

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

PETER A. KNIGHT, M.D. (KNIGHT),

Plaintiff,

v.

GENESEE VALLEY CARDIOTHORACIC,
PC. (GVC), CARDIOTHORACIC OF GREATER
ROCHESTER, P.C. (CGR)
RONALD L. KIRSHNER, M.D. (KIRSHNER),

Defendant.

DECISION AND ORDER

Ind # 2002/06610

BACKGROUND:

Knight and Kirshner are cardiovascular surgeons who practiced cardiac surgery together primarily at Rochester General Hospital from 1990 through November 2001. They formed CGR in 1990 and were the sole shareholders. They were also employees of CGR under employment contract. In 1992 they merged their practice with the practice of two other physicians to form GVC. Under the 1992 GVC shareholders' agreement, Knight and Kirshner agreed that CGR shall continue in existence and CGR agreed to provide the services of Knight and Kirshner to GVC "on a regular basis in accordance with the provisions of this Agreement, and as reasonably required by [GVC]." (§12.1).

On or about October 25, 2001, Knight orally accepted an offer of employment with the University of Rochester involving the practice of cardiothoracic surgery at Strong Memorial Hospital in direct competition with his former employer.

Documentary evidence indicates that Knight accepted the University's offer of employment in writing on November 1, 2001 (exhibit N attached to Essler Affirmation, 11/18/04), and that, on November 5, 2001, he informed CGR and GVC by letter that his employment contract with CGR was terminated. In that letter, Knight wrote:

Since I first informed you of my interest in pursuing a position with the University of Rochester, CGR and GVC have taken a number of actions which have prevented my continued employment with CGR and related performance of professional services on behalf of GVC. These actions included your contacting the medical director of Rochester General Hospital to limit my privileges; removing my name from the office door; informing a referring physician that he should reconsider a referral made by me for surgery because post operative care may be inadequate; removing my name from making rounds; removing my name from the call schedule; and preventing calls and consultations for new work.

These actions either constitute a termination of my Employment Agreement dated July 1, 1990 with CGR and/or prevention of my performing services on its behalf and/or on GVC's behalf.

In the event that you take the position that my Employment Agreement dated July 1, 1990 is not terminated or that you have not prevented me from performing services on behalf of CGR or GVC, then this letter will serve as my notice of termination of employment with CGR effective immediately.

Pursuant to the terms of the Shareholder Agreement dated July 1, 1990 between you, me and CGR, the termination of employment triggers an option in your favor to purchase all of my shares of CGR within sixty (60) days of the date of termination of my employment pursuant to Sections 5, 6, 8 and 9 of the Agreement.

(Exhibit D attached to the complaint). Since then, as relevant here, GVC and CGR have refused to buyout Knight's interest in either corporation.

The 1992 GVC shareholders' agreement did not prohibit Knight from leaving GVC and practicing surgery in direct competition with GVC. However, that agreement contains alternative methods for determining the price in the event of a buyout dependent upon whether there is an agreement not to compete with GVC. The "covenant price" paid in consideration for an agreement not to compete is based in part on GVC's accounts receivable (§ 7.2) and thus is greater than the other price, which is "book value" (§ 7.1).

The 1990 CGR shareholders' agreement does not contain a similar provision. There are, however, separate provisions governing a buyout under circumstances of a voluntary sale (§ 5) and in the event of disability or termination (§ 6), and only under the circumstances set forth in § 6 can a buyout by CGR be required at a price set forth in § 9.2. That price is based on CGR's cash, accounts receivable, tangible assets and liabilities as of the date of termination (§ 9.2).

PENDING ACTIONS:

There are two pending actions. Action No. 1 was commenced by Knight in May 2002. As relevant here, Knight seeks under the second cause of action "an accounting to determine the cash,

accounts receivable and value of tangible assets and liabilities of CGR as of the date of [his] termination" (¶ 28) and, based on that accounting, a buyout of his shares by CGR under §§ 6 and 9.2 of the 1990 agreement (¶ 29). Furthermore, Knight seeks under the third cause of action an accounting to determine the book value of his shares in GVC and, based on that accounting, a buyout of his shares in GVC under § 7.1 of the 1992 agreement. Knight does not allege in action No. 1 the nonpayment of the salary and benefits to which he is entitled under his employment contract with CGR. Defendants counterclaim for damages for alleged breaches of fiduciary duty and contract based on the allegation that Knight negotiated employment with Strong Memorial Hospital while still employed at CGR and GVC.¹ Action No. 2 was commenced by defendants against Knight in October 2002 to recover the sum of \$144,021.92, allegedly representing the amount paid by GVC and CGR on Knight's behalf since October 25, 2001 on liabilities incurred by GVC and CGR prior to October 25, 2001. The first and third causes of action, however, are conditional, brought in "the event that [Knight] is entitled to any portion of revenues received by GVC after October 25, 2001" (¶ ¶ 12, 23). The first cause of action is based on a theory of unjust

¹ Five counterclaims are based on this allegation. One of the motions pending is a motion by defendants to withdraw the sixth counterclaim for misappropriation of proprietary information..

enrichment and the third cause of action is for contribution. The second cause of action is not conditional and is based on the allegation that Knight has breached his duty as a shareholder of GVC and CGR to pay his proportionate share of the expenses of the two corporations (¶¶ 17-18).

PRESENT MOTIONS:

There are pending before the court three motions:

A. Motion by defendants seeking an order pursuant to CPLR 3025 (b) granting them leave to serve an amended answer and counterclaims, or alternatively, an order pursuant to CPLR 602 (a) consolidating the two actions. Defendants seek leave to serve an amended answer and counterclaim withdrawing the existing sixth counterclaim for misappropriation of proprietary information and adding three counterclaims identical to the causes of actions set forth in their complaint in action No. 2.

B. Cross motion by Knight seeking (1) an order pursuant to CPLR 3212 granting summary judgment dismissing the counterclaims in action No. 1; (2) an order pursuant to CPLR 3211 (a) (7) dismissing the complaint in action No. 2, or alternatively, an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in action No. 2; and (3) an order awarding costs and disbursements.

C. Cross motion by defendants seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the second cause of action in action No. 1.

To facilitate a discussion of the issues, the court considers the motions in the opposite order in which they were received.

DEFENDANTS' CROSS MOTION:

By cross motion dated February 7, 2005, defendants seek summary judgment dismissing the second cause of action in action

No. 1. Their cross motion is the last in the series of motions now pending before the court and is supported by three items of evidence attached to the cross-motion papers, as well as the evidence, including deposition testimony, already before the court.

Under the second cause of action, Knight seeks judgment requiring CGR to purchase his interest in that corporation pursuant to § 6 of the 1990 shareholders' agreement. Section 6 of that agreement governs the buyout of a shareholder's interest upon "Disability or Termination of Employment" and obligates CGR to effect the buyout should the other shareholder not exercise his option to purchase the shares himself. Defendants, without conceding the continued viability of the buyout provisions of the 1990 shareholders' agreement, contend that Knight was not terminated but freely elected to leave CGR, as was his right under his employment contract,² thus triggering §5 of the agreement under which his only remedy is dissolution of CGR if, as here, the other shareholder refuses to buy him out (§5.1). Knight contends that, because §6 is triggered by a "voluntary or involuntary" termination and the term "termination" encompasses a "voluntary quitting" (see Meckes v Cina, 75 A.D.2d 470, 474 [4th

² The employment agreement contemporaneously signed by Knight gives him the right to terminate his employment for any reason "upon ninety [90] days prior written notice to the Company." (§ XI [B]).

Dept. 1980]), §6 is applicable here, even if it was he, and not CGR, who precipitated the termination.

The court thus is called upon to determine the intent and purpose of these two sections of the 1990 agreement. In making that determination, the court is guided by general contract principles, under which the agreement "must be read as a whole" (Aimco Chelsea Land, LLC v Bassey, 6 A.D.3d 367, 368 [2d Dept. 2004], appeal dismissed 3 N.Y.3d 701 and lv denied 3 N.Y.2d 612) and the words and phrases must be given their "plain meaning" (see Brooke Group Ltd. v JCH Syndicate, 87 N.Y.2d 530, 534 [1996]). Punctuation and grammatical construction may also be "reliable signposts" (see Wirth & Hamid Fair Booking v Wirth, 265 N.Y. 214, 219 [1934]). Applying those principles here, it is clear that the sections in question are unambiguous in their application and should be enforced according to their terms (see Rehberger v Ritchberg, 295 A.D.2d 490, 491 [2d Dept. 2002]; Walker & Zanger, LTD v Zanger, 241 A.D.2d 345 [1st Dept. 1997]) .

The two sections in question are parts of a contractual scheme governing the repurchase of shares in CGR that includes §7 of the 1990 agreement. Section 5, entitled "Voluntary Lifetime Disposition," is triggered when "either Shareholder desires to sell his Shares." The other shareholder has a 60-day option to purchase the shares or CGR must be dissolved (§5.1). Section 6 applies in the event that "either Shareholder shall for any

reason whatsoever ... be unable to perform his normal duties ... or ... be terminated voluntarily or involuntarily from full-time employment with the Company, with or without cause (emphasis supplied).” The other shareholder again has a 60-day option to purchase the shares of the “affected Shareholder” but should that option not be exercised, CGR is obligated to make the purchase itself at the mandatory price set forth in §9.2. Under §7 governing the disposition of shares upon a shareholder’s death, there is a similar mandatory buyout provision in the event the surviving shareholder does not exercise his 60-day option.

Upon review of this contractual scheme, the court is immediately struck by the use of the active voice in §5 as opposed to the passive voice in §6. The active voice connotes action by the subject; hence use of the active voice in §5 indicates that §5 is triggered by the shareholder himself should he desire to sell his shares. The passive voice, however, places the emphasis on the receiver of the action and what has happened, or been done, to that receiver. Section 6 is written in the passive voice, thus indicating that it is triggered by actions occurring to a shareholder, such as an illness, rather than by the actions of the shareholder, as in §5. Thus, while the court agrees with Knight that, generally, a termination encompasses a voluntary quitting, it determines that, within the contractual scheme at issue here, a voluntary quitting falls within the

purview of §5, and §6 is applicable only when action has been taken against a shareholder terminating his employment. Any interpretation of §6 as encompassing a voluntary quitting would effectively write §5 out of the agreement.

Knight's interpretation of §6 rests in large measure on the use of the phrase "voluntarily or involuntarily." The phrase as used here, however, modifies the act done to the shareholder, thus indicating that §6 is applicable whenever CGR acts to terminate the employment of a shareholder, regardless whether the shareholder fights the termination.

Defendants have the initial burden on their cross motion of establishing their entitlement to judgment as matter of law, and they "must do so by tender of evidentiary proof in admissible form" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Thus, to prevail on their argument that Knight's sole remedy under the 1990 agreement is dissolution of CGR, defendants must establish as a matter of law by tender of proof in admissible form that Knight voluntarily quit his employment at CGR and thus § 5, and not § 6, is applicable. Failure to meet that initial burden of proof requires denial of the cross motion, "regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

The evidence submitted by defendants in support of their cross motion, which the court deems to have been submitted in

addition to the evidence already before the court on the other motions, does not meet that exacting standard. The court has examined in particular the deposition testimony of Knight, which the court already had before it on Knight's cross motion (exhibit H). In that testimony, Knight indicates that, prior to October 21, 2001, he met several times with the representatives of the University of Rochester, and specifically Strong Memorial Hospital, to discuss possible employment; that on October 21, 2001 he met with Kirshner and another official of Rochester General Hospital to talk about those contacts; and that, following a subsequent meeting with officials of Rochester General Hospital some time before October 25, 2001, he decided to accept the University's offer of employment. Knight specifically testified that he made the decision to accept the offer only after it became apparent at the last meeting that "they were not interested in retaining me" (EBT at 234; see EBT at 240). Knight further indicated in his testimony that he wanted to continue working for CGR during the 90-day transition period set forth in his employment agreement, but was prevented from doing so by actions thereafter taken by defendants as set forth in the November 5, 2001 letter (EBT at 302). Critically, Knight testified as follows:

"Q. As you sit here today, you are unable - let me ask it this way: As you sit here today, do you believe that you left employment of CGR or that somebody else terminated your employment?

- A. I believe that it was my decision to leave CGR, but that the - it was my desire to fulfill my obligations with regard to leaving CGR. CGR, however, and GVC through its actions, made that - made the - made it impossible for me to fulfill all the terms of those obligations.
- Q. And what obligations did they make it impossible to fulfill?
- A. To continue to work for ninety days, to serve ninety days notice.
- Q. So you are saying that it was your intention to leave CGR, correct?
- A. Correct.
- Q. But that somebody ... prevented you from fulfilling the ninety day requirement, correct?
- A. Correct.
- Q. Because you wanted to continue to work; is that your testimony?
- A. Yes.
- Q. And you wanted to do that for the full ninety days, correct?
- A. Or longer if that's what they decided they wanted.
- Q. But its your testimony that they - they didn't want you there for the ninety days, they just wanted you as long as you were going to leave, just leave now?
- A. Yes."

(EBT at 308-309). This evidence certainly supports the inference that Knight quit voluntarily and thus has no claim against defendants based on §6 of the 1990 agreement. In this regard, the court notes that, even if it is assumed that defendants

engaged in the acts of constructive discharge alleged in the November 5, 2001 letter (see Chernoff Diamond & Co. v Fitzmaurice, 234 A.D.2d 200, 203 [1st Dept. 1996] [a constructive discharge occurs "when an employer 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation'"]), those actions were not taken until after Knight made his decision to leave CGR's employment. Those actions impact on the failure of Knight to comply with the 90-day notice requirement in his employment contract (see Kaplon-Belo Assoc. v Tae Hee Kim, 145 A.D.2d 413, 414 [2d Dept. 1988], lv denied 74 N.Y.2d 615), but are irrelevant on the issue whether Knight quit voluntarily.

On the other hand, the evidence also supports the inference that defendants terminated Knight within the broad meaning of §6 of the agreement by their actions at the meeting subsequent to October 21st and before October 25th, which led Knight to believe that they did not intend to retain him. If Knight is to be believed, even after being approached by the University regarding possible employment, he was open to the idea of remaining with CGR and his decision to leave was precipitated by defendants' actions at that last meeting. Knight did not effect a termination of his employment simply by discussing employment options with the University, and if, as alleged, defendants overreacted to that news and gave him no other option than to

accept the University's offer, there was a termination by defendants within the broad meaning of §6.

The court, therefore, concludes that there is an ambiguity in the facts that precludes a determination as a matter of law that §5 and not §6 is applicable here (see Matter of Pezzo v Mazzetti, 202 A.D.2d 935, 937 [3rd Dept. 1994] [summary judgment not proper where competing inferences are reasonably capable of being drawn from the evidence]). Thus, defendants have not met their initial burden of proof on that issue.

Defendants alternatively contend that the buyout provisions of the 1990 agreement, including §6, were superceded by the buyout provisions of the 1992 agreement, and thus they are entitled to judgment as a matter of law dismissing the second cause of action. This contention necessarily raises issues regarding the interplay of the 1992 and 1990 agreements, which the court now examines.

It is undisputed that, under 1992 agreement, the parties agreed that CGR would continue in existence for the express purpose of providing the services of Knight and Kirshner to GVC while they remained under employment contract with CGR (§12.1). Section 12.1 of the 1992 agreement provides that:

"[Knight and Kirshner] agree that ... [CGR] shall continue in existence, and [CGR], by the execution of this Agreement, agree[s] that [it] will provide [GVC] the services of [Knight and Kirshner] ... on a regular basis in accordance with the provisions of this

Agreement, and as reasonably required by [GVC].
[Knight and Kirshner] agree that each of them will practice cardiothoracic surgery during the term of this Agreement solely as a participant in [GVC] and each of them will devote his entire professional time and best efforts to the business of [GVC], and each of them will not engage in any professional business activity in competition with [GVC] or in any other professional business activity which would, in the aggregate, require a substantial portion of time and attention without first obtaining [GVC's] consent in writing. [Knight and Kirshner] further agree that any fees received by each [of them] for professional medical services for patient care performed by each [of them] shall belong to [GVC]."

The 1992 agreement acknowledges the "cumbersome" nature of this arrangement and provides for a subsequent review (article 23), which apparently never occurred.

Upon reading §12.1 of the 1992 agreement, several things are apparent. First, while it was agreed that CGR shall remain in existence and provide GVC the services of Knight and Kirshner, both of them agreed not to practice medicine any longer as participants in CGR. They agreed to practice medicine solely as participants in GVC and to devote all their professional time and efforts to that business endeavor. Moreover, they agreed that any revenues generated from their practice of medicine were the revenues of GVC and not CGR.

In keeping with those understandings, §12.3 of the 1992 agreement provides that "all of the expenses required to operate [GVC] and continue the employment of each staff member, other than the Shareholders, shall be paid by [GVC]" and §12.4 provides

"that all services rendered by [Knight and Kishner] shall be billed solely by [GVC] and ... all monies received by [GVC] from such billings shall be the property of [GVC]." Under §12.4, GVC is obligated to distribute its "excess monies after payment of expenses" to CGR (and another similar corporate entity not involved here) and CGR is obligated to use those monies to "pay any and all compensation due to [its] shareholders," as well as "any expenses and retirement and other benefits that [it] has obligated itself to pay to its shareholders." The amount of the distribution under §12.4 is based on the "receipts" of GVC "after the deduction of all of the expenses." Furthermore, under article 15, CGR - which was a signatory of the 1992 agreement - agreed to make all its "equipment, supplies and other tangible personal property" available to GVC for "no consideration whatsoever." Moreover, GVC agreed "to pay for any expenses incurred to terminate any lease for office space which is in effect and binds ... [CGR] as of the Effective Date [of the agreement]."

Thus, it is clear that the 1992 agreement reduced CGR, in essence, to a shell corporation whose only revenue is the distribution that it receives from GVC, and only liability, the compensation and benefits it pays Knight and Kirshner under their

employment contracts.³ In other words, CGR serves only as the conduit for the payment of Knight and Kirshner. GVC is solely responsible for all billings of the business, and all monies received from such billings are the property of GVC. All business expenses, aside from the compensation and benefits paid to Knight and Kirshner, are expenses of GVC, and not CGR. GVC is obligated to pay its expenses from its "receipts" and to distribute CGR's share of the balance to CGR for the payment of the compensation and benefits due Knight and Kirshner. The use of the term "receipts" in this context means "money received" by GVC since it is from this money that expenses are to be paid (see Bridewell v Cincinnati Reds, 155 F.3d 828, 830 [6th Cir. 1998]). CGR has no accounts receivable or revenues arising from the practice of medicine by Knight and Kirshner, and the distribution that it receives is not based on GVC's accounts receivable. To the extent that there is any value in CGR as a corporate entity, it is nominal.⁴

Defendants' contention that the buyout provisions of the 1990 agreement, including § 6, were superceded by the buyout

³ Knight's employment contract provides that he shall be paid a salary and bonus as determined by CGR (§ VI).

⁴ In their answers to Knight's first set of interrogatories, defendants indicate that the total assets of CGR as of October 25, 2001 was \$24,283.11 and the total liabilities was \$22,340.51 (Exhibit I attached to Knight's cross motion).

provisions of the 1992 agreement rests on the merger clause of the 1992 agreement, which provides:

This Agreement contains the entire understanding of the parties hereto with regard to the subject matter hereof, and supercedes any and all prior agreements by and among all or some of the parties hereto with respect to the subject matter herein; and may not be amended or modified, nor may any of its provisions be waived, except by a writing executed by all the parties hereto or, in the case of a waiver, by each party waiving compliance (emphasis added).

(§ 24.5). Under a provision of this type, one contract merges in a later one so as to extinguish the earlier one if they deal with the same subject matter (see generally, 22A NY Jur 2d, Contracts §481). There is no merger here generally because the 1992 agreement provides for the continued existence of CGR (§12.1), thus manifesting an intent that its shareholder agreement survive (see Policastro v Town of La Grange, 193 A.D.2d 950, 952 [3rd Dept. 1993]). More particularly, the buyout provisions of the 1992 agreement do not extinguish the buyout provisions of the 1990 agreement because there is no identity of subject matter with respect to those provisions. The buyout provisions in the 1992 agreement pertain only to shares in GVC (§4.2) and the purchase prices set under article 7 are the purchase prices for those shares only. Nowhere in the 1992 agreement is mention made of a buyout of a shareholder's interest in CGR, thus leaving such a buyout subject to the 1990 agreement.

Defendants contend that this result renders the buyout provisions of the 1992 agreement meaningless. The court disagrees. Having opted not to sign a non-compete agreement, Knight is entitled to the "book value" only for his shares in GVC (§7.1). He has no right, nor does he assert the right, to the "covenant price" for his shares (§7.2). Knight thus has no claim under the 1992 agreement to any part of GVC's accounts receivable. Nor does he have such a claim under the 1990 agreement. The purchase price under the 1990 agreement is determined based on a formula which includes a proportionate share of CGR's accounts receivable only (§9.2).

The argument is made by Knight that CGR's receivables include money "owed ... by GVC as of the date of Dr. Knight's termination for services previously provided" and thus "GVC receivables are directly related to Dr. Knight's contractual claim against CGR [under the second cause of action]" (§13, Essler affirmation 11/18/04). The court disagrees. Under the 1992 agreement, "all services rendered by [Knight] shall be billed solely by [GVC] and ... all monies received by [GVC] from such billings shall be the property of [GVC]." (§12.4). Thus, no part of CGR's receivables may be attributed to billings for services rendered by Knight. If CGR has any receivables at this point, they would represent nothing more than the amount of a distribution under the 1992 agreement as yet unpaid by GVC.

However, CGR receives distributions from GVC only for the purpose of paying the compensation and benefits of Knight and Kirshner under their employment agreements with CGR, and Knight makes no claim in action No. 1 against CGR for unpaid compensation and benefits under his employment agreement. The absence of any claim against CGR for unpaid compensation and benefits indicates that CGR has no receivables attributable to unpaid distributions from GVC.

The court therefore denies defendants' cross motion. The court determines that defendants failed to establish their entitlement to judgment as a matter of law with respect to their contention that §5 and not §6 of the 1990 agreement is applicable here and that their remaining contention resting upon §24.5 of the 1992 agreement is legally without merit.

KNIGHT'S CROSS MOTION:

Knight cross-moves for an order dismissing the counterclaims in action No. 1 and the complaint in action No. 2. The court examines first that part of the cross motion seeking dismissal of the complaint in action No. 2.

As already indicated, the complaint in action No. 2 has three causes of action, two of which (the first and third) are conditional, brought "in the event that [Knight] is entitled to any portion of revenues received by GVC after October 25, 2001" (§§12, 23). The court grants summary judgment dismissing those

causes of action because the court, as already indicated, interprets the two agreements as precluding that possibility (see CPLR 3212 [b]).

The second cause of action in action No. 2 is not conditional. Under that cause of action, defendants seek recovery from Knight of \$144,021.92 under a theory of contribution arising from Knight's alleged "obligation, as shareholder of GVC and CGR, to bear a proportionate share of expenses and liabilities of those corporations, incurred on his behalf." (§17). According to the complaint, those expenses and liabilities were incurred by GVC and CGR prior to October 25, 2001, and paid by GVC and CGR after October 25, 2001 "on behalf of all physicians affiliated with GVC" (§§15, 16).

Knight contends that the second cause of action should be dismissed for failure to state a cause of action (CPLR 3211 [a] [7]) because as a general rule a shareholder is not personally liable for the financial obligations of a corporation (point IV, Knight's reply memorandum 3/2/05). Although defendants agree with the general rule, they contend that the second cause of action states a cause of action for contribution under Aspinwall v Sacchi (57 N.Y. 331 [1874]) (point III, defendants' memorandum of law 2/7/04). Defendants' reliance on that case, however, is misplaced. Under Asprinwall, when shareholders are held personally liable for a corporate debt and one of them is

compelled to pay more than his or her proportionate share, that shareholder is entitled to seek contribution from the others. That allegation is lacking here. Nowhere in the complaint is it alleged that a shareholder was compelled to discharge more than his proportion of a common obligation. The second cause of action in particular alleges instead that there was a corporate debt that was paid by the corporations (§16). Defendants thus have not stated a cause of action for contribution under Asprinwall (see generally, 13 Fletcher Cyclopedia of Private Corporations, §6070), and the second cause of action in particular should be dismissed.

The other portion of Knight's cross motion seeks summary judgment dismissing the remaining five counterclaims in action No. 1. Under each of those counterclaims, defendants seek damages based on the allegation that Knight breached a contractual or fiduciary duty owing GVC and CGR by seeking new employment with the University while still employed with CGR. Knight has moved for summary judgment dismissing these counterclaims based in part on deposition testimony by Kirshner indicating that neither corporation was damaged by Knight's departure from CGR (§§ 40-41, Essler affirmation 11/18/04). Defendants contend only that Knight was barred by his contract and fiduciary duties from negotiating other employment while still employed by CGR and thus summary judgment dismissing the

counterclaims is inappropriate. They have not produced any evidence in admissible form indicating that they were damaged by Knight's actions.

Defendants have no claim here for breach of contract or breach of fiduciary in the absence of damages. It is well established that "damages are an essential element of a breach of contract cause of action" (Orville v Newski, 155 A.D.2d 799 [3rd Dept. 1989], appeal dismissed 75 N.Y.2d 946) and thus "that allegations of a breach of contract are not sufficient to sustain a complaint in the absence of allegations of fact showing damage" (Ryan Ready Mixed Concrete Corp. v Coons, 25 A.D.2d 530, 530 [2d Dept. 1966]). Similarly where, as here, equitable relief is not sought, "the proponent of a claim for breach of fiduciary duty must, at a minimum, establish that the offending parties' actions were a 'substantial factor' in causing an identifiable loss" (Gibbs v Breed, Abbott & Morgan, 271 A.D.2d 180, 189 [1st Dept. 2000]).

Knight met his initial burden of proof by establishing prima facie entitlement to judgment as matter of law on the issue of damages (see Zuckerman, 49 N.Y.2d at 562). The court notes in this regard that the 1992 contract effectively liquidates damages in the event, as here, a shareholder terminates his involvement with GVC without agreeing not to compete. That shareholder is entitled to only the book value of his shares, a price

considerably less than the covenant price under the 1992 agreement. Kirshner acknowledged as much in his deposition testimony (exhibit K attached to Knight's cross motion at 296-297). Knight too acknowledges this and seeks only the book value of his shares.

The burden thus shifted to defendants to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 N.Y.2d 320, 324). Defendants, however, failed to meet that burden (see Miller v Kliger, ___ A.D.3d ___, 789 N.Y.S.2d 445 [2d Dept. decided 2/14/05]) and thus that part of Knight's cross motion seeking summary judgment dismissing the remaining counterclaims in action No. 1 should be granted.

Based on the forgoing, the court grants Knight's cross motion insofar as Knight seeks an order dismissing the complaint in action No. 2 pursuant to CPLR 3211(a)(7) and dismissing the counterclaims in action No. 1 pursuant to CPLR 3212(b).

DEFENDANTS' MOTION:

Defendants seek leave to serve an amended answer, withdrawing the existing sixth counterclaim for misappropriation of proprietary information and adding three additional counterclaims identical to the causes of action set forth in their complaint in action No. 1. Certainly no reason exists to deny that part of defendants' motion withdrawing the existing

sixth counterclaim. However, that part of defendants' motion seeking leave to assert three additional counterclaims is denied inasmuch as the three identical causes of action in action No. 2 have been dismissed for failing to state a cause of action.

Alternatively, defendants seek an order consolidating actions No. 1 and No. 2. Action No. 2, however, has been dismissed.

CONCLUSION:

A. Defendants' motion is granted only insofar as leave is granted to withdraw the sixth counterclaim.

B. Knight's cross motion is granted insofar as the court dismisses the complaint in action No. 2 pursuant to CPLR 3211(a)(7) and dismisses the counterclaims in action No. 1 pursuant to CPLR 3212(b). The court otherwise denies that part of the cross motion seeking costs and disbursements.

C. Defendants' cross motion is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March __, 2005
Rochester, New York