

ROCHESTER LINOLEUM AND CARPET  
CENTER, INC. d/b/a ROCHESTER  
FLOORING RESOURCE,

Plaintiff,

v.

DECISION AND ORDER

Index #2005/11545

DIANE SPRINGER and  
MATTHEW GREENFIELD,

Defendant.

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Defendants, Diane Springer ("Springer") and Matthew Greenfield ("Greenfield"), have cross-moved separately for various relief. This action was commenced on October 14, 2005 via summons and complaint. Plaintiff simultaneously filed an Order to Show Cause containing a Temporary Restraining Order (TRO) requesting a Preliminary Injunction enjoining and restraining defendants from submitting bids on any jobs that were on plaintiff's database as of September 20, 2005, and also requesting an order for defendant Springer to produce her personal computer for the purposes of immediate discovery. The Order to Show Cause is supported by a Memorandum of Law, Affidavits from Andrew J. Ryan, Esq., Jatinder Singh (plaintiff's computer network administrator), and David Pelusio (plaintiff's Vice President), and various exhibits attached to the Affidavits.

The Order to Show Cause/TRO was granted by this Court on October 17, 2005, and plaintiff subsequently examined Springer's computer.

In its complaint, plaintiff asserted six causes of action: (1) permanent injunction against Springer, (2) trespass against Springer, (3) Computer Trespass - Violation of Penal Law § 156.10 against Springer, (4) breach of duty of loyalty against Greenfield, (5) aiding and abetting - violation of Penal Law § 20 against Greenfield, and (6) punitive damages against Springer and Greenfield.

Defendant Greenfield filed a cross-motion (1) to dismiss the complaint for failure to state a claim, (2) to vacate the Temporary Restraining Order, and (3) to request damages resulting from the TRO plus attorneys' fees. In support of his cross-motion, Greenfield submitted an Affidavit along with numerous exhibits, and Greenfield's attorney submitted an Affirmation and a Memorandum of Law. Defendant Springer also filed a cross-motion to (1) dismiss the complaint, (2) for leave for Springer to apply for damages resulting from the TRO, (3) to order plaintiff not to use Springer's business information downloaded from her computer, (4) for an order that no more copies of information downloaded from her computer be made, (5) for an order to return all copies of information downloaded, (6) that if Springer's motion to dismiss is not granted, for an order

allowing Springer to answer the complaint and to file counterclaim(s), and (7) to pay Springer's attorneys' fees. In support of her cross-motion, defendant Springer submitted an Affidavit along with numerous exhibits, and Springer's attorney submitted an Affirmation and a Memorandum of Law.

In opposition to defendants' cross-motions and in further support of its motion for a preliminary injunction, plaintiff submitted reply affidavits and corresponding exhibits from David Pelusio and Andrew Ryan, Esq., affidavits and corresponding exhibits from Michael DeSilva (plaintiff's computer expert) and Jatinder Singh, and a Memorandum of Law. Both Defendants submitted Affidavits and Memorandums of Law in response to plaintiff's reply to defendants' cross-motions.

After oral argument on November 2, 2005, the court vacated the TRO, resolved the discovery dispute, and reserved decision on the motions to dismiss. With respect to the discovery dispute, plaintiff's attorney agreed to a protective order whereby the contents of the CD-ROM containing Springer's personal and business information obtained from her personal computer only would be viewed by plaintiff's attorney. In addition, the parties agreed that Springer's personal information contained on the CD-ROM would be separated and removed from it so that the CD-ROM in the plaintiff's attorney's possession would only contain matter related to this dispute. This court signed an order to

this effect on December 30, 2005. In addition, a scheduling order was issued at the hearing which is set forth at the end of this memorandum. This decision only addresses the motions to dismiss.

### **Background Facts**

As this is a motion to dismiss, this court must accept as true all facts that are alleged in the complaint and in any submissions in opposition to defendants' motions to dismiss. Plaintiff, Rochester Linoleum & Carpet Center, Inc., d/b/a Rochester Flooring Resource ("Rochester Flooring" or "plaintiff") is in the business of selling and installing carpet and other flooring materials in commercial settings. Complaint, ¶ 4. Defendant Diane Springer starting working for Rochester Flooring in January 2000 as a Branch Manager and her duties included managing the sales staff, estimators, and the service and support staff. Id. at ¶¶ 10-11. Springer was terminated from Rochester Flooring on September 20, 2005, allegedly because Springer allegedly misrepresented the status of a customer's account. Id. at ¶19. Defendant Matthew Greenfield began working at Rochester Flooring in February 1999 as an estimator, and his responsibilities included reviewing the plans and specifications of various commercial building and construction contracts to determine an estimate of the cost of the job. Id. at ¶¶ 15-16. Greenfield reported directly to Springer and assisted Springer in

preparing bids. Id. at ¶ 17. Greenfield voluntarily left his employment with Rochester Flooring on September 26, 2005 after returning from a week-long vacation. Id. at ¶ 25. Plaintiff alleges that Springer and Greenfield are now in business together competing against Rochester Flooring. Id. at ¶ 26.

Plaintiff uses "a computer software program known as RFMS [which] organize[s] and store[s] information on building and construction contracts for which Rochester Flooring has submitted or intends on submitting a bid." Complaint, ¶ 5. Plaintiff describes this RFMS software program as its "bid database," and alleges that this bid database contains "secret and confidential information and trade secrets" and that the information was and is "confidential and proprietary information."

Plaintiff explains that certain employees of Rochester Flooring are permitted to access Rochester Flooring's computer system remotely through the use of software known as Citrix. Both defendants, while employed at Rochester Flooring, were authorized to access Rochester Flooring's computer system by their own assigned Citrix username and password. Citrix allows employees to access the bid database and Microsoft Outlook from their home computers. Plaintiff alleges that, after Springer was fired on September 20, 2005 and after her authorization to access Rochester Flooring's computer system was revoked by her Citrix username and password being changed, she obtained Greenfield's

Citrix username and password and accessed Rochester Flooring's computer system on the evening of September 20, 2005. Plaintiff based its conclusion on the belief that Greenfield was out of town on vacation at the time. While logged in without authorization, plaintiff alleges that Springer obtained confidential and proprietary information regarding Rochester Flooring's bids or intended bids on commercial building and construction contracts. Plaintiff also alleges that Springer deleted over 2500 emails from Greenfield's email account, some of which contained current projects and bid information. Plaintiff maintains that Springer (and Greenfield) used this proprietary information to submit bids in competition with Rochester Flooring and could and will undercut plaintiff's bids because Springer allegedly knew Rochester Flooring's pricing information and their bidding process.

Upon further examination of Rochester Flooring's computer system by Singh, plaintiff's computer network administrator, and as set forth in his affidavit, it was determined that Springer logged on to Rochester Linoleum's computer system three more times after September 20, 2005 using her former secretary's Citrix username and password ("AmyH") which was given to Springer after her secretary stopped working at Rochester Linoleum but before Springer was terminated. Apparently, the secretary's Citrix username and password were not changed after Springer was

fired. Springer admitted in her affidavit and at oral argument to using the "AmyH" login information after being fired, but for the sole purpose of retrieving personal information left on her former employer's computer, including travel itineraries, personal real estate information, and the like after plaintiff allegedly refused to return this information to Springer after promising to do so.

As far as the results of the forensic examination of Springer's home computer are concerned, plaintiff's computer expert Michael DeSilva admits in his affidavit that he found no proprietary information on Springer's home computer that was downloaded on or after September 20, 2005. However, he said that while it is possible to determine if a user tried to access Rochester Flooring's computer system remotely using Citrix, it is impossible to determine what a user accessed once logged on. Thus, the plaintiff alleges that, even though there is no proof defendant Springer downloaded proprietary information, plaintiff maintains that Springer still accessed proprietary information and could have printed it.

While this is a motion to dismiss and we are to take plaintiff's allegations as true, this court will briefly set forth both Springer's and Greenfield's version of the facts.

Springer alleges that she was fired because she tried to collect past due commissions owed to her and that she was going

to take a planned medical leave. She also alleges that she was discriminated against on the basis of her gender. Both Springer and Greenfield assert that Greenfield went to Springer's house on the night of September 20, 2005, before he left for vacation and remotely logged into Rochester Linoleum's computer system using his own Citrix password and Springer's home computer. Greenfield alleges that he was scared that he would be the next employee fired, so he accessed his email account so that he could retrieve some personal emails and also so he would be in compliance with Rochester Flooring's Employee Handbook policy of maintaining his email account. Springer admits to using the "AmyH" login after September 20, 2005 in an effort to retrieve some personal information on her work computer, including vacation plans and personal real estate information, but insists that she did not access or download any proprietary information or files on the Rochester Flooring computer system.

Both defendants insist that there is no "bid database" in the form alleged by plaintiffs, containing all the past, present, and future bid pricing information of Rochester Linoleum. Instead, defendants assert that the details and pricing information of each bid is only found on an individual salesperson's work computer, and neither defendant has access to these salespersons' computers. Furthermore, defendants maintain that the "bid database" (which does contain a list of jobs that

Rochester Linoleum has bid or intends to bid on, but does not contain specific pricing information; see Exhibit A attached to David Pelusio's Affidavit) does not contain proprietary information or trade secrets since most of the jobs are public contracts and are available through public sources like internet web sites and trade journals.

Greenfield also states that he is merely an employee of Springer's new flooring business, and is not an owner thereof. Springer admits that she currently owns a competing business, but maintains she did nothing wrong in forming this business nor did she steal any of plaintiff's bid information.

#### **Springer's Cross-Motion to Dismiss**

In its complaint, plaintiff asserted four causes of action against Springer: entitled (1) Permanent Injunction, (2) Trespass, (3) Computer Trespass - Violation of Penal Law § 156.10, and (4) Punitive Damages. Springer cross-moved pursuant to CPLR §3211 for an order, *inter alia*, dismissing the complaint against her in its entirety, with prejudice.

In determining a motion to dismiss for failure to state a cause of action, a court will liberally construe the complaint, CPLR § 3026; Doria v. Masucci, 230 A.D.2d 764, 765 (2d Dept. 1996), and will give the plaintiff "the benefit of every possible favorable inference." Shanley v. Welch, 6 A.D.3d 1065 (4th Dept. 2005). See 511 West 232nd Owners Corp. v. Jennifer Realty Co.,

98 N.Y.2d 144, 152 (2002). In addition, the court will accept as true all facts that are alleged in the complaint and in any submissions in opposition to the motion to dismiss. 511 West 232nd Owners Corp., 98 N.Y.2d at 152; Gibraltar Steel Corporation v. Gibraltar Metal Processing, 19 A.D.3d 1141, 1142 (4th Dept. 2005). The motion to dismiss for failure to state a cause of action "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.' " 511 West 232nd Owners Corp., 98 N.Y.2d at 152 (quoting Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 54 (2001)); Shanley v. Welch, 6 A.D.3d at 1065. If the court determines "that Plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

**Permanent Injunction - First Cause of Action**

The First Cause of Action against Springer only is denominated "Permanent Injunction," and does not expressly reference any particular substantive theory of the claim. Although there does not appear to be any state cases saying so, the rule is well settled that "[t]here is no "injunctive" cause of action under New York law or federal law. Instead [plaintiffs] must allege some wrongful conduct on the part of

[the defendant] for which their requested injunction is an appropriate remedy.'" The O Zon Inc. v. Charles, 272 F.Supp.2d 307, 312 (S.D.N.Y. 2003) (quoting Reuben H. Donnelly Corporation v. Mark I Marketing Corporation, 893 F.Supp. 285, 293 (S.D.N.Y. 1995)). The first cause of action attempts to do just that, however, by alleging that Springer misappropriated confidential, proprietary, and trade secret information on the occasions she accessed plaintiff's computer, using Greenfield's Citrix user name and password, after she was terminated from employment, for the purpose of giving them both unfair advantage in their current business in competition with plaintiff. "To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 43-44 (2d Cir. 1999) (citing Hudson Hotels Corp. v. Choice Hotels Int'l, 995 F.2d 1173, 1176 (2d Cir.1993); Integrated Cash Management Servs., Inc. v. Digital Transactions, Inc., 920 F.2d 171, 173 (2d Cir.1990)). See Ashland Management Inc. v. Janien, 82 N.Y.2d 395, 407 (1993); 4B Robert L. Haig (ed.), N.Y. Prac., Commercial Litigation in New York State Courts § 81:3 (2d ed. 2005) ("the authors believe that both elements are and should be part of a plaintiff's burden of proof even in state

username and password so that Springer could access, and did remotely access, plaintiff's computer system from her home. Furthermore, plaintiff alleges that Springer, while logged on to Rochester Flooring's computer system using Greenfield's Citrix username and password, obtained confidential and proprietary information regarding plaintiff's bids or intended bids on commercial building and construction contracts. See Complaint, §§ 19-24. In a subsequent affidavit, plaintiff also alleges that Springer accessed the Rochester Linoleum computer system using her former secretary's login information ("AmyH").

Plaintiff further alleges in its trespass claim that Springer was no longer authorized to access the plaintiff's computer system after her termination, that plaintiff at no time provided its consent for Springer to access the computer system, and that plaintiff had no prior knowledge that Springer intended to access its computer systems after she was terminated. See Complaint, §§ 47-49.

In its last filed Memorandum of Law in response to defendants' motions to dismiss, plaintiff describes its trespass claim as one for trespass to land, presumably because it cannot allege actual damage. To state a cause of action for trespass to land, there must be "the intentional entry by defendants onto plaintiffs' land and the wrongful use without justification or consent." Augeri v. Roman Catholic Diocese of Brooklyn, 225

A.D.2d 1105, 1106 (4th Dept. 1996). See also, Chlystun v. Kent, 185 A.D.2d 525, 526 (3d Dept. 1992). "The essence of trespass is the invasion of a person's interest in the exclusive possession of land." Zimmerman v. Carmack, 292 A.D.2d 601, 602 (2d Dept. 2002). See also, Kaplan v. Incorporated Village of Lynbrook, 12 A.D.3d 410, 412 (2d Dept. 2004). Nominal damages are recognized in a trespass to land action - an exception to the "general proposition" that actual injury or loss must be shown in a tort action - for the reason that a continuing trespass to land may "ripen into a prescriptive right and deprive a property owner of title to his or her land." Kronos, Inc. v. AVX Corp., 81 N.Y.2d at 94, 95. See 2 N.Y. PJI (2d ed) ¶ 3.8 comment at 89-90 (2006). However, the Court of Appeals has stated that "[t]here is no similarly compelling reason for departing from the actual injury rule when the trespass alleged is not to real property but to a chattel." Kronos, Inc. v. AVX Corp., 81 N.Y.2d at 95. "In such cases [i.e., trespass to chattels], actual [economic] loss must be demonstrated." Kronos, Inc. v. AVX Corp., 81 N.Y.2d at 95, 97 ("actual economic loss").

Because Springer never actually entered, nor is it alleged that she entered, plaintiff's land, plaintiff's cause of action is one sounding in trespass to chattels rather than in trespass to land. Furthermore, computers, even those that can be accessed remotely as in the instant case, are personal property and not

real property. Courts have recognized and revived the trespass to chattels cause of action in the realm of cyberspace (see cases set forth below). Because plaintiff's claim "concerns an alleged trespass to something other than real property, it is most accurately treated as a claim for trespass to chattels." In re Jetblue Airways Corp. Privacy Litigation, 379 F.Supp.2d 299, 327 (E.D.N.Y. 2005) (plaintiffs' allegations that "defendants committed trespass to property by participating the transfer of data containing their personal and private information . . . is most accurately treated as a claim for trespass to chattels"). See, e.g., School of Visual Arts v. Kuprewitz, 3 Misc.3d 278, 281-82 (Sup. Ct. N.Y. Co. 2003) (employer stated trespass to chattels claim by alleging that former employee caused "large volumes" of unsolicited job applications and pornographic emails to be sent to the company and to the director of human resources by way of it's computer system, without consent, and that the unsolicited emails "depleted hard disk space, drained processing power, and adversely affected other system resources on the company's computer system"); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (internet domain name registrar was likely to prevail on claim for trespass to chattels where website development service provider used search robots to perform multiple automated successive searches for domain name registrant information; even though provider's robots' could not

themselves incapacitate registrar's servers, the provider's robots use would encourage others to use similar programs which collectively would overtax registrar's servers); Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL 388389, 1998 U.S. Dist. LEXIS 10729 (N.D.Cal., Apr. 16, 1998) (plaintiff likely to prevail on trespass to chattels claim upon showing that defendant's unsolicited emails filled up plaintiff's computer storage space); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D.Ohio 1997) (sending unsolicited bulk email where it was shown that processing power and disk space were adversely affected states claim for trespass to chattels); America Online, Inc. v. IMS, 24 F.Supp.2d 548 (E.D.Va. 200\_) (sending unsolicited bulk email constituted trespass to chattels). *But see Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1346, 71 P.3d 296, 1 Cal. Rptr.3d 32 (2003) (emails that didn't cause physical damage or functional disruption to plaintiff's computers, or deprive plaintiff of the use of its computers did not constitute a trespass to chattels claim because there was no actual damage to the computers). To state a cause of action for trespass to chattels in New York, a plaintiff must allege that defendant intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in the plaintiff's possession, and that the plaintiff was harmed thereby. School of Visual Arts v. Kuprewitz, 3 Misc.3d at 281,

citing N.Y. PJI (2d ed.) ¶3:9. See also, In re Jetblue Airways Corp. Privacy Litigation, 379 F.Supp.2d at 327; City of Amsterdam v. Daniel Goldreyer, Ltd., 882 F.Supp. 1273, 1281 (E.D.N.Y. 1995). "Furthermore, to sustain this cause of action, the defendant must act with the intention of interfering with the property or with knowledge that such interference is substantially certain to result." School of Visual Arts v. Kuprewitz, 3 Misc.3d at 281, citing Buckeye Pipeline Co., Inc. v. Congel-Hazard, Inc., 41 A.D.2d 590 (4th Dept. 1973); 2 N.Y. PJI (2d ed.) ¶ 3.9 comment at 92 (2006). A defendant is liable to a plaintiff for a trespass to chattels only if the defendant causes harm to "the [owner's] materially valuable interest in the physical condition, quality, or value of the chattel, or if the [owner] is deprived of the use of the chattel for a substantial time." School of Visual Arts v. Kuprewitz, 3 Misc.3d at 281, quoting A.L.I., Restatement (Second) of Torts § 218, comment e (1965). See also, "J.Doe No. 1" v. CBS Broadcasting Inc., \_\_\_ A.D.3d \_\_\_, 806 N.Y.S.2d 38, 39, (1st Dept., Dec. 13, 2005); Register.com, Inc. v. Verio, Inc., 356 F.3d at 404; In re Jetblue Airways Corp. Privacy Litigation, 379 F.Supp.2d at 328.

Plaintiff has not alleged harm to the condition, quality, or material value of the chattel at issue, here, their computer system, and therefore has failed to plead the resulting harm element of the cause of action. "J.Doe No. 1" v. CBS

Broadcasting Inc., \_\_\_ A.D.3d at \_\_\_, 806 N.Y.S.2d at 39. See In re Jetblue Airways Corp. Privacy Litigation, 379 F.Supp.2d at 328-29. Plaintiff merely alleges that it "has suffered significant damages in an amount still yet to be determined." Complaint, ¶ 51. Nor has plaintiff alleged that it was deprived of the use of the chattel (i.e., the computer and any confidential or proprietary information) for a substantial time. Plaintiff admits that Springer was only logged on for a short period of time on each occasion, and to the extent plaintiff alleges that Springer participated in Greenfield's attempted deletion of emails containing attachments comprised of confidential or trade secret information, plaintiff's computer network administrator concedes in a reply affidavit that plaintiff "was able to restore those emails." Accordingly, plaintiff has failed to state, and does not have, a cause of action for trespass, whether to real property or to chattels, and thus defendant Springer's motion to dismiss plaintiff's second cause of action is granted.<sup>1</sup>

Plaintiff has not pled, but also does not on these facts have, a cause of action for conversion, either. Matzon v.

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<sup>1</sup> This is one of those rare occasions, envisaged in Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976), "in which a submission by plaintiff will conclusively establish that he has no cause of action." Id. 40 N.Y.2d at 636. See also, Gibralter Steel Corp. v. Gibralter Metal Processing, 19 A.D.3d 1141 (4<sup>th</sup> Dept. 2005).

Eastman Kodak Co., 134 A.D.2d 863-64 (4<sup>th</sup> Dept. 1987) ("A claim for conversion does not lie for the withholding of indefinite, intangible, and incorporeal species of property.") Conversion is "any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property." Citipostal, Inc. v. Unistar Leasing, 283 A.D.2d 916, 919 (4th Dept. 2001), *citing* Meese v. Miller, 79 A.D.2d 237, 242 (4th Dept. 1981). For example, when a plaintiff alleges that a defendant destroyed or took plaintiff's property, the allegations may be construed as an action for conversion. In contrast, allegations that a defendant merely interfered with a plaintiff's property and thus plaintiff's property rights may be construed only as sounding in trespass to chattels. Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 487-88 (1983).

Here, plaintiff only alleges that Springer "invaded plaintiff's interest in the exclusive possession of the information contained in the Rochester Flooring's computer system, including the Bid Database," Complaint ¶ 50, and further alleges that Springer obtained confidential and proprietary information regarding plaintiff's bids or intended bids. Furthermore, it was later established by plaintiff's computer expert, Michael DeSilva, and set forth in his affidavit, that after examining Springer's personal computer DeSilva conceded

that defendant Springer did not download any Rochester Linoleum documents or files onto her home computer on or after September 20, 2005; rather DeSilva only found documents that were downloaded before September 20, 2005, which was of course permissible since she was still an employee of Rochester Linoleum. In addition, the DeSilva examination could only determine if Springer *downloaded* Rochester Linoleum files; through the examination it was not possible to determine what, if any files were accessed by Springer. Moreover, Rochester Linoleum's network administrator, Jatinder Singh, could only determine if Springer remotely accessed Rochester Linoleum's computer system via the Citrix software; it was not possible to determine what documents or files Springer accessed once logged on to Rochester Linoleum's computer system. While it is still undetermined if Springer accessed any confidential information, there is no contention that, if she had, "defendants did anything to exclude plaintiffs from exercising their rights over the information." Trust Forte Corp. v. Ersien, unpublished 2005 N.Y. Slip. Opn. 52116(u) (2005 WL 3501587) (Sup. Ct. N.Y. Co. November 15, 2005) (adding that, like here, "the complaint indicates that plaintiffs retained the information in question and were still able to use it") See State v. Seventh Requirement Fund, Inc., 98 N.Y.2d 249, 259 (2002) ("to the exclusion of the owner's rights"); Woodie v. Aztech Int'l Corp., 9 Misc.3d 1104(A), 806 N.Y.S.2d 449

(Sup. Ct. N.Y. Co. July 1, 2005) (claim for conversion of "contact list" dismissed as involving intangible property "where the owner of the property is not excluded from possession"); Hair Say, LTD v. Salon Opus, Inc., 6 Misc.3d 1041(A), 800 N.Y.S.2d 347 (2005 WL 697538) (Sup. Ct. Nassau Co. 2005) ("Hair Say retained possession of the customer list at all times"). Cf., Shaveli v. Corcorn Group, 9 Misc.3d 589, 802 N.Y.S.2d 871 (Sup. Ct. N.Y. Co. 2005) (conversion of competitors lists actionable if coupled with interference with owner's access to data, such as changing owner's access code, and asportation of "hard copy list of client contacts"). As stated above, in regard to plaintiff's allegation that Greenfield's attempted deletion of his emails containing attachments comprised of confidential or trade secret information, plaintiff's concession in a reply affidavit that plaintiff "was able to restore those emails" conclusively establishes that plaintiff has no claim against Springer for participating in that conduct. See supra, fn 1, above. Since plaintiff has failed to state any cause of action cognizable at law for its second cause of action, defendant Springer's motion to dismiss plaintiff's second cause of action is granted.

**Computer Trespass - Violation of Penal Law § 156.10 - Third Cause of Action**

Plaintiff asserts in it's third cause of action against Springer a violation of § 156.10 of the Penal Law . Section 156.10, entitled "Computer Trespass" provides that:

[a] person is guilty of computer trespass when he knowingly uses or causes to be used a computer or computer service without authorization and: (1) he does so with an intent to commit or attempt to commit or further the commission of any felony; or (2) he thereby knowingly gains access to computer material. Computer trespass is a class E felony.

N.Y. Penal Law § 156.10 (McKinney 1998). The phrase "uses a computer or computer service without authorization" is defined in § 156.00 as:

the use of a computer or computer service without the permission of, or in excess of the permission of, the owner or lessor or someone licensed or privileged by the owner or lessor after notice to that effect to the user of the computer or computer serviced has been given by: (a) giving actual notice in writing or orally to the user; or (b) prominently posting written notice adjacent to the computer being utilized by the user; or (c) a notice that is displayed on, printed out on or announced by the computer being utilized by the user.

N.Y. Penal Law § 156.00 (McKinney 1998). "Computer material" is defined in pertinent part as:

any computer data or computer program which:  
. . . (c) is not and is not intended to be available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his or their consent and which accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

Id. Since the New York State Legislature did not expressly provide for a civil remedy under § 156.10, recovery under Penal Law § 156.10 is allowed only if a private right of action can be

implied. Hammer v. American Kennel Club, 1 N.Y.3d 294, 299 (2003); Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629, 633 (1989). A plaintiff may seek relief "'only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history.'" Gerel Corp. v. Prime Eastside Holdings, LLC, 12 A.D.3d 86, 90 (1st Dept. 2004), quoting Hoxie's Painting Co. v. Cato-Meridian Cent. Sch. Dist., 76 N.Y.2d 207, 211 (1990).

Ordinarily, the pleading of separate causes of action alleging the violation of the penal code is inappropriate. Crandall v. Bernard Overton & Russell, 133 A.D.2d 878, 879 (3d Dept. 1987) ("we hold that Supreme Court properly found that plaintiff's allegations of extortion, perjury, attempted grand larceny, harassment and coercion constituted criminal offenses specifically defined in the Penal Law and, as such, were improperly pleaded as separate causes of action in the instant civil action") (emphasis supplied). See also, Luckett v. Bure, 290 F.3d 493, 497 (2d Cir. 2002) ("affirm[ing] the district court's dismissal of Luckett's claims of sabotage, forgery, and perjury, which are crimes and therefore do not give rise to civil causes of action") (emphasis supplied). The Supreme Court in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975) and our Court of Appeals in Sheehy, 73 N.Y.2d at 633-36 have, however, not "go[ne] so far as to say that in this circumstance a bare criminal

statute can never be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group." Cort v. Ash, 422 U.S. at 80, 95 S. Ct. at 2089.

Hammer and Sheehy set forth a three-pronged test, previously established in Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 325 (1983), to determine if a private right of action can be implied from a statute. See also, CPC Intl. v. McKesson Corp., 70 N.Y.2d 268, 276 (1987). "The essential factors to be considered are: (1) whether the plaintiff is one of

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<sup>2</sup> The Fourth Department seems to be the only court that has repeatedly implied a private right of action from penal or regulatory statutes. See e.g., Stambach v. Pierce, 136 A.D.2d 329 (4<sup>th</sup> Dept. 1988), overruled on the authority of Sheehy, Stambach v. Pierce, 162 A.D.2d 1054 (4<sup>th</sup> Dept. 1990). In Niagra Mohawk Power Corp. v. Freed, 265 A.D.2d 938 (4<sup>th</sup> Dept. 1999), the court observed that "commercial bribery can constitute a civil cause of action" under Penal Law §180.03. Id. 265 A.D.2d at 939. Freed has since been thoroughly repudiated on this point by two of the other departments, Wint v. ABN Amro Mort. Group, Inc., 19 A.D.3d 588 (2d Dept. 2005); Sardanis v. Sumitomo, 279 A.D.2d 225, 230 (1<sup>st</sup> Dept. 2001), and the federal courts, Phillip Morris Inc. v. Heinrich, unpublished 1996 WL 363156 (S.D.N.Y. June 28, 1996) (collecting cases). Freed is not, however, authority for the proposition that a private cause of action may be implied from penal statutes generally, Kwasnik v. City of New York, 298 A.D.2d 502 (2d Dept. 2002) ("plaintiff failed to demonstrate that a private right of action to recover damages may be implied from Penal Law §240.50(2)"); Niagra Mohawk Power Corp. v. Testone, 272 A.D.2d 910, 911 (4<sup>th</sup> Dept. 2000) (refusing to imply a private right of action from the attempt statute, Penal Law §110.00); General Motors Acceptance Corp. v. Desbiens, 213 A.D.2d 886, 888 (3d Dept. 1995) (refusing to imply a right of action from the Harassment statute), nor is it authority for resolution of the question whether a private right of action should be implied from Article 156 of the Penal Law.

the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629, 633 (1989), quoted in Hammer, 1 N.Y.3d at 299. See, e.g., Gerel Corp. v. Prime Eastside Holdings, LLC, 12 A.D.3d 86, 90 (1st Dept. 2004); Ahmad v. Nassau Health Care Corp., 8 A.D.3d 512, 513 (2d Dept. 2004); Earsing v. Nelson, 212 A.D.2d 66, 71 (4th Dept. 1995). In applying this test, courts must keep in mind that "the legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves[,] . . . [and that] regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme." Sheehy, 73 N.Y.2d at 634-35, quoted in Hammer, 1 N.Y.3d at 299.

Lindler establishes that there is a fourth factor that must be considered in addition to the three identified in Sheehy and Hammer, whether telescoped into the three-pronged test or considered separately. Courts must consider "existing common-law . . . remedies, with which legislative familiarity is presumed," Lindner, 59 N.Y.2d at 325, and determine whether to impose "[a]

private action, which would impose per se liability without any of the limitations applicable to the common-law forms of action . . . , [and thereby] would inevitably upset the delicate balance established" by the existing common law remedial scheme. Id. 59 N.Y.2d at 330. This test roughly parallels the fourth Cort v. Ash factor, i.e., whether the putative cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law," absent of course the federalism aspect of the analysis. Cort v. Ash, 422 U.S. at 78, 95 S.Ct at 2088.<sup>9</sup>

#### **Legislative History Background**

Article 156 of the Penal Law, entitled "Offenses Involving Computers" went into effect on November 1, 1986, and created five new offense categories: unauthorized use of a computer, computer trespass, computer tampering, unlawful duplication of computer related material, and criminal possession of computer related material. Among other things, it amended several sections of the Penal Law and Criminal Procedure Law, and it expanded the meaning of terms "property" and "service" for crimes of larceny and theft of services to include computer data and programs, and a computer

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<sup>9</sup> The Lindner decision in this respect drew heavily on the Cort v. Ash test. The first three prongs of the Lindner-Sheehy-Hammer test are virtually identical to those established in Cort v. Ash, 422 U.S. at 78, 95 S.Ct at 2088.

service, respectively. Summary of Legislation, 1986, ch. 514, at 11-61. In addition, it defined the terms "computer data," "computer program," and "computer material" as property.

Article 156 was enacted in response to a burgeoning rash of computer crimes against businesses and private individuals, and also because the Penal Law at the time was woefully inadequate to address these computer crimes. Mem. of The Attorney General, Governor's Bill Jacket, L.1986, ch. 514. It was enacted to provide a "comprehensive statutory scheme to allow for effective law enforcement in the areas of crimes abetted by computers, or crimes in which the computer or their data or programs are, in effect, the victims of the crime." Id. The legislation adapted New York's statutes "to the realities of the computer age" due to the "proliferation of computers and the technological advances of recent years" and it prohibited "the unethical and illegal use of computers." Governor's Approval Mem., July 24, 1986, Bill Jacket, L.1986, ch. 514. The legislation was both prophylactic and punitive, and encouraged the computer industry to "post notices of the scope of authorized use and to devise codes to limit unauthorized use." Id.

At the time when the New York State Legislature enacted Article 156 of the Penal Law, 42 other states had already enacted some form of computer crime laws, People v. Versaggi, 83 N.Y.2d 123, 128 n.3 (1994). Some states expressly provided for a civil

cause of action within the text of the penal statute (see, e.g., Cal. Penal Code § 502(e)(1) (West 1999); N.J. Stat. Ann. §§ 2A:38A-1 to 2A:38A-6 (West 2000)), while other states did not expressly provide for a civil remedy within the computer crimes penal statute (see, e.g., N.Y. Penal Law § 156 (McKinney 1998)). This legal backdrop provides some evidence whether a civil remedy may be implied from the enactment of Article 156.

### **Analysis**

The case law discussing whether a private right of action can be implied under Article 156 of the Penal Law is sparse. In Lawrence v. State of New York, 180 Misc.2d 337, 343 (Ct. Cl. 1999), the Court of Claims left open the issue whether a former prisoner had an implied private cause of action against the state under §156.05 (unauthorized use of a computer) based on a correctional officer's unauthorized dissemination of his computerized criminal record. The court dismissed the complaint, however, on other grounds. Plaintiff relies on Blissworld, LLC v. Kovak et al., unpublished, 2001 N.Y. Slip. Op. 40084(U). In Blissworld, the defendants sought dismissal of various causes of action based on alleged violations of the Penal Law, including § 156.10 (Computer Trespass) and § 20 (Aiding and Abetting). The court denied the motion, ruling that the three-pronged test of Sheehy was satisfied, and held that a private right of action was implied under § 156.10. Assuming that Blissworld was correct on

the first two Sheehy factors, the court disagrees with Blissworld's analysis of the third factor, i.e., that creation of an implied private right of action under § 156.10 is consistent with the legislative scheme.

The Court of Appeals has stated that the most critical inquiry when determining whether a private right of action can be implied where one is not expressly provided for in the statutory language is whether such action is consistent with the legislative scheme. Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d at 634 *citing* Burns Jackson Miller Summit & Spitzer 59 N.Y.2d at 325; CPC Intl. v. McKesson Corp., 70 N.Y.2d at 276. As the Sheehy court noted, "the Legislature has both the right and authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves." Sheehy, 73 N.Y.2d at 634. Even if consistent with the basic legislative goal, Sheehy stated that "a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the overall statutory scheme." Sheehy, 73 N.Y.2d at 634-35 (1989). See also, Ahmad v. Nassau Health Care Corp., 8 A.D.3d 512, 514 (2d Dept. 2004).

An implied private right of action does not exist under § 156.10 because the creation of such a right would not be consistent with the legislative enforcement scheme. It is

presumed that, when the Legislature enacted Article 156 of the Penal Law in 1986, it was aware of the fact that 42 other states had already enacted criminal statutes to combat computer crimes, with some of those states expressly providing for civil damages for a violation of their criminal computer statute, and some states not so providing. Lindner, 59 N.Y.2d at 325. The Legislature chose not to follow the lead of those states expressly providing for a civil remedy. Furthermore, while the plaintiff in the instant case has not successfully pled the intentional torts of trespass to chattels or conversion, plaintiff has a remedy for the tort of misappropriation of trade secrets, and a civil remedy under the federal Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030(g). Given the enforcement mechanisms chosen by the legislature, i.e., prosecution by the district attorney of a Class E felony, and the foregoing statutory and common-law backdrop, creation of a per se action cannot be supposed without some evidence of an intention to create one, evidence that is wholly lacking.

In short, plaintiff has not met its burden of proving that an implied private right of action exists under § 156.10 of the Penal Law. Cf., Kwasnik v. City of New York, 298 A.D.2d 502 ("failed to demonstrate"). After reviewing the legislative history and the statutory language, the court concludes that the Legislature did not intend to create an implied right of action

under § 156.10, and also finds that it is not consistent with the legislative scheme in recognizing such a right.

In any event, plaintiff has nevertheless failed to allege a necessary element of the crime of computer trespass in its complaint, namely that plaintiff actually notified defendant Springer that she was prohibited from using the computer after her termination on September 20, 2005. Plaintiff failed to allege that defendant Springer "use[d] a computer . . . without the permission of, or in excess of the permission of, the owner . . . after notice to that effect to the user of the computer . . . has been given by: (a) giving actual notice in writing or orally to the user; . . . or (c) a notice that is displayed on, printed out on or announced by the computer being utilized by the user." Read law § 156.00(6) and § 156.10. The fact that Springer logged on to Rochester Linoleum's computer system via Citrix a half-hour after she was served with the Order to Show Cause and TRO is irrelevant since the TRO only restrained Springer (and Greenfield) from bidding on jobs and also mandated that she produce her computer for discovery. It did not provide her with the actual notice required pursuant to § 156.00(6) and § 156.10 to stop accessing Rochester Linoleum's computer system.

Based on the foregoing analysis, plaintiff has failed to state a cause of action for a violation of section 156.10 (Computer Trespass) of the Penal Law, and thus defendant

Springer's motion to dismiss plaintiff's third cause of action is granted.

### **Punitive Damages - Sixth Cause of Action**

A claim for punitive damages is not a separate cause of action in that it is "parasitic and possesses no viability absent its attachment to a substantive cause of action." Rocanova v. Equitable Life Assurance Society, 83 N.Y.2d 603, 616-17 (1994). "The claim for punitive damages is not a separate cause of action; it merely constitutes 'an element of the single total claim for damages.'" Knibbs v. Wagner, 14 A.D.2d 987 (4<sup>th</sup> Dept. 1961) (quoting Gill v. Montgomery Ward & Co., 284 App. Div. 36, 41). In other words, there must be a valid claim for compensatory damages before an award for punitive damages can be considered. Hubbell v. Trans World Life Ins. Co. of New York, 50 N.Y.2d 899, 901 (1980). Because plaintiff's claims for trespass and computer trespass have been dismissed for failure to state a cause of action, and the claim for misappropriation of trade secrets remains only, plaintiff's separately stated punitive damages claim against Springer cannot stand on its own. Accordingly, defendant Springer's motion to dismiss the sixth cause of action alleging punitive damages against her is granted, without prejudice to plaintiff seeking punitive damages at trial in connection with its only viable and remaining cause of action. Topps Co., Inc. v. Cadbury Stani S.A.I.C., 380 F.Supp.2d 250,

266-67 (S.D.N.Y. 2005); Huschle v. Battelle, 33 A.D.2d 1017, 308 N.Y.S.2d 235 (1st Dep't 1970), aff'd, 31 N.Y.2d 767, 338 N.Y.S.2d 622, 290 N.E.2d 823 (1972).

### **Greenfield's Cross-Motions to Dismiss**

In its complaint, plaintiff asserted three causes of action against Greenfield: (1) breach of duty of loyalty, (2) aiding and abetting - violation of Penal Law § 20, and (3) punitive damages. Defendant Greenfield filed a cross-motion to dismiss the complaint for failure to state a cause of action.

### **Breach of Duty of Loyalty - Fourth Cause of Action**

Plaintiff alleges in its fourth cause of action that Greenfield breached the duty of loyalty to his employer, Rochester Linoleum. An employee owes his employer a fiduciary duty and a duty of loyalty. Luskin v. Seoane, 226 A.D.2d 1144, 1145 (4th Dept. 1996). Accordingly, an employee "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." Burnett Process, Inc. v. Richlar Industries, Inc., 55 A.D.2d 812 (4th Dept. 1976) quoting Lamdin v. Broadway Surface Advertising Corp., 272 N.Y. 133, 138 (1936). See Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 416 (2001); Mega Group, Inc. v. Halton, 290 A.D.2d 673, 675 (3d Dept. 2002).

On this motion to dismiss, this court must not only accept

as true the facts as alleged in the complaint and in plaintiff's submissions in opposition to the motion, but also give plaintiff the benefit of every possible favorable inference. Plaintiff alleges that, on September 20, 2005, "while still employed by Rochester Flooring, Greenfield knowingly provided Springer his Citrix user name and password to allow Springer to access Rochester Flooring's Bid Database." Complaint, ¶ 63.

Furthermore, plaintiff alleges that Greenfield provided his user name and password information to Springer even after Springer told him that she was no longer an employee of Rochester Flooring. Complaint, ¶ 65. Plaintiff also alleges that Greenfield knowingly and willfully provided Springer with this information to allow Springer to obtain confidential and proprietary information in the Bid Database concerning commercial building and construction contracts that Rochester Flooring has already bid or intends to submit a bid, and as a result of this breach of loyalty, plaintiff alleges that it has been damaged in an amount still yet to be determined. Id. ¶¶ 64, 66. While Greenfield alleges that he, and not Springer, remotely accessed Rochester Linoleum's computer system from defendant Springer's home computer on the night of September 20, 2005, this motion to dismiss only goes to the sufficiency of the complaint. His affidavit cannot be used in support of his pre-answer motion. Royello, 40 N.Y.2d at 636.

Based on the foregoing, plaintiff has adequately alleged a cause of action against Greenfield for breach of duty of loyalty, and therefore defendant Greenfield's cross-motion to dismiss this cause of action is denied.

**Aiding and Abetting - Violation of Penal Law § 20 - Fifth Cause of Action against Greenfield**

Section 20.00 of the Penal Law, entitled "Criminal liability for conduct of another," states, "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." Plaintiff alleges in its fifth cause of action that "[b]y Greenfield's actions, he knowingly and intentionally aided Springer in her engagement of conduct which constitutes a criminal offense, [and] "as a result of Greenfield's actions of aiding and abetting Springer, Rochester Flooring has been damaged in an amount still yet to be determined." Complaint ¶¶ 68, 69.

For the same reasons as set forth in this court's analysis of the third cause of action against Springer for violation of § 156.10 (Computer Trespass) of the Penal Law, in concluding that there is no private right of action against defendant Springer, there can be no accessory liability on the part of defendant Greenfield. Separately, there is no civil tort for conduct

amounting to being an accessory to a crime, just as there is no civil tort for attempting to commit a crime. Niagara Mohawk Power Corp. v. Testone, 272 A.D.2d at 911.

To the extent that plaintiff alleges a civil conspiracy for the improper use of its computer, New York does not recognize the tort of civil conspiracy. Burdick v. Verizon Communications, Inc., 305 A.D.2d 1030, 1031 (4th Dept. 2003); Testone, 272 A.D.2d at 911. Accordingly, defendant Greenfield's cross-motion to dismiss plaintiff's fifth cause of action against him for aiding and abetting is granted.

#### **Punitive Damages - Sixth Cause of Action Against Greenfield**

Defendant Greenfield cross-moves to dismiss plaintiff's sixth cause of action for punitive damages. Plaintiff alleges that "Greenfield's conduct amounted to a wanton, willful or reckless disregard of Rochester Flooring's rights and property interests," Complaint, ¶ 71. Plaintiff further asserts that, in addition to compensatory damages, plaintiff is entitled to judgment against Greenfield for punitive damages in the amount of \$1,000,000. Id. ¶ 72.

A claim for punitive damages is not a separate cause of action in that it is "parasitic and possesses no viability absent its attachment to a substantive cause of action." Rocanova v. Equitable Life Assurance Society, 83 N.Y.2d 603, 616-17 (1994). In other words, there must be a valid claim for compensatory

damages before an award for punitive damages can be considered. Hubbell v. Trans World Life Ins. Co. of New York, 50 N.Y.2d 899, 901 (1980). On the other hand, if the complaint states facts which warrant an award for punitive damages, it is not necessary that they be specifically demanded. Kaplan v. Sparks, 192 A.D.2d 1119, 1120 (4<sup>th</sup> Dept. 1993), on subsequent appeal, 221 A.D.2d 974 (4<sup>th</sup> Dept. 1995); Korber v. Dime Sav. Bank of Brooklyn, 134 App. Div. 149 (2d Dept. 1909).

The purpose of punitive damages is to vindicate public rights, not to remedy private wrongs. Rocanova v. Equitable Life Assurance Society, 83 N.Y.2d 603, 613 (1994). As such, punitive damages are not recoverable in an ordinary breach of contract action unless the breach also involves "a fraud evincing a high degree of moral turpitude and demonstrat[es] such wanton dishonesty as to imply a criminal indifference to civil obligations [and if] the conduct was aimed at the public generally." Id. at 613, *quoting Walker v. Sheldon*, 10 N.Y.2d 401, 404-05 (1961) (internal quotations omitted). As this conduct "aimed at the public" only applies to breach of contract cases, it does not apply to tort cases for breach of fiduciary duty. Don Buchwald & Associates, Inc. v. Rich, 281 A.D.2d 329, 330 (1st Dept. 2001). Accordingly, punitive damages are recoverable in tort cases as long as the "very high threshold of moral culpability is satisfied." Giblin v. Murphy, 73 N.Y.2d

769, 772 (1988). One of the following must be shown to sustain a claim for punitive damages in tort: "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." Don Buchwald & Associates, Inc. v. Rich, 281 A.D.2d 329, 330 (1st Dept. 2001), *citing* Swersky v. Dreyer & Traub, 219 A.D.2d 321, 328 (1st Dept 1996); Smith v. County of Erie, 743 N.Y.S.2d 649, 651 (4th Dept. 2002). Accepting plaintiff's allegations as true at this early stage of litigation, and giving the plaintiff the benefit of every possible favorable inference, plaintiff has sufficiently stated a claim for punitive damages against Greenfield. Accordingly, defendant Greenfield's cross-motion to dismiss the punitive damages cause of action against him is granted without prejudice to plaintiff seeking punitive damages at trial on it's only remaining claim against Greenfield if the trial court determines that there is a reasonable basis in the evidence to submit the claim to the jury. Pchelka v. Loomis-Root, Inc., 210 A.D.2d 889, 889-90 (4<sup>th</sup> Dept. 1994).

**Conclusion**

The cross motions are granted in part and denied in part as specified above.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: January 30, 2006  
Rochester, New York