded from providing the future services Frosch expected.⁷ (NYSCEF 3, Employment Agreement §§ 5-8.)

⁷ "[A] fraud-in-the-inducement claim requires proof of a specific monetary injury." (*Williams v DSS-HRA*, 2025 NY Slip Op 32320[U], *4 [Sup Ct, NY County 2025].) Accordingly, "there can be no recovery for profits which would have been realized in the
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Even if the court were to find that Frosch sets forth the elements for fraudulent inducement, its motion for summary judgment must be denied because Botbol satisfies his burden of demonstrating that material issues of fact exist. Specifically, Botbol offers evidence that raises a material question of fact as to whether Frosch knew of the Non-Solicitation Agreement prior to signing the Employment Agreement and accordingly, whether Botbol in fact made misrepresentations that Frosch detrimentally relied on.

Botbol acknowledges that he signed the Non-Solicitation Agreement with UTM in January 2016 in exchange for phantom stock. (NYSCEF 438, Botbol tr 185: 20-25, 186: 7-18.) Prior to joining Frosch, Botbol disclosed in conversations with Liebman the existence of the Non-Solicit Agreement. (*Id.* at 186:19-25, 187:12-17; 193:20-25.) From June through August of 2018, Botbol also retained Herrick, Feinstein LLP to provide advice “regarding non-solicitation and non-diversion,” “conduct legal research concerning enforceability of restrictive covenants following expiration of employment agreement,” and “research and advice regarding a non-disclosure, non-solicitation agreement with a previous employer.” (NYSCEF 439, Invoices at 4/13, 6/13, 10/13 [NYSCEF pagination].) Frosch was aware that Botbol hired an attorney and agreed to reimburse Botbol for his legal fees. (NYSCEF 444, Leibman 37:10-24.) The fact that Frosch agreed to reimburse Botbol for legal fees he incurred to determine the enforceability of the Non-Solicitation Agreement raises a material question of fact as to

absence of fraud.” (*Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666,667 [1st Dept 2017] [internal quotation marks and citation omitted].) To the extent Frosch alleges injury for Botbol’s inability to provide services as expected, this does not satisfy the out-of-pocket rule. Nevertheless, Frosch’s damages resulting from Botbol’s compensation and benefits package are sufficient proof of injury.

whether Botbol misrepresented the existence of the agreement and whether Frosch could have detrimentally relied.

Moreover, Botbol objects to summary judgment because Frosch was not surprised to learn of the Non-Solicitation Agreement from UTM on August 17, 2018. (See NYSCEF 361, August 17, 2018 Letter at 3/12 [NYSCEF pagination].) Upon receiving the letter from UTM's legal counsel, Espinoza stated in an email to Leibman that it was "[a]s expected" and Leibman provided in response that there was "no need to respond. it was expected." (NYSCEF 359, August 17, 2018 Email Chain.) Frosch's response again raises a material question of fact as to whether Botbol misrepresented the existence of the Non-Solicitation Agreement and whether Frosch detrimentally relied. Accordingly, summary judgment is denied on Frosch's cause of action for fraud.

Violation of the Faithless Servant Doctrine

Further, Frosch alleges that Botbol violated the faithless servant doctrine by "engag[ing] in numerous acts directly against FROSCH's interests, including misappropriating FROSCH's confidential information and disclosing it to FROSCH's competitors to attempt to secure new employment, improperly competing with FROSCH, and usurping FROSCH's business opportunities." (NYSCEF 112, AC ¶ 85.) Botbol seeks summary judgment in his favor dismissing Frosch's faithless servant claim as duplicative of its cause of action for breach of contract. Meanwhile, Frosch seeks summary judgment on its faithless servant claim against Botbol on the grounds that it has shown that Botbol's conduct breached the duty of loyalty and, therefore, warrants forfeiture.

“[T]he faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties is not entitled to recover either salary or commission.” (*Two Rivs. Entities, LLC v Sandoval*, 192 AD3d 528, 529 [1st Dept 2021] [citations omitted].)

“Two alternative standards have been applied by New York courts in determining whether an agent's conduct warrants forfeiture under the faithless servant doctrine. The first standard is met when the misconduct and unfaithfulness substantially violates the contract of service such that it permeates the employee's service in its most material and substantial part. The second standard requires only misconduct that rises to the level of breach of a duty of loyalty or good faith. In other words, it is sufficient that the employee acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment.” (*Institute for Am. Musical Theater LLC v Drost*, 2025 NY Slip Op 30215[U], *11-12 [Sup Ct, NY County 2025].)

Here, Botbol acknowledged in the Employment Agreement his duty of loyalty to Frosch and agreed not to disclose Frosch's confidential information to anyone outside the company. (NYSCEF 3, Employment Agreement §§ 11 [A], 12 [C].) Botbol testified that he was aware of the confidentiality provision. (NYSCEF 190, Botbol tr 214:3-15.) Nevertheless, between April 3, 2019, and March 4, 2020, Botbol sent his resume, on which he had allegedly included confidential financial information about Frosch's clients, accounts, and revenues to a number of prospective employers, which included Frosch's competitors. (NYSCEF 386, August 19, 2019 Email; NYSCEF 387, October 20, 2019 Email; NYSCEF 388, November 18, 2019 Email; NYSCEF 389; November 19, 2019 Email; NYSCEF 390, December 12, 2019 Email; NYSCEF 391, January 5, 2020 Email; NYSCEF 393, February 5, 2020 Email; NYSCEF 394, February 13, 2020 Email; NYSCEF 395, February 15, 2020 Email; NYSCEF 396, February 18, 2020 Email; NYSCEF 397, March 2, 2020 Email; NYSCEF 398, March 3, 2020 Email; NYSCEF 399,

March 4, 2020 Email; NYSCEF 400, April 3, 2019 Email.) On January 6, 2020, Botbol also uploaded his resume, allegedly containing Frosch's confidential information, on Indeed.com. (NYSCEF 392, Indeed Resume.)

In addition to including confidential financial information on his resume, Botbol sent on June 5, 2019, a PowerPoint presentation to CTM, one of Frosch's competitors, as part of Botbol's interview process with the company. (NYSCEF 214, June 5, 2019 Email.) The presentation allegedly contained confidential financial information about Frosch's commissions, hotel program, marketing fees, and pipeline of New York accounts. (*Id.* at 7/20, 19/20 [NYSCEF pagination].) The PowerPoint presentation also included confidential slides copied from a presentation created by a consulting company Frosch had acquired. (*Compare e.g.* NYSCEF 11, Botbol PowerPoint at 15/20, 17/20 [NYSCEF pagination], *with* NYSCEF 402, TCG PowerPoint at 21/26 [NYSCEF pagination].)

Botbol argues that the claims are the same. Where the faithless servant claim is "based on essentially the same allegations, which largely track the allegations underlying the breach of contract claim[]," the faithless servant claim must be dismissed as duplicative. (*Shanley v Louise Blouin Media, Inc.*, 2018 NY Slip Op 32982[U], *30-31 [Sup Ct, NY County 2018].) However, "the law [also] recognizes independent common-law duties that are incidental to the relationship between parties" and "[w]here the same conduct constitutes a breach of a contractual obligation and the breach of a duty independent and distinct from the contract, a party may be subject to both breach of contract and tort claims." (*At Last Sportswear, Inc. v Byron*, 226 AD3d 551, 551 [1st Dept 2024] [citation omitted].) Where, for example,

“the breach of contract claim is based on the allegation that the employee violated a confidentiality provision by taking and distributing proprietary information, and the tort-based claim[] [is] based on allegations that the employee engaged in conduct against the employer's interest by taking and distributing confidential information while employed . . . the employer may assert both tort-based claims rooted in the violation of the duty of loyalty and breach of contract.” (*Id.* at 552.)

Botbol motion is granted and the claim is dismissed as duplicative.

Accordingly, the court is compelled to deny Frosch's motion for summary judgment. Were the court to find that Frosch established a breach of the duty of loyalty, it would deny Frosch's motion for summary judgment because Botbol raises material issues of fact exist. First, “[e]ven if the information Frosch claims Botbol sent is confidential, sending information in a resume seeking a job is far afield from embezzle, improperly competing with the current employer, or usurping business opportunities.” (NYSCEF 449, Botbol's MOL at 16.) Botbol is correct that “[t]aking preparatory steps, while still in the employer's employ, to enter into a competing business is not a breach of an employee's duty of loyalty as long as the employee does not use the employer's time or resources to do so.” (*Jeremias v Toms Capital LLC*, 204 AD3d 498, 499 [1st Dept 2022] [citation omitted].) A question of fact exists as to whether Botbol used Frosch's time and resources to pursue consulting jobs with third parties while still employed by Frosch.

Second, Botbol challenges where the information included on Botbol's resume and PowerPoint presentation was Frosch's confidential information subject to the confidentiality provision in the Employment Agreement. As to the financial information included on his resume, Botbol asserts that the size of the pipeline “was an estimate” based on companies that Botbol had relationships with prior to joining Frosch.

(NYSCEF 447, Botbol aff ¶ 3.) “This was not a Frosch number or a number [Botbol] learned from Frosch. It was [Botbol’s] number showing some of the value [he] brought.” (*Id.*)

Further, Botbol insists the identity of clients and the size of their accounts are not confidential information. (*Id.* ¶¶ 4-5, 7.) “[W]here the employer’s past or prospective customers’ names are readily ascertainable from sources outside its business, trade secret protection will not attach.” (*Columbia Ribbon & Carbon Mfg. Co. v A-1-1 Corp.*, 42 NY2d 496, 499 [1977], see also *Japanese Med. Care PLLC v Tamba*, 241 AD3d 1104, 1105 [1st Dept 2025].) To support his claim that such information was readily available as opposed to confidential, Botbol has provided (i) a BTN Innovate Buyer Registration List, a trade publication that lists potential clients, including Blackstone Group (Blackstone), and the size of their accounts (NYSCEF 440, Registration List), (ii) the August 24, 2018 cease-and-desist letter from UTM to Frosch, in which UTM notes that UTM and Frosch are competing for Blackstone’s business (NYSCEF 445, August 24, 2018 Letter), (iii) an October 11, 2018 email from Botbol to Leibman providing an update on the Blackstone account with information about UTM’s services as told by a Blackstone employee (NYSCF 446, October 11, 2018 Email), and (iv) the April 15, 2019 Blackstone newsletter announcing the launch of Frosch as its new travel management company. (NYSCEF 441, April 15, 2019 Email).

As to the financial information included on his PowerPoint slides, Botbol explains that the commission “was an estimate” extrapolated “on an annual basis” and the marketing fees were those of UTM, not Frosch. (NYSCEF 454, Botbol tr 297:9-25, 298:4-25, 299:2-3.) Further, Botbol notes that this information is not confidential, as

evidenced by the fact that the commission amounts have been revealed in public filings in this action and Frosch has not taken steps to seal/redact the information. (See e.g. NYSCEF 267, Botbol tr 298:9-19.) Frosch counters that this court has already concluded that the information in Botbol's PowerPoint "is Frosch's commercially sensitive financial and marketing information," citing language in the court's sealing order. (See NYSCEF 328, Decision and Order [mot. seq. no. 007] at 3.) The court's finding that a party has demonstrated good cause to seal/redact information in public filings is not conclusive evidence that the information falls within the purview of the confidentiality provision in the parties' Employment Agreement. Since the court would find that material questions of fact exist as to whether the financial information included on Botbol's resume and PowerPoint slides is confidential information governed by Employment Agreement, summary judgment would be denied on Frosch's motion for summary judgment.

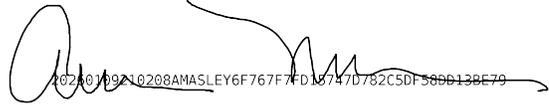
Accordingly, it is

ORDERED that motion sequence 008 is denied; and it is further

ORDERED that motion sequence 012 is granted to the extent that faithless servant is dismissed and otherwise denied; and it is further

ORDERED that motion sequence 013 is denied; and it is further

ORDERED that the trial scheduling conference will be held on February 9, 2026 at 4 pm. Parties shall consult the Part 48 Trial Procedures prior to the conference and shall consult with their clients and witnesses for availability. The court is currently available for trial in April through June 2026 and 2027. Motions in limine shall be filed by February 9, 2026. Otherwise waived.



1/9/2026
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE