IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

JAMES NATION Plaintiff, AMERICAN CAPITAL, LTD., d/b/a American Capital Strategies, Ltd., a Delaware corporation Defendant.	)	No. 09 CV 6917

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, James Nation, by and through his attorneys, Fritzshall & Pawlowski, and for his Response to Defendant's Motion for Summary Judgment states as follows:

I. Statement of Facts

James Nation ("Jim") was formerly employed by The Spring Air Company ("Spring Air"). He was hired in May 1990 as Senior Vice President for national accounts. He was promoted to President and CEO in October 1995. (James Nations' Local Rule 56.1 Statement of Undisputed Facts, ¶ 1). Spring Air manufactured and sold mattresses to the public. Spring Air was a co-op where the ownership of individual factories were individually held by families around the United States, but all participated in manufacturing the Spring Air brand. (Id. ¶ 20)

Spring Air operated like two entities. HIG owned Consolidated Bedding, which had five factories in the Spring Air group. There were eleven other individual licensees that formed the remainder of Spring Air. In the summer of 2007, HIG conducted a "roll-up" of the outstanding licensees, which consisted essentially of buying up the individual licensees and consolidating the business into one entity along with the corporate facility and intellectual property. (Id. ¶¶ 23-25).

On or about June 2007, Jim was informed by HIG people that since Spring Air had been sold to HIG, the new owners were placing someone else in his position. Bob Hellyer replaced Jim as President and CEO, but Jim remained on as an employee for about three months. In October 2007, Jim negotiated a severance agreement with Spring Air. Ron Lueptow, Spring Air's CFO at the time, signed the Agreement on Spring Air's behalf. Pursuant to the Agreement, Jim was to receive $1,243,140.00 as severance payments over a period of months. He was paid $836,153.28, until July 2008, when Spring Air stopped payments. (Id. ¶¶ 2, 25-26).

Jim learned Spring Air stopped paying him when he received an email from Greg Moore, the Vice President of human resources at Spring Air. The email was sent to Jim and three other executives also receiving severance payments under agreements with Spring Air, Eric Spitzer, Ron Lueptow and Vince Zupkus, saying that Spring Air stopped making severance payments indefinitely. Jim called Steve Cumbow, Spring Air's Chief Financial Officer at the time, after receiving the email and Cumbow acknowledged that Spring Air was breaching his Agreement. (Id. ¶¶ 18, 27). Spring Air eventually resumed payments to Spitzer, Lueptow and Zupkus. (Id. ¶ 28, Jim Nation's Response to American Capital's Local Rule 56.1 Statement and Additional Statement of Undisputed Facts, ¶¶ 44-45). Starting again in September or October of 2008, Spitzer was paid the remainder of his approximately $90,000.00 severance agreement and Zupkus was paid the remainder of his approximately $235,000.00 severance agreement. (Id.). Spring Air never resumed Jim's payments. (James Nations' Local Rule 56.1 Statement of Undisputed Facts, ¶ 26).

Jim fully performed his obligations under the Agreement and is still owed $406,980.72. (Id. ¶¶ 26, 31). Jim filed suit against Spring Air for breach of the Agreement, but Spring Air filed for Chapter 7 bankruptcy. (Id. ¶ 22). Jim then filed the instant suit for tortious interference with his contract against American Capital.

American Capital was originally a lender to HIG in its roll-up of the licensees and was putting capital into Spring Air, along with HIG, in 2007, to enable Spring Air to move forward. (Id. ¶ 14-15). The relationship changed significantly into 2008 and 2009, however. In March 2008, the Spring Air Board of Directors contained one American Capital member. By May-June 2008, there was a change in capital structure that precipitated a change in the Board of Director's structure. American Capital invested about $15,000,000.00 into Spring Air and obtained a total of four of the seven seats on the Board. Bowen Diehl, William Byers, Michael Michienzi and William Moore were American Capital people on the Spring Air Board of Directors and, at that point, American Capital had control of Spring Air. (Id. ¶¶ 14, 16, 21).

American Capital was ingrained into Spring Air. American Capital maintained an office inside Spring Air's Tampa offices in 2008. They had people with offices in various areas inside Spring Air's Tampa office and used a conference room in Spring Air's Tampa building that housed American Capital employees who were there every week. At times, there were five to six American Capital people in the conference room for a week at a time. American Capital was provided daily reports of Spring Air's bank information by way of a Spring Air generated cash flow spreadsheet and would ask questions about pending deals and sales analysis. Byers also received copies of these reports. (Id. ¶¶ 4, 34). The American Capital people also entrenched themselves into Spring Air's outside vendor relationships. Michienzi went with Cumbow and Hellyer and some others to meet a spring making vendor, Legget and Platt, in June 2008, in Atlanta and again on July 15, 2008, in Missouri. (Id. ¶¶ 8, 19).

William Byers was there every week and in American Capital's Spring Air office about 90% of the time. (Id. ¶ 31). Michienzi worked in the Spring Air Tampa office five to six days per month from March 2008 through May 2009. He came to the Spring Air Tampa office a few times in 2008

and 2009 to give the Spring Air personnel pep talks. (Id. ¶ 13). When he would work there, he would use the old Tampa Spring Air CEO's office. (Id. ¶ 9, 13).

Michienzi was so entrenched in Spring Air that he considered himself part of the company. Michienzi sent an email on July 25, 2008, wherein he said "Since June 1st when we took control, we had made tremendous progress. . ." Again, Michienzi sent an email on September 24, 2008, wherein he stated "We are staged to execute a sizeable cost cutting plan to be complete by Oct. 6th, " and by "we," Michienzi meant "Spring Air." (Id. ¶¶ 10-12)

American Capital, through its power on the Board, ultimately replaced Hellyer with Steve Cumbow. Michienzi, the Chairman, approved Cumbow's appointment. Cumbow worked for American Capital as a vice president of finance immediately before being hired as Spring Air's Chief Financial Officer. Cumbow reported to the CEO, Robert Hellyer, until Hellyer left Spring Air. (Id. ¶¶ 6-7, 18-19, 40).

By way of its infusion into Spring Air, American Capital was well aware of Spring Air's Agreement and severance payment obligations to Jim. Michienzi sent an email to Hellyer, Spring Air's CEO, and other Spring Air people, on May 9, 2008, rejecting the idea of allowing Jim to renegotiate his non-compete agreement. Diehl also participated in those email discussions. (¶¶ 10, 17, 32). Ultimately, it was American Capital, through Michael Michienzi, that made the decision to stop Jim's severance payments. At that point, in July 2008, Michienzi, an American Capital employee, was making all of the financial decisions for Spring Air. Spring Air did not do anything without American Capital's approval. (Id. ¶¶ 5, 38-39).

II. Argument

American Capital's Motion must be denied. Robert Hellyer, Spring Air's former CEO, affirms that only American Capital's Michael Michienzi made the decision to breach Jim's Agreement. However, at the very least, there are questions of fact permeating the record as to who

was actually in control of Spring Air's finances and the decisions to terminate payments to Jim and other former employees. Factual questions also abound concerning American Capital's relationship with Spring Air and whether it maintained any special privilege to interfere with Jim's $406,980.72 payment due. Finally, American Capital cannot sustain its claim of an offset against any wages Jim earned after Spring Air stopped paying him. Jim was paid to sit. Once the payments stopped, Jim was free to work and to compete. Accordingly, American Capital's motion must be denied.

A. Legal Standard

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue for trial exists only when the evidence could allow a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court must view all evidence in a light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. denied,* 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987), and draw all inferences in the nonmovant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir.1990). However, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1032 (7th Cir.), *cert. denied,* 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988). In determining whether a genuine issue exists, the court "must view the evidence presented through the prism of the substantive evidentiary burden." Anderson, 477 U.S. at 254, 106 S.Ct. at 2513. In making its determination, the court's sole function is to determine whether sufficient evidence exists to support a verdict in the nonmovant's favor. Id. at 255, 106 S.Ct. at 2513-14.

B. American Capital's Local Rule 56.1 Statement

As a prelimary matter, Jim objected to a few paragraphs in American Capital's Local Rule 56.1 Statement. Paragraphs 8, 19, 24 contain, at least in part, legal conclusions which are not proper in a statement of undisputed facts. Local Rule 56.1(a)(3); Inland Real Estate Development, LLC v. HPD Cambridge, Inc., 2010 WL 3404834, 1 (N.D.Ill.,2010). The improper portions thereof should be stricken.

C. American Capital Controlled Spring Air and Ordered Spring Air To Breach Jim's Contract

Michael Michienzi, an American Capital employee, controlled all of Spring Air's financial decisions; Michienzi made the decision to breach Jim's Agreement. Michienzi's control is fatal to American Capital's Motion. There is no question on four of the five elements necessary to prove Jim's tortious interference claim; 1) Jim had a valid contract, 2) that American Capital was well aware of Spring Air's obligations to pay Jim thereunder, 4) that Spring Air did in fact fail to pay Jim as a result of Michienzi's orders and, 5) finally, that Jim was damaged in the amount remaining to be paid under the Agreement, $406,980.72. Regan v. Garfield Ridge Trust and Savings Bank, 220 Ill.App.3d 1078, 581 N.E.2d 759 (2nd Dist. 1991); Blivas and Page, Inc., v. Klein, 5 Ill.App.3d 280 (2nd Dist. 1972); Girsberger v. Kresz, 261 Ill.App.3d 398, 633 N.E.2d 781 (1st Dist. 1994); Cress v. Recreation Services, Inc., 341 Ill.App.3d 149, 795 N.E.2d 817 (2nd Dist. 2003).

The question that exists defeating American Capital's Motion is on the third element - whether American Capital intentionally and unjustifiably inducement Spring Air to breach Jim's Agreement. American Capital contends that "not a single shred of evidence exists" to show how it interfered with Jim's Agreement. However, Robert Hellyer's affidavit states unequivocally that Michienzi made all the financial decisions for Spring Air, including the decision to stop Jim's payments. Despite American Capital's employees' self serving testimony to the contrary, where they attempt to blame their puppet CEO Cumbow, Hellyer has no axe to grind in this matter. There is

no question that American Capital controlled 4 of 7 Spring Air Board seats, officed in Spring Air's offices and had their hands in every aspect of Spring Air's daily financial lives. As a result, there is no need to delve into the questions of Cumbow's agency and loyalties raised by American Capital in its Motion. Hellyer's testimony rings true and simply makes the most sense - it was Michienzi and American Capital controlling Spring Air and Jim's severance payments. However, at the very least, there exists a question of fact created by Hellyer's testimony as to who made the decision to breach Jim's Agreement which requires American Capital's motion to be denied.

D. American Capital Had No Privilege To Manufacture The Breach

American Capital had no privilege to force Spring Air to breach Jim's Agreement. While Illinois law does recognize that a third party may be privileged to purposefully bring about a breach of a party's contract with another, it does not apply here. Illinois courts generally recognize privileges in instances where the defendant has acted to protect an interest which the law deems to be of equal of or greater value than the plaintiff's contractual rights. Mannion v. Stallings & Co., Inc., 561 N.E.2d 1134, 1140 (1st Dist.,1990). The Seventh Circuit has adopted the formulation of the Restatement (Second) of Torts, § 768 (1979) and followed Illinois precedent in determining when a competitive privilege exists. The courts look to whether:

> (a) the relation concerns a matter involved in the competition between the actor and the other, and;
> (b) the actor does not employ wrongful means, and;
> (c) his action does not create or continue in an unlawful restraint of trade, and;
> (d) his purpose is at least in part to advance his interest in competing with the other.
>
> Fishman v. Estate of Wirtz, 807 F.2d 520, 546 -547 (C.A.7 (Ill.),1986); see also Candalaus Chicago, Inc. v. Evans Mill Supply Co., 366 N.E.2d 319, 327 (Ill.App. 1977); Getschow v. Commonwealth Edison Co., 444 N.E.2d 579 (1st Dist. 1982).

However, American Capital simply fails the first prong of the test. American Capital was not a competitor and is not entitled to such privilege. They were not competing with Jim as creditors both seeking Spring Air's money under contracts. Rather, American Capital **WAS** Spring Air.

American Capital maintained 4 of the 7 seats on Spring Air's Board of Directors; it placed a former employee in the position of CFO/CEO; it officed in Spring Air's offices; it met with Spring Air vendors out of state; its employee, Michael Michienzi, made all financial decisions for Spring Air. There was no practical distinction between the two - Spring Air's purposes became American Capital's purposes. American Capital cannot claim equal footing with all other creditors in an attempt to assert a competitive privilege when no other creditor controlled Spring Air inside and out. There is no privilege here.

American Capital fails to cite to any case on point, and merely relies on the general principles of privilege which are not enough to exculpate it. Most of its cases deal with privilege claims on officers or individual liability cases, but no case cited deals with the scenario where the main creditor also **OWNS AND CONTROLS** the breaching company. The rulings in George A. Fuller Co., a Div. of Northrop Corp. v. Chicago Coll. of Osteopathic Med., 719 F.2d 1326 (7th Cir. 1983), HPI Health Care, Inc., v. Mt Vernon Hosp., Inc., 545 N.E.2d 672 (Ill. 1989), and MGD, Inc., v. Dalen Trading Co., 596 N.E.2d 15 (1st Dist. 1992), were decided under a motion to dismiss standard, not the factual questions of summary judgment present here. Likewise, Stevenson v. ITT Harper, Inc., 366 N.E.2d 561 (1st Dist. 1977) was also not analyzed under a summary judgment standard, but decided after a trial, and made no worthwhile analysis into whether the privilege existed.

The remaining citations are also easily differentiated. Like the others, none really focused on the existence of the privilege, but rather summarily determined it existed. The findings in Swager v. Couri, 395 N.E.2d 921 (Ill. 1979); Certified Mechanical Contractors, Inc., v. Wight & Co., Inc., 515 N.E.2d 1047 (2nd Dist. 1987), and HPI Health Care, Inc., 545 N.E.2d 672 (Ill. 1989) fail to focus

on facts as presented in the case at bar. None deal with a creditor making determinations based on its ownership of the breaching party over creditors who have no such ownership interests or financial control.

The facts in Interlease Aviation Investors II v. Vanguard Airlines, 2004 WL 1149397 (N.D.Ill. 2004), appear to be similar to the present matter, but upon closer scrutiny, they are also unhelpful. There, two creditors, one owed $61 million and one owed $6.5 million were fighting to be paid on their contracts. The smaller creditor accused the larger creditor of interfering with its payments. The court granted summary judgment to the larger creditor finding that its conduct was privileged and any interference was allowable because they were both on equal footing under their respective contracts. Ultimately, the court determined that any deference of the breaching party to pay the larger creditor was voluntary.

However, the Interlease facts do not fit the pattern here. Interlease, like all of American Capital's other cases, fails to deal with a competing creditor that is no longer a separate entity from the other creditors. In Interlease, the large and small creditor were still competing for funds as creditors. While the larger creditor may have had more leverage due to its larger balance, it did not control the debtor's finances like American Capital controlled Spring Air's. There simply is no privilege to assert. American Capital cannot have it both ways - it cannot contend that it is a third party creditor to escape liability, while at the same time control Spring Air's Board, CEO and check book. The Motion must be denied on this issue.

E. If A Privilege Exists, American Capital's Conduct Was Unjustified and Intentional Voiding Any Protection

If the Court finds that American Capital's conduct was privileged, it is still not protected. American Capital correctly points out that where the conduct of a defendant in a tortious interference action was privileged, it is the plaintiff's burden to plead and prove that the defendant's conduct was unjustified or malicious. HPI Health Care, Inc., 545 N.E.2d at 677. The term "malicious" in this

context merely means that the interference must have been intentional and without justification. Id.

There are ample facts here that, at the very least, create a question of fact to defeat American Capital's Motion. Hellyer's affidavit sets forth that American capital unequivocally intended to interfere with Jim's payments when Michienzi ordered them stopped; Cumbow admitted to Jim that he knew Spring Air was breaching the contract when it stopped payments; Michienzi had no justification to stop the payments to Jim, which is supported by the fact that Zupkus, Spitzer and Lueptow, whose severance payments stopped at the same time as Jim's, were all later paid in full. There was sufficient funds to pay the other three. Singling out Jim simply gives more credence to American Capital's unjustified decision to force Spring Air to breach his Agreement.

Moreover, a defendant who is protected by a privilege is not justified in engaging in conduct which is totally unrelated or even antagonistic to the interest which gave rise to defendant's privilege. Id. at 678. The Court in HPI offers the example, where a hospital management company, whose privilege is based upon the management company's role in exercising business judgment on behalf of the company's hospital, would not be justified in inducing a breach of contract solely for the management company's gain, since such conduct would not further the hospital's interests. Id. Nearly identically, American Capital, who is a Spring Air creditor, but effectively owns and runs Spring Air on a daily basis, is not justified in inducing Spring Air to breach Jim's Agreement for his remaining $406,980.72, because only American Capital would stand to gain from the excess funds, leaving Spring Air to face liability for a breach of contract. American Capital's conduct, in taking advantage of its equity status in Spring Air to breach Jim's contract is not type of action the law protects by a privilege. The Motion should be denied on this issue as well.

F. American Capital Is Not Entitled To Any Offset

No offset is available to American Capital. First, it does not even have standing to assert such a defense. Rubin v. Islamic Rebublic of Iran, 436 F.Supp.2d 938 (N.D. Ill. 2006); U.S. Dept.

Labor v. Tripplett, 494 U.S. 715 (1990). The affirmative defense of offset is a Spring Air defense to a breach of the Agreement. American Capital cannot assert Spring Air's defenses in this matter. (Id.).

Nonetheless, the offset is really a red herring. Once the Agreement was breached, Jim's non-compete obligations were discharged. Kel-Keef Enterprises, Inc. v. Quality Components Corp., 316 Ill.App.3d 998, 738 N.E.2d 524 (1st Dist. 2000); Galesburg Clinic Assoc. v. West, 302 Ill.App.3d 1016, 706 N.E.2d 1035 (3rd Dist. 1999); Dragon Construction, Inc., v. Parkway Bank & Trust, 287 Ill.App.3d 29, 678 N.E.2d 55 (1st Dist. 1997). A party to a contract is discharged from his duty to perform where there is a material breach of the contract by the other party. Id.

American Capital's case law is unhelpful and distinguishable since Jim's Agreement was a "pay to sit" contract. Spring Air paid him and he sat out of the work force. Michienzi acknowledged as much in a May 9, 2008, email where he agreed with Peter Cornetta of HIG who said, "My opinion is if you get paid to sit on the sidelines, you sit. If you want to discuss not getting paid, that is different." (Jim's Local Rule 56.1 Statement, Ex. 8, pg. 1). When Spring Air breached its duties to pay Jim's remaining $406,980.72, he was free of his non-compete duties. Instead of sitting at home collecting Spring Air payments, which is what he bargained for, Jim, had to go back to work and earn the $106,384.64 in salary American Capital claims as an offset. He was not supposed to be working and would not have been working if American Capital had not stopped his payments. There is no offset.

III. Conclusion

At the very least, there are questions of fact surrounding who controlled Jim's payments from Spring Air. While Jim requests summary judgment in his favor in his contemporaneously filed Motion, if the Court is not so inclined, then American Capital's Motion must be denied due to those questions of fact.

Respectfully submitted,
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/s/ Steven N. Fritzshall
By: one of his attorneys

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