SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Brainwave Science, Inc, Individually and as Assignee

INDEX NO. 153867-2019

MOT. DATE

- v -

MOT. SEQ. NO. 5, 6 and 7

Lawrence A. Farwell et al.

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s).____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s).____
Replying Affidavits	ECFS DOC No(s).____

There are three motions pending which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 5, plaintiff Brainwave Science, Inc. ("BS Inc." or sometimes "Company") moves to hold defendant Lawrence A. Farwell in contempt. Farwell, who is self-represented, opposes the motion and cross-moves to stay the court's decision on the underlying motion.

In motion sequence 6, defendant moves to amend the preliminary injunction so that it "not apply in situations where ...

1. The specific statement [] in question made by the defendant[] is true.

2. The Witnesses' Statement of Evidence is relevant to crimes [] allegedly committed by the CEO of the Plaintiff, Krishna Ika [] and/or his co-conspirators
...

6. The Witness' Statement of Evidence pertains to information or facts regarding which the Witness has relevant expertise and/or direct knowledge.

7. The Witness made the Witness' Statement of Evidence specifically to an individual or organization with an interest in bringing Ika and his co-conspirators to justice...
[or]

1. The Witness' Statement of Evidence contains information constituting a public record that is accessible to anyone, having been presented in other legal proceeding

Dated: 1/3/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

BS Inc. opposes Farwell's motion, claiming that he has not shown compelling or changed circumstances which would warrant modifying the preliminary injunction.

Finally, in motion sequence 7, Farwell moves for summary judgment dismissing this action. BS Inc. opposes that motion as well and moves for summary judgment on: [1] its first cause of action and a permanent injunction against Farwell "from falsely and fraudulently misrepresenting that plaintiff has committed and fraud (sic), that its subject intellectual property is counterfeit, that is (sic) not authorized to offer such technology, that it is not properly trained, that Plaintiff's technology is a threat to national security and justice and any and all similar misrepresentations; [2] on the third cause of action for defamation; [3] on the fourth cause of action and a declaration that defendants hold no right, title and/or ownership interest in certain intellectual property and technology identified in the "Brainwave IP" Agreements; and [4] dismissal of defendants counterclaims and affirmative defenses. There is no opposition to BS Inc.'s cross-motion.

The relevant facts are as follows. Based upon the sworn affidavit of Kirshna Ika, BS Inc.'s CEO and sole principal, Farwell entered into an agreement with BS Inc.'s predecessor-in-interest, Brainwave Science, LLC ("BS LLC") wherein Farwell agreed to serve as a Scientific Advisor and had a 5% interest in the plaintiff. On or about June 27, 2012, Farwell assigned his rights, title and interest in and to, *inter alia*, "the software enabled invention referred to as the 'Brain Fingerprinting' application as well as patents and patent applications identified as Exhibit 2 to an agreement entitled Nunc Pro Tunc Intellectual Property Acknowledgement and Assignment. Meanwhile, Ika represents that BS Inc paid Farwell more than $500,000.00 through 2016 for his contributions of patents and other intellectual property.

In or about May 2016, Ika states that he learned Farwell, without Ika's knowledge or consent, "attempted to covertly transfer Company-owned patents into a corporation he owned and/or controlled". Plaintiff has provided to the court a copy of a transfer request filed by Farwell with the United States Patent and Trademark Office ("USPTO") along with Ika's response to same. The transfer request indicated that BS LLC had conveyed patent numbers 5,363,858, 5,406,956, 5,467,777 and 7,689,272 to American Scientific Innovations, LLC pursuant to a notarized agreement dated October 23, 2013 signed by Farwell on behalf of BS LLC as "Founder, Chief Scientist and Member".

In a sworn affidavit filed with the USPTO in response to the unauthorized transfer, Ika states in pertinent part the following:

> 2. Brainwave Science, LLC did not authorized Lawrence Farwell, as a member of the LLC, to execute the Corrected Nunc Pro Tunc Intellectual Property Acknowledgement and Assignment dated June 27, 2013 which was submitted to the USPTO Assignment and Recordation Branch on October 31, 2013 under the Assignment cover letter recorded in Reel/Frame 31645-969 with the assignee of American Scientific Innovations, LLC.
>
> 3. Brainwave Science, LLC is the rightful Assignee and owner of the following patents,
>
> 5363858, 5406956, 5467777 and 7689272
>
> that were assigned by Lawrence Farwell to Brainwave Science, LLC on June 17, 2013 pursuant to a Nunc Pro Tunc Intellectual Property Acknowledgement and Assignment dated June 17, 2013 ...

Ika further states that Farwell falsely obtained proprietary equipment form a company vendor claiming he was an authorized representative of the Company. When confronted with his actions, Farwell initially denied any wrongdoing, but according to Ika, eventually "admitted that he had been the signatory on the attempt re-assignment of the company's patents."

BS LLC served a notice dated October 20, 2016 that a vote would take place on Farwell's removal from the Company based upon "Fraudulent Misrepresentation" and "Theft of Corporate Assets". Despite such notice, Farwell did not appear at the meeting and on November 29, 2016, Farwell was removed from BS LLC and was disgorged of his membership interest.

Meanwhile, Ika claims that Farwell continues to use plaintiff's proprietary equipment "to market Brain Fingerprinting technology on his own behalf." In a screenshot of a website maintained by Farwell, the website advises "Brain Fingerprinting technology is offered only through Dr. Farwell's companies, Brain Fingerprinting Laboratories, Inc. and Brain Fingerprinting, LLC and their authorized affiliates." Further, the website advised that Farwell was offering a reward of $100,000 for the arrest and conviction of persons "fraudulently misrepresenting themselves as Brain Fingerprinting Experts and/or attempting to sell counterfeit Brain Fingerprinting technology."

In support of its motion for contempt, BS Inc. claims that Farwell has violated a preliminary injunction enjoining defendants from "representing that plaintiff has committed fraud, that its subject intellectual property is counterfeit, that it is not authorized to offer such technology, that it is not properly trained, credentialed, certified or qualified, that it has never actually sold or implemented the technology, that Plaintiff's technology is a threat to national security and justice and any and all similar representations except as may be required by law pursuant to lawfully issued subpoena or as part of any court proceeding or arbitration."

Plaintiff's counsel represents that in or about April, 1, 2022, plaintiff obtained a copy of a document dated July 19, 2021 purporting to be made in connection with an investigation by the Federal Bureau of Investigation. The "Fabricated FBI Report" has been provided to the court. The Fabricated FBI Report bears the Official Seal of the FBI. At his deposition, Farwell admitted to having drafted the Fabricated FBI Report. At oral argument on the motion, Farwell specifically admitted on the record to using the FBI seal and, having no connection to the FBI himself, did not see anything wrong with this gross misrepresentation.

The Fabricated FBI Report is largely written in the third person and purports to represent a summary of "evidence" provided by Farwell to an unnamed third-party regarding BS Inc., Ika and BS Inc.'s employees. The report claims, *inter alia*, that plaintiff and/or its employees stand "accused of fraud in South Africa, Pakistan, Nigeria, and Thailand, in each case involving Ika and his employees (a) falsely representing themselves as experts in forensic neuroscience, event-related brain potentials, and Brain Fingerprinting competent to implement a technology transfer of Brain Fingerprinting technology to government agencies and to train agency personnel in the same; and (b) attempting to sell a counterfeit "Brain Fingerprinting" training and technology that does not in fact meet the established Brain Fingerprinting Standards." The Fabricated FBI Report alleges criminal violations of the Racketeering Influenced and Corrupt Organizations Act: 18 U.S.C. § 1961, 18 U.S.C. § 1512; Tampering with a witness, victim, or an informant; §1513, Retaliating against a witness, victim, or an informant; the Securities Act of 1933; the Securities Exchange Act of 1934; International fraud constituting a threat to national security; Theft of intellectual property constituting a threat to national security and Theft of financial instruments involved in interstate and international commerce.

Defendant Farwell also admitted at his deposition that he "probably" forwarded the Fabricated FBI Report to persons and entities whom he felt had an "interest in" the contents of the Fabricated FBI Report including, but not limited to, a Mr. Robin Parsons, Professor at the University of Canterbury in New Zealand, and "FSL [Forensic Science Laboratory] Delhi",

Parties' arguments

Plaintiff maintains that Farwell has plainly violated the preliminary injunction and thus seeks an order holding Farwell in contempt. In his opposition to the motion for contempt, Farwell calls the report: "Dr. Farwell's Report to the FBI" and claims that the report was forwarded to various FBI officials. He further maintains that the report clearly indicates it is a summary of evidence provided to the FBI, not a

summary created by the FBI. In his motion to amend, Farwell maintains that there is truth to his claims that the plaintiff and Ika have engaged in wrongdoing.

While noticed as a motion for summary judgment, Farwell has actually moved to dismiss plaintiff's claims as duplicative and/or for failure to state a cause of action under CPLR 3211[1][7]. Meanwhile, BS Inc. maintains that it is entitled to summary judgment on the various claims it has moved with respect to since there are no triable issues of fact. Plaintiff further maintains that Farwell's affirmative defenses fail as a matter of law, are baseless and/or have no merit.

Discussion

The court will first consider plaintiff's cross-motion for summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff has shown the existence of the Nunc Pro Tunc Intellectual Property Acknowledgement and Assignment Agreements between plaintiff and defendants and has established their terms. Via said agreement, Farwell and codefendants Brain Fingerprinting Laboratories, Inc. Brain Fingerprinting, LLC and American Scientific Innovations, LLC, entities owned and/or controlled by Farwell, transferred to BS Inc.

> all rights, title and interest in a) the software enabled invention referred to as "Brain Fingerprinting", b) patents and pending patents (including the right to renew or refresh patents) relating to "Brain Fingerprinting" c) all software and intangible assets relating to "Brain Fingerprinting", d) all modifications, including improvements and derivative works, relating to "Brain Fingerprinting, e) the exclusive right maintain any license, patent or copyright of, or relating to, Brain Fingerprinting and f) the right to sue for past, present or future infringement.

Moreover, plaintiff has established that the defendants received substantial consideration in connection with their execution of said agreements, including $350,000 in salary and additional payments of more than $100,000. Thus, plaintiff has demonstrated the existence of an enforceable agreement which granted it the right to own and possess the patents which Farwell tried to fraudulently transfer from plaintiff. Defendants cannot demonstrate that they were fraudulently induced to enter into the subject agreements as they have not alleged any facts which would support every element of the claim. Similarly, the court agrees that Farwell has failed to state any other viable affirmative defense, since they are all conclusory and unsubstantiated. An affirmative defense which fails to set forth any factual basis supporting it, must be dismissed (*Robbins v. Growney*, 229 AD2d 356, 645 N.Y.S.2d 791 [1st Dept 1996]).

Plaintiff is entitled to summary judgment on the first cause of action and an injunction prohibiting defendant from falsely and fraudulently misrepresenting that plaintiff has committed fraud and that its intellectual property, namely patent numbers 5,363,858, 5,406,956, 5,467,777 and 7,689,272, are counterfeit, since these are discrete, ascertainable statements of fact. As for plaintiff's request for an injunction barring plaintiff from stating that BS Inc. is not authorized to offer such technology, that it is not

properly trained and that its technology is a threat to national security and justice, the court finds these statements to be expressions of opinion or mixed statements of fact and opinion and therefore, the court cannot grant plaintiff relief with respect to these types of statements.

Plaintiff is also entitled to summary judgment on its third cause of action for defamation. Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Plaintiff has shown that Farwell's published statements were false, published without privilege, made with scienter, or, at a minimum, with negligence. Furthermore, Defendant Farwell's published statements that Plaintiff has committed fraud tend to injure plaintiff's business and impute or directly accuse plaintiff of, criminal acts without regard to the truth. Thus, plaintiff is also entitled to summary judgment on the issue of liability on its defamation claim.

Plaintiff is further entitled to a declaration that defendants do not hold any right, title and/or ownership interest in patent numbers 5,363,858, 5,406,956, 5,467,777 and 7,689,272 based upon the underlying agreements transferring said patents from Farwell and/or defendants to plaintiff.

Finally, defendants' counterclaims are dismissed based upon the doctrine of unclean hands. Defendants four counterclaims are for negligent fraudulent inducement, fraudulent inducement, conversion and fraud. They seek damages for the illegal transfer of IP to plaintiff, alleged misrepresentations regarding the members of BS LLC, Farwell's improper removal from the Company without due process, and a duplicative claim of fraud. "Unclean hands in participating in a course of conduct of deception and deceit is an effective bar to all of the causes of action within the complaint...including cause of action sounding in fraud" (*Wang v. Wong*, 163 AD2d 300, 302 [2d Dept 1990], app den 77 NY2d 804 [1991], cert den 501 U.S. 1252 [1991]). During the time in which Farwell claims he was defrauded and his IP was taken from him, Farwell earned half a million dollars in salary and other payments, and himself tried to illegally transfer patents from plaintiff to an entity under his control. Farwell's conduct constitutes the type of behavior which must bar him from recovering in this action.

Accordingly, plaintiff's cross-motion is granted to the extent that plaintiff is granted summary judgment: [1] on the first cause of action and a permanent injunction against Farwell from falsely and fraudulently misrepresenting that plaintiff has committed fraud and that its subject intellectual property is counterfeit; [2] on the third cause of action for defamation; [3] on the fourth cause of action and a declaration that defendants hold no right, title and/or ownership interest in certain intellectual property and technology identified in the "Brainwave IP" Agreements; and [4] dismissing defendants' counterclaims

and affirmative defenses. An inquest shall be held to determine plaintiff's damages on the third cause of action on February 8, 2023 at 10:00am via Microsoft Teams.

In light of this result, Farwell's motion to dismiss is denied as moot.

The court now turns to the remaining motions.

Contempt, stay and amend injunction

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties (Judiciary Law § 753 [A] [5]; NY City Civ. Ct. Act § 210;. *see also Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 *amended* 69 N.Y.2d 652 [1983]; *Puro v. Puro*, 39 AD2d 873 [1st Dept 1972]). The actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side (*Matter of County of Orange v. Rodriguez*, 283 AD2d 494 [2d Dept 2001]). A party seeking contempt must show that there are no alternative effective remedies available (*Farkas v. Farkas*, 201 A.D.2d 440 [1st Dept 1994]).

The notice provisions of the motion warn Farwell that he may be punished by the imposition of a fine, or imprisonment, or both, thus complying with the requirements of Judiciary Law § 756. For the reasons already stated herein, plaintiff has shown that Farwell knowingly violated the preliminary injunction. In his opposition, Farwell calls the report: "Dr. Farwell's Report to the FBI" and claims that the report was forwarded to various FBI officials. He further maintains that the report clearly indicates it is a summary of evidence provided to the FBI, not a summary created by the FBI. This argument is plainly disingenuous. Farwell describes himself as a "Harvard-trained forensic neuroscientist" and lauds himself on his self-ascribed accomplishments. The court discredits Farwell's claim that he did not draft the Fabricated FBI Report for the purpose of misleading readers into believing that the FBI had generated the document which is plainly on what appears to be FBI letterhead. Indeed, the Fabricated FBI Report plainly states that it "constitutes evidence in the investigation of an ongoing racketeering scheme involving the following statutes and crimes invested by the FBI".

Thus, the court finds that Farwell knowingly violated the preliminary injunction. Petitioner has also established that violation of the preliminary injunction has defeated impaired, impeded or prejudiced plaintiff's rights (Judiciary Law § 753 [a]; *Farkas v. Farkas*, *supra*; *Great Neck Pennysaver v. Central Nassau Publications*, 65 A.D.2d 616 [2d Dept 1978]). Finally, petitioner has shown that there are no alternative effective remedies available. Petitioner's motion, to hold respondent in contempt for failing to comply with the preliminary injunction, is granted.

Farwell is therefore held in civil contempt. As punishment for his contempt, the court hereby fines Farwell $5,000, which shall be payable to plaintiff directly and/or through plaintiff's counsel within 30 days from service of this order with notice of entry. In the event that Farwell fails to pay the $5,000 fine in full, the Clerk is directed to enter a judgment in favor of plaintiff and against Farwell for the unpaid amount up to the full amount of $5,000. As for Farwell's request for a stay or modification, plaintiff is correct that these applications are tantamount to a delay tactic, and Farwell has otherwise failed to demonstrate entitlement to the relief sought. Accordingly, those applications are also denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED plaintiff's motion sequence 5 is granted to the extent that defendant Farwell is held in civil contempt. As punishment for his contempt, the court hereby fines Farwell $5,000, which shall be payable to plaintiff directly and/or through plaintiff's counsel within 30 days from service of this order with notice of entry. In the event that Farwell fails to pay the $5,000 fine in full, the Clerk is directed to

enter a judgment in favor of plaintiff and against Farwell for the unpaid amount up to the full amount of $5,000; and it is further

ORDERED that Farwell's cross-motion on motion sequence 5 requesting a stay is denied; and it is further

ORDERED that Farwell's motion sequence 6 for a modification of the preliminary injunction is denied; and it is further

ORDERED that Farwell's motion sequence 7 is denied; and it is further

ORDERED that plaintiff's cross-motion on motion sequence 7 is granted to the extent that plaintiff is granted summary judgment:

[1] on the first cause of action and a permanent injunction against Farwell from falsely and fraudulently misrepresenting that plaintiff has committed fraud and that its subject intellectual property is counterfeit;

[2] on the third cause of action for defamation;

[3] on the fourth cause of action and a declaration that defendants hold no right, title and/or ownership interest in certain intellectual property and technology identified in the "Brainwave IP" Agreements; and

[4] dismissing defendants' counterclaims and affirmative defenses.

And it is further **ORDERED** that an inquest shall be held to determine plaintiff's damages on its third cause of action for defamation on **February 8, 2023 at 10:00am via Microsoft Teams.**

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/3/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.