

**Alpha Funding Group Inc. v. Continental Funding LLC,
13784/06**

Decided: August 15, 2008

Justice Carolyn E. Demarest

KINGS COUNTY
Supreme Court

Attorneys:

Attorneys for Plaintiff Alpha Funding: James F. Woods, Esq.

Woods Verzani LLP

Attorney for Defendants except Arthur Gorenshteyn and Alfia Coglitore/

Attorneys for Third Party Plaintiff Continental Funding: Thomas Herndon, Jr.,
Esq.

Siverman Schlar Shin & Byrne, PLLC

Attorney for defendant and Third-Party Plaintiff Igor Kanfer a/k/a Gary
Kanfer

Tony Mirvis, Esq.

The Mirvis Law Firm, PC

Justice C. Demarest

In this action by plaintiff Alpha Funding Group, Inc. (Alpha) alleging, among other things, breach of fiduciary duties, unfair competition, misappropriation of trade secrets, unlawful use of proprietary and confidential client information, and tortious interference with current and prospective business relations, and seeking damages, injunctive relief, and an accounting, Silverman, Sclar, Shin & Byrne, PLLC (SSS & B), the attorneys for defendant Continental Funding, LLC (Continental) and the individual defendants/third-party plaintiffs except for Igor Kanfer a/k/a Gary Kanfer (Gary Kanfer),¹

move, by order to show cause, for an order, pursuant to CPLR 3103 (c), dismissing the entire action with prejudice, or, in the alternative, pursuant to CPLR 321 (b) (2), relieving it as counsel for all of the individual defendants/third-party plaintiffs, excluding Continental.

Alpha is a corporation engaged in the mortgage brokerage business, and Michael Levitis is Alpha's president. Gary Kanfer was a key employee and executive vice-president of Alpha, who had unrestricted access to Alpha's proprietary and confidential client information. Milan Schwartz, Yevgeniy Khodov, Allen Kaplan, Allan Neyman, and Eugene Gertsakis were employed by Alpha as team leaders; Daniel Kanfer, Alexander Kofman, Tair Yakubov, and Arthur Gorenshteyn were employed by Alpha as loan officers; and Alfia Coglitore was employed by Alpha as a loan processor.

Alpha asserts that on April 28, 2006, Gary Kanfer informed Michael Levitis that he was leaving Alpha to work for Continental, a competitor in the mortgage business, since Continental had offered him certain incentives. Alpha further asserts that Gary Kanfer also informed Michael Levitis that unless Alpha matched Continental's offer, he and Eugene Gertsakis, Allen Kaplan, Yevgeniy Khodov, Allan Neyman, Milan Schwartz, Arthur Gorenshteyn, Daniel Kanfer, Alexander Kofman, Tair Yakubov, and Alfia Coglitore (collectively, the individual defendants) would leave Alpha to work for Continental. When Alpha declined, Gary Kanfer and the other individual defendants left Alpha's employment. According to Alpha, when the individual defendants departed from Alpha, they copied and removed its proprietary and confidential client information. Alpha claims that in doing so and in utilizing this information, the individual defendants have breached their fiduciary duties to it.

On May 5, 2006, Alpha filed this action against Continental and the individual defendants (collectively, defendants). Alpha's complaint alleges nine causes of action. Alpha's first cause of action alleges that the individual defendants breached their fiduciary duties to it during the course of their employment by Alpha, and it seeks damages of no less than \$600,000. Alpha's second cause of action asserts that due to the individual defendants' breach of their fiduciary duties and defendants' acts of unfair competition, Alpha has been damaged in the sum of not less than \$1 million. Alpha's third cause of action alleges that defendants have acquired Alpha's trade secrets and/or other proprietary and confidential client information and are using this in the operation of Continental to unlawfully compete with Alpha, thereby causing

Alpha to lose clients and business. In particular, this cause of action asserts that Gary Kanfer misappropriated Alpha's trade secrets and proprietary and confidential client information for commercial advantage, has unfairly competed with Alpha, and has breached his fiduciary duties to Alpha. It seeks damages of \$1 million based upon these alleged acts of unfair competition.

Alpha's fourth cause of action requests injunctive relief due to defendants' alleged misappropriation of trade secrets, acts of unfair competition, and unlawful use of its proprietary and confidential client information. Alpha's fifth cause of action seeks an accounting of all revenue derived from business performed for Alpha's clients based upon the alleged breach of fiduciary duties owed to Alpha by the individual defendants. Alpha's sixth cause of action seeks an accounting by Gary Kanfer due to his alleged dereliction of duty, failure to perform his job responsibilities, his disposition of Alpha's assets which were committed to his charge, and his waste, diversion, and acquisition of Alpha's assets. Alpha's seventh cause of action alleges that Gary Kanfer was negligent in his performance of supervisory and administrative duties as an employee of Alpha, and seeks \$600,000 against him. Alpha's eighth cause of action alleges that defendants have unlawfully interfered with the current and prospective business relationship between it and its financial clients, effectuated by virtue of the individual defendants' breach of their fiduciary duties to it. Alpha's ninth cause of action asserts that defendants converted its trade secrets and proprietary and confidential client information.

SSS & B, on behalf of defendants, interposed an answer to Alpha's complaint on August 11, 2006, asserting counterclaims against Alpha. On August 11, 2006, SSS & B, on behalf of defendants, also filed a third-party action against Alpha and Michael Levitis. On September 26, 2006, Woods, Verzani, LLP (WV), the attorneys for Alpha and Michael Levitis, served, on behalf of Michael Levitis, an answer to the third-party complaint and, on behalf of Alpha, a reply to the counterclaims.

During the course of this action, which has now been pending for over two years, SSS & B represented defendants, and engaged in discovery and motion practice on behalf of defendants. Thomas H. Herndon, Jr., Esq., an attorney associated with SSS & B, in his affirmation, sets forth how, for over a year and a half, SSS & B met with defendants, and, particularly, with Gary Kanfer, to formulate, discuss, and plan an overall and comprehensive trial strategy. Thomas Herndon, Jr., Esq. explains how, during those meetings

and communications, Gary Kanfer had access to all of SSS & B's privileged communications, its attorney-client work product, and litigation strategies.

Thomas Herndon, Jr., Esq. asserts that in or about mid-December 2007, SSS & B learned, in a telephone conversation with WV, that Gary Kanfer had left Continental (which had closed its office) and was rehired by Alpha. It is also undisputed that after Continental closed its office, four of the other individual defendants were also rehired by Alpha. Thomas Herndon, Jr., Esq., therefore, contends that by rehiring Gary Kanfer, who is the lead defendant and the "ringleader" of the individual defendants' defection to Continental (and against whom the allegations of Alpha's complaint are largely predicated), Continental's defense has been irreparably prejudiced and compromised since Gary Kanfer will share all of the privileged communications, attorney's work product, and litigation strategies of SSS & B (to which he still retains access) with his employer, Alpha. Thomas Herndon, Jr., Esq. maintains that this will enable Alpha to use the information Gary Kanfer obtained during his meetings with SSS & B to the detriment of Continental. Thus, Thomas Herndon, Jr., Esq. argues that Alpha, by rehiring Gary Kanfer, has "forever tainted" this litigation.

Thomas Herndon, Jr., Esq. further asserts that due to Alpha's rehiring of Gary Kanfer and the other individual defendants, SSS & B now has a conflict of interest since it cannot effectively counsel them and cannot even contact them, its own clients, because they are now employed by Alpha. SSS & B, therefore, brought this motion, pursuant to CPLR 3103 (c), seeking a protective order dismissing Alpha's action, or, at the very least, pursuant to CPLR 321 (b) (2), permitting it to withdraw as counsel for all of the individual defendants.

According to WV, Gary Kanfer changed attorneys and became represented by Tony Mirvis, Esq. as of September 14, 2007. However, no signed consent to the change of attorneys was filed in the Kings County Clerk's Office at that time as mandated by CPLR 321 (b) (1). At oral argument held on May 1, 2008, at which James F. Woods, Esq. of WV, Thomas Herndon, Jr., Esq. of SSS & B, and Tony Mirvis, Esq. appeared, the parties stipulated, on the record, to dismiss the action as against Arthur Gorenshteyn, Alfia Coglitore, and Tair Yakubov (Transcript at 4). In addition, James F. Woods, Esq. also represented that he was awaiting stipulations of discontinuance, which would be recorded shortly, with respect to Yevgeniy Khodov and Alexander Kofman (Transcript at 6). Alexander Gurevich, who is the principal of Continental, did

not appear at the oral argument.

Initially, the court notes that the circumstances presented in this case would necessarily warrant a withdrawal by SSS & B of its representation of Gary Kanfer and the other individual defendants now employed by Alpha (see *McCormack v. Kamalian*, 10 AD3d 679, 679 [2004]; *Walker v. Mount Vernon Hosp.*, 5 AD3d 590, 590 [2004]). CPLR 321 (b) (2) permits an attorney of record, upon motion, to withdraw by an order of the court. Code of Professional Responsibility DR 2-110 (c) (1) (iv) (22 NYCRR 1200.15 [c] [1] [iv]) provides:

"Withdrawal from Employment.

. . .

(c) Permissive withdrawal. Except as stated in section 1200.15 (a) of this Part, a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client:

. . .

(iv) By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively" (see *McCormack*, 10 AD3d at 679; *Walker*, 5 AD3d at 590).

Here, it is undisputed that Alpha's conduct in rehiring most of the individual defendants has rendered it unreasonably difficult for SSS & B to carry out its representation of them or counsel them effectively. Indeed, SSS & B points out that, as noted above, it cannot even contact its own clients because they are now employed by Alpha. James F. Woods, Esq. concedes that SSS & B's representation of Continental now presents a conflict of interest since Continental would inexorably plead cross claims against the individual defendants, and, particularly, against Gary Kanfer. James F. Woods, Esq., however, in contrast to SSS & B, who wishes to continue to represent Continental, argues that SSS & B should be disqualified from representing all of the defendants, including Continental, due to the conflict of interest between the individual defendants and Continental.

SSS & B's motion, insofar as it seeks dismissal of this action, is predicated on CPLR 3103, which governs the subject of protective orders. Pursuant to CPLR 3103 (c), if any disclosure under article 31 "has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed." CPLR 3103 thus confers broad discretion upon a court to fashion appropriate remedies where disclosure abuses have occurred (see *Lipin v. Bender, Inc.*, 84 NY2d 562, 570 [1994]; see also *Sgambellone v. Wheatley*, 165 Misc 2d 954, 956 [1995]). In *Lipin* (84 NY2d at 571), the Court of Appeals explicitly held that CPLR 3103 (c) confers authority upon the court to enter an order of dismissal where that is appropriate under the circumstances.

The Court of Appeals, in *Lipin* (84 NY2d at 568-573), dismissed the complaint of the plaintiff Joan C. Lipin, pursuant to CPLR 3103 (c), as a remedy for her conduct in secretly reading, taking, photocopying, and retaining the defendant's attorneys' confidential and privileged documents. WV attempts to distinguish the facts in *Lipin* (84 NY2d at 566-567) from those in the case at bar by noting the deliberate and bad faith nature in which the plaintiff in *Lipin* obtained and retained access to the confidential information at issue. However, while the circumstances involved in this case may not be as egregious as the conduct of the plaintiff in *Lipin* (84 NY2d at 569), they are no less prejudicial to Continental merely because Gary Kanfer obtained the information during the ordinary course of SSS & B's representation of him in this litigation. Moreover, while aware of this pending action, Alpha intentionally and deliberately rehired Gary Kanfer as well as the other individual defendants.

In any event, CPLR 3103 (c) "is a measure for remediation, not sanction" (*Lipin*, 84 NY2d at 572). Although the court acknowledges that dismissal is an extreme and severe remedy, here, there is serious prejudice to Continental, which is irremediable by less drastic measures (see *Lipin*, 84 NY2d at 572; compare *Fayemi v. Hambrecht & Quist, Inc.*, 174 FRD 319, 326 [SD NY 1997] [where there was no prejudice to the defendants to warrant dismissal since the information obtained would have been subject to disclosure during the normal course of discovery]).

As alleged in Alpha's complaint, Gary Kanfer was the "ringleader" who effectuated the alleged scheme to misappropriate Alpha's trade

secrets/proprietary interest. The claims in Alpha's complaint are, for the most part, directed against Gary Kanfer and the individual defendants. This is undoubtedly because it is a former employee who may not compete with a former employer by misappropriating the former employer's trade secrets or employing fraudulent methods (see *Don Buckwald & Assoc., Inc. v. Marber-Rich*, 11 AD3d 277, 278 [2004]; *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460, 461 [2004]; *Starlight Limousine Serv. v. Cucinella*, 275 AD2d 704, 705 [2000]). Alpha's claims against Continental, as can be ascertained from its complaint, are based only on its status as a third party who allegedly knowingly participated in the claimed breach by the individual defendants' improper use of Alpha's proprietary secrets (see *Bender Ins. Agency v. Treiber Ins. Agency*, 283 AD2d 448, 450 [2001]; *Execulease Corp. v. Jacobs*, 188 AD2d 580, 581 [1992]; *Schnieder Leasing Plus v. Stallone*, 172 AD2d 739, 741 [1991]).

Therefore, to permit this action to continue against Continental following Gary Kanfer and the other individual defendants' alignment with Alpha in joining Alpha's employ, would place Continental in the untenable position of having to defend against claims originally directed largely against Gary Kanfer and which will now inevitably be redirected as against it. James F. Wood, Esq. acknowledges that Continental would have a right to cross-claim against Gary Kanfer and the individual defendants for taking any current or former clients from Alpha and for reimbursement for any proceeds from closings from these clients. In this regard, it is also noted that Tony Mirvis, Esq. has informed the court that Alpha would dismiss Gary Kanfer as a defendant, but the concern was that Continental would then file a third-party complaint against Gary Kanfer, bringing him back into this action (Transcript at 9-10).

While Thomas Herndon, Jr., Esq. attests to SSS & B's sharing of confidential information with Gary Kanfer, there is no affidavit from Gary Kanfer or Michael Levitis disputing that Gary Kanfer was privy to privileged information and that he has shared this information with Alpha. Irreparable prejudice to the conduct of Continental's defense has, thus, occurred as a result of the knowledge that Gary Kanfer has gained through privileged communications with SSS & B. This knowledge would yield significant litigation advantage to Alpha, and consequent disadvantage to Continental (see *Lipin*, 84 NY2d at 572).

Due to the nature of the communications disclosed, this case does not lend

itself to the mere suppression of information as a realistic alternative (compare *Cippitelli v. Town of Niskayuna*, 203 AD2d 632, 633 [1994]). An order of suppression cannot be practically utilized since the disclosure which has occurred is not confined to any particular document, but, instead, permeates the entire defense. Thus, there is no way for the court to suppress the information that Gary Kanfer obtained during his meetings with SSS & B; Gary Kanfer's knowledge simply cannot be purged (see *Lipin*, 84 NY2d at 572-573; compare *Matter of Beiny*, 129 AD2d 126, 136-137 [1987]).

Contrary to WV's argument, the mere fact that Gary Kanfer has now hired a new attorney does not ameliorate the prejudice to Continental's defense. The knowledge at issue is retained by Gary Kanfer, which he can carry into this new attorney-client relationship (see *Lipin*, 84 NY2d at 573). Even more significantly, Kanfer's knowledge acquired during his employment by defendant Continental can, and probably will be, shared with his renewed employer Alpha. Consequently, the court finds that dismissal of this action is the only practicable remedy under the circumstances of this case (see CPLR 3103 [c]; *Lipin*, 84 NY2d at 572-573).

Accordingly, SSS & B's motion to dismiss Alpha's complaint as against defendants, pursuant to CPLR 3103 (c), is granted.

This constitutes the decision, order, and judgment of the court.

1. Arthur Gorenshteyn (against whom this action has now been dismissed) was also represented by separate counsel. In addition, the court, at oral argument, was informed that Yevgeniy Khodov was represented by separate counsel and that a stipulation of discontinuance of this action as against him was about to be filed (Transcript at 6).