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NO.: 37576-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

LEILANI ZUTRAU, individually and on behalf of ICE SYSTEMS, INC.,

Plaintiff,

-against-

ICE SYSTEMS, INC. and JOHN C. JANSING,

Defendants.

LIDDLE & ROBINSON, L.L.P.
Attorneys for Plaintiff
800 Third Avenue
New York, New York 10022

LITTLER MENDELSON, P.C.
Attorneys for Defendants
900 Third Avenue
New York, New York 10022

DECISION AFTER TRIAL

The defendant ICE Systems, Inc. ("ICE"), is a Delaware corporation engaged in the business of providing and tabulating proxies for the U.S. trust-banking industry. The defendant John Jansing is ICE's President and majority shareholder. The plaintiff, Leilani Zutrau, began working for ICE in May 2000 as a consultant. She became a part-time employee in July 2000 and a full-time employee in March 2001. Her primary areas of responsibility were managing ICE's finances and overseeing its sales and marketing. She also performed some human-resource functions, payroll in particular, in conjunction with Gevity HR, Inc. ("Gevity"), the outside human-resource company used by ICE. In 2004, the plaintiff became a 22% shareholder of ICE and was appointed as its Treasurer.

At the end of 2005, the plaintiff was diagnosed with breast cancer. She advised Jansing of her diagnosis and continued to perform her functions at ICE, taking time off as needed for medical appointments and treatment. In January 2007, she learned that the cancer had spread and informed Jansing thereof. In May 2007, she advised Jansing that she needed to take some time off because she was fatigued, which was a side-effect of the cancer medication that she was taking. Although the parties disagree whether the plaintiff asked Jansing for a two-month leave of absence or an unspecified amount of time, it is undisputed that Jansing did not object and that his response was, “Fine” or “Okay.” The plaintiff was scheduled to begin her leave in the middle of June 2007. In early June 2007, Jansing advised the plaintiff that he wanted to arrange for an audit of ICE’s finances, and she voluntarily postponed her leave until the end of June to work on the audit.

In connection with her human resource and payroll functions, the plaintiff instituted timekeeping software to track employee hours and attendance, in part, to ensure the proper payment of overtime. Two employees, Jeff Berg, a computer programmer, and Walter Lotspeich, a sales-and-relationship manager, were salaried employees. Lotspeich reported directly to the plaintiff. Lotspeich, in particular, objected to having to clock in and out. On May 31, 2007, Lotspeich advised the plaintiff that he had received an offer to work elsewhere and that he was prepared to accept the offer. The plaintiff advised Jansing, who promoted Lotspeich to manager of the sales department, reporting directly to him. Jansing disagreed with the plaintiff that ICE was required to track Berg’s and Lotspeich’s hours. After consulting with Gevity, Jansing advised the plaintiff in an e-mail on June 14, 2007, that he no longer wanted Berg and Lotspeich to clock in and out and that they should be converted to “exempt” status. The plaintiff, who had also consulted with Gevity, conceded that Berg was exempt, but continued to disagree with Jansing about Lotspeich.

Jansing terminated the plaintiff’s employment on June 20, 2007. The plaintiff subsequently commenced this action on behalf of herself individually and on behalf of ICE derivatively. The amended complaint contains causes of action to recover damages for disability discrimination under the Human Rights Law, retaliatory discharge under the Labor Law, and breach of fiduciary duty, among other things. By an order of this court dated May 13, 2010, the defendants’ motion to dismiss was granted solely to the extent of dismissing the cause of action alleging shareholder oppression under Delaware law. By a subsequent order of this court dated October 28, 2011, the defendants’ motion for summary judgment was granted to the extent of dismissing the first cause of action for sex discrimination, the sixth cause of action for breach of contract, the derivative causes of action seven through ten, and the fourth cause of action for breach of fiduciary duty except insofar as it alleged that the plaintiff was excluded from participation in the management of ICE and denied shareholder distributions. By a further order of this court dated July 16, 2012, the defendants’ motion for an order striking the plaintiff’s jury demand and dismissing the third cause of action for retaliatory discharge under the Labor Law was granted solely to the extent of striking the jury demand. A non-jury trial on the issue of liability was held on July 16-20, 2012; September 4, 2012; and September 10-11, 2012. Leilani Zutrau and Jeanine Howard, a Gevity employee, testified for the plaintiff. John Jansing; Walter Lotspeich; and Maurice Kalaygian, Jansing’s personal accountant, testified for the defendants. Danielle Digiose (nee Ruggerio), a former ICE employee, and Leilani Zutrau testified as rebuttal witnesses. Two stipulations and approximately 75 exhibits were entered into evidence. Transcripts of the trial testimony and post-trial memoranda of law were received in chambers on or about December 6, 2012.

Disability Discrimination under the Human Rights Law

The plaintiff alleges that she is disabled because she has cancer. She also alleges that the defendants refused her request for a 60-day leave of absence to accommodate her disability and, instead, terminated her employment.

The New York State Human Rights Law makes it unlawful for an employer to fail to provide reasonable accommodations to the known disabilities of their employees (Executive Law § 296 [3] [a]). To establish a prima facie failure-to-accommodate claim under the Human Rights Law, the plaintiff must demonstrate that she has a disability within the meaning of the statute, that her employer had notice of the disability, that she was otherwise qualified to perform the essential functions of her job with reasonable accommodation, and that her employer refused to make a reasonable accommodation (**Vinokur v Sovereign Bank**, 701 F Supp 2d 276, 292).

The parties do not dispute that the plaintiff is disabled under the Human Rights Law, that the defendants had notice of her disability, or that she was otherwise qualified to perform the essential functions of her job. They do, however, diverge sharply on the issue of whether the defendants reasonably accommodated the plaintiff's disability.

The burden of proof rests with the plaintiff, who must establish the truth and validity of each claim by a fair preponderance of the credible evidence (*see*, **Liberty Doorworks, Inc. v Baranello**, 35 Misc 3d 1222 [A] at *5). Stated otherwise, in order for the plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it (**Id**.). If the evidence does not, or if the evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant (**Id**.). Only when the evidence favoring the plaintiff's claim outweighs the evidence opposed to it may the plaintiff prevail (**Id**.).

The court finds that the plaintiff has not established by a fair preponderance of the credible evidence that the defendants failed to reasonably accommodate her disability. The record reflects that, between 2005 when the plaintiff was diagnosed with breast cancer and 2007 when her employment was terminated, Jansing suggested a doctor, allowed her to take time off to travel to Texas to consult with a doctor there, and allowed all of her other requests for time off, including the last one in 2007 that the plaintiff claims led to her termination. The record also reflects that the plaintiff had surgery in July 2006, after which she stopped traveling for ICE until September 2006. Additionally, ICE's health insurance plan did not cover Buphenyl, which the plaintiff was taking in 2007 to treat her cancer. The record reflects that Jansing told the plaintiff to find another plan that covered Buphenyl, which she did. ICE obtained that insurance plan for the plaintiff in May 2007, shortly before her employment was terminated in June 2007.

The Human Rights Law envisages that the employer and employee engage in an interactive process to arrive at a reasonable accommodation for a disabled employee (*see*,

Pimentel v Citibank, N.A., 29 AD3d 141, 149). The plaintiff alleges that the defendants failed to engage in the interactive process. The Appellate Division, First Department, recently held that engagement in the interactive process is itself an accommodation and that the failure to engage in an individualized interactive process with a disabled employee is an unlawful failure to make a reasonable accommodation (*see*, **Vinokur v Sovereign Bank**, *supra*, citing **Phillips v City of New York**, 66 AD3d 170, 176). The Appellate Division, Second Department, however, has not followed that rule. In **Hayes v Estee Lauder Cos., Inc.** (34 AD3d 735, 737), the Second Department found that there is no controlling or persuasive authority holding that an employer may be held liable based solely on its failure to engage in an interactive process with an employee absent a showing that the breakdown of the interactive process led to the employer's failure to provide a reasonable accommodation. Since this court sits in the Second Department, it is bound to follow **Hayes v Estee Lauder Cos., Inc.** (*supra*).

As previously discussed, the record does not reflect that either Jansing or ICE failed to reasonably accommodate the plaintiff's disability. In any event, the plaintiff has not established by a fair preponderance of the credible evidence that Jansing refused to engage in the interactive process with her. Although the plaintiff testified that Jansing ignored her numerous requests to speak to him during the month of June 2007, those requests did not identify why she needed to speak to him or that her requests were related to her need for an accommodation. Moreover, Jansing testified that he believed the plaintiff wanted to talk about their failed romantic relationship, which he sought to avoid.

Finally, the plaintiff has failed to establish by a fair preponderance of the credible evidence that her termination was in retaliation for requesting an accommodation for her disability. It is unlawful under the Human Rights Law to retaliate against an employee for opposing discriminatory practices (Executive Law § 296 [7]). In order to assert a viable claim of retaliatory discharge, the plaintiff must demonstrate that there was a reasonable basis to believe that ICE was engaged in an actionable discriminatory practice and that she was discharged as a result of her opposition to that practice (*see*, **McKenzie v Meridian Capital Group**, **LLC**, 35 AD3d 676, 677). The Appellate Division, Second Department, has held that an allegation that the plaintiff was terminated in retaliation for requesting additional leave time to accommodate her disability does not state a cause of action for retaliatory discharge under the Human Rights Law (**Id.**) Like the plaintiff in **McKenzie,** Zutrau does not allege that her request for leave was made in opposition to a practice forbidden by the Human Rights Law (see, Executive Law § 296 [1] [e]). Moreover, there is no evidence in the record that the plaintiff made any complaints about a violation of her rights before she was terminated. Thus, her termination could not have been in retaliation for her request for leave (*see*, **Iannone v ING Financial Servs., LLC**, 49 AD3d 391, 392).

In view of the foregoing, the court finds that the plaintiff has not prevailed on her claim of disability discrimination under the Human Rights Law.

Retaliatory Discharge under the Labor Law

The plaintiff contends that Jansing terminated her employment in violation of Labor Law § 215 because she raised objections to ICE's failure to comply with the record-keeping requirements of New York's wage-and-hour laws. Specifically, the plaintiff contends that ICE was required to keep records of the hours worked by and wages paid to Berg and Lotspeich in order to pay overtime and that the failure to keep such records was a violation of the Labor Law.

Labor Law § 215 provides, in pertinent part, as follows:

> No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer...that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter....

The record reveals that Jansing terminated the plaintiff's employment a few days after their June 14, 2007, e-mail exchange in which he advised the plaintiff that he no longer wanted Berg and Lotspeich to clock in and out and directed her to convert them to "exempt" status. In response, the plaintiff conceded that Berg was exempt, but continued to disagree with Jansing about Lotspeich.

The Labor Law does not contain any provisions governing overtime compensation (*see*, **Epifani v Johnson**, 65 AD3d 224, 226), which is governed by the Fair Labor Standards Act (''FLSA"). The Labor Law, however, does require employers to keep true and accurate records of the hours worked by and the wages paid to each employee (*see e.g.*, Labor Law § 661). Both the FLSA and the Labor Law exempt an "outside salesman" from their provisions (*see*, 29 USC § 213 [a] [1]; Labor Law § 651 [5][d]). Labor Law regulations define an "outside salesman" as an employee who is customarily and predominantly engaged away from the premises of the employer for the purpose of making sales, selling articles or goods, or obtaining orders or contracts (12 NYCRR 142-2.14 [c] [5]). Likewise, the FSLA's regulations define an "outside salesman" as an employee whose primary duty is making sales or obtaining orders or contracts for services and who customarily and regularly performs this duty away from the employer's place of business (29 CFR 541.500).

The court finds that Lotspeich was an "outside salesman" within the meaning of both the Labor Law and the FLSA. Lotspeich testified that his primary duty as a sales-and-relationship manager was to sell and market ICE's services to the trust-banking industry and that the primary way he did that was to attend industry conferences. Lotspeich testified that he attended approximately 30 conferences every year to generate leads, which he followed up with on-site meetings afterwards. He often worked more than 40 hours a week and traveled at least 50 percent of the time. He had an office in North Carolina until 2007, when he moved to Philadelphia. He testified that he never worked out of ICE's New York office and that he went there only three or four times a year. Accordingly, the court finds that Jansing did not violate the Labor Law when he directed the plaintiff to convert Lotspeich to "exempt" status.

The court also finds that the plaintiff did not reasonably and in good faith believe that Jansing was violating the Labor Law. The record reflects that the plaintiff never told either Lotspeich or Jansing that Lotspeich was entitled to overtime. The plaintiff testified that she never reported any overtime to Gevity for Lotspeich, despite the fact that she required him to clock in and out. The plaintiff testified that, because Lotspeich was a salaried employee, she merely reported to Gevity that he worked 80 hours for each bi-weekly payroll period. Thus, contrary to her contention that she was required to keep records of Lotspeich's hours and wages in order to pay him overtime, the plaintiff never took any steps to actually pay him overtime.

Lotspeich testified that he was a salaried, full-time employee who never received overtime. Lotspeich also testified that none of his counterparts at other companies were paid overtime and that he never expected to be paid overtime. He testified that the plaintiff liked to micromanage him and that she used the timekeeping system to monitor his whereabouts. For example, she would often check up on him if he clocked out for lunch and did not clock back in within an hour. Lotspeich testified that the plaintiff micromanaged him in other respects as well. She restricted his access to Jansing and would not allow him talk to Jansing without being involved in the conversation herself. She would not give him a travel and entertainment budget, requiring her to approve his flight, hotel, car rental, and other expenses before taking business trips. She also would not give him access to ICE's financial information about clients, such as how much revenue they brought in, hampering his ability to do his job.

Jansing testified that the plaintiff was a "control freak" whose management style was more hierarchical and inflexible than his, focusing on timekeeping and other things that were, in his opinion, not important to getting the job done. Jansing also testified that the plaintiff created a divisive atmosphere in the workplace. She had a condescending attitude toward the other employees who worked at ICE and was often critical of them, constantly complaining to him about their weaknesses. Jansing testified that the plaintiff was even critical of him and that, on more than one occasion, she recommended that he get psychological treatment. Jansing testified that the plaintiff would not allow him to speak to Lotspeich without her and that he felt she was trying to separate him from his employees. Jansing testified that the plaintiff was having a negative effect on morale and productivity. The situation came to a head at the end of proxy season in 2007. Jansing testified that, after Lotspeich stopped reporting to the plaintiff, he complained about having to clock in and out and that, in June 2007, the plaintiff fired ICE employee Danielle Ruggiero without honoring Jansing's request to meet with the both of them to discuss Ruggiero's performance. Jansing testified that, at that point, he had had enough and let the plaintiff go.

In view of the foregoing, the court finds that the plaintiff has failed to establish by a preponderance of the credible evidence that Jansing fired her in retaliation for disagreeing with him about Lotspeich being exempt from the Labor Law.

Breach of Fiduciary Duty

The plaintiff alleges that Jansing breached his fiduciary duty to her as a minority shareholder by denying her participation in the management of ICE and by failing to pay her shareholder distributions. Under Delaware law, a shareholder owes a fiduciary duty only if he owns a majority interest in the corporation or exercises control over its business affairs (**Invahoe Partners v Newmont Min. Corp.**, 535 A2d 1334, 1344). Jansing is both the majority shareholder and sole director of ICE. Moreover, Ice's by-laws provide that the business of the corporation shall be managed by the entire board, which shall consist of one director. Thus, Jansing owes the plaintiff a fiduciary duty.

Under Delaware Law, the business affairs of a corporation are managed by or under the direction of its board of directors, and the stockholders may not directly manage the corporation absent specific authorization either in law or in the certificate of incorporation (*see*, **CA, Inc. V AFSCME Employees Pension Plan**, 953 A2d 227, 232). The plaintiff is a shareholder and not a director of ICE. She does not allege any statutory authorization to manage ICE's business affairs, and ICE's certificate of incorporation does not give her any management authority. Since the plaintiff is not entitled to participate in ICE's management, Jansing's purported failure to include her did not result in a breach his fiduciary duty.

The plaintiff contends that, after she left ICE in 2007, Jansing paid himself shareholder distributions disguised as bonuses so that he would not have to pay her an equivalent amount. The record reveals that, in 2007, Jansing received a bonus in the amount of $432,000. It is undisputed that no shareholder distributions or bonuses were paid in 2008. In 2009, Jansing received a bonus in the amount of $275,000. In 2010, Jansing received a bonus in the amount of $172,000 and a shareholder distribution in the amount of $465,350. In 2011, Jansing received a bonus in the amount of $272,866 and a shareholder distribution in the amount of $100,175. It is undisputed that the plaintiff received proportional sums as shareholder distributions in 2010 and 2011, which were paid to her accumulated capital account at ICE.

The record reveals that Jansing's bonuses were paid through payroll and reported to the IRS as compensation for the years in question. Maurice Kalaygian, Jansing's personal accountant and a CPA, testified that it is not an acceptable accounting practice to make shareholder distributions through payroll. He also testified that ICE paid shareholder distributions in 2010 and 2011, but not before 2010. The court credits Kalaygian's testimony over contradictory testimony by the plaintiff, who is not an accountant and has no formal training in accounting. Moreover, the documentary evidence supports the defendants' view that the bonuses were not shareholder distributions. Accordingly, the court finds that the plaintiff has not established by a preponderance of the credible evidence that Jansing's bonuses were, in fact, shareholder distributions.

The plaintiff contends that the bonuses paid to Jansing after she stopped working for ICE are not protected by the business judgment rule because Jansing was an interested director. The plaintiff also contends that the bonuses did not meet the entire-fairness standard under Delaware law. The plaintiff further contends that, under Delaware law, the decision to award additional executive compensation requires the vote of a majority of the disinterested and fully informed shareholders, which was not obtained.

It is axiomatic that a shareholder has no individual cause of action to recover damages for a wrong against a corporation. Allegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the corporation only for which a shareholder may sue derivatively, but not individually. (*see*, **Abrams v Donati**, 66 NY2d 951, 953; **Elenson v Wax**, 215 AD2d 429). The pertinent inquiry is whether the thrust of the action is to vindicate the plaintiff's personal rights as an individual and not as a stockholder on behalf of the corporation (*see*, **Albany-Plattsburgh United Corp. v Bell**, 307 AD2d 416, 419). The court finds that the purported diversion of corporate assets by Jansing to himself in the form of bonuses resulted in an injury to the corporation because it deprived ICE of profits (*see*, **Glenn v Hoteltron Sys.**, 74 NY2d 386, 392). The plaintiff, as an innocent shareholder, was injured by Jansing's bonuses only to the extent that she was entitled to share in ICE's profits (**Id**.). Thus, her injury was derivative in nature and not direct (**Id**.).

Carlson v Hallinan (925 A2d 506), upon which the plaintiff relies, is inapposite. In that case, there was an oral agreement providing that the directors and officers of the corporation would receive no compensation other than the plaintiff Carlson's monthly salary and that the stockholders would receive only pro rata distributions. The Delaware Chancery Court found that the director defendants Hallinan and Gordon breached that agreement, and the plaintiffs suffered damages as a result because the money paid to the director defendants as salary was not available for pro rata distribution to the stockholders. The Chancery Court also found that the director defendants Hallinan and Gordon breached their fiduciary duties to the corporation by paying themselves executive compensation that did not meet the entire-fairness standard under Delaware law. **Carlson v Hallinan** (*supra*) does not stand for the proposition that the director defendants breached their fiduciary duties to the other shareholders by paying themselves executive compensation that did not meet the entire-fairness standard under Delaware law.

Here, there was no agreement between the plaintiff and Jansing that was breached and any diversion by Jansing of corporate profits to himself resulted in an injury to the corporation, which is derivative in nature, and not to the plaintiff individually. By an order dated October 28, 2011, this court granted the defendants' motion for summary judgment, inter alia, to the extent of dismissing the derivative causes of action without prejudice on the ground that the plaintiff could not pursue her individual claims and derivative claims in the same action because it presented an impermissible conflict of interest. The plaintiff subsequently commenced a derivative action in Delaware. The court finds that, since the claim that Jansing breached his fiduciary duty by paying himself bonuses is a derivative claim, it should be pursued in Delaware as part of the Delaware derivative action.

The defendants contend that, in 2006, ICE awarded the plaintiff and Jansing bonuses of $100,000 and $378,000, respectively, and that the plaintiff awarded herself an additional bonus in the amount of $111,000 that was not authorized by Jansing or ICE. The defendants contend that equity requires that the plaintiff repay $111,000 to ICE.

Preliminarily, the court notes that the defendants have not asserted any counterclaims against the plaintiff. The failure to include a counterclaim may precluded affirmative relief from being awarded to the defendant, but if the plaintiff has the requisite notice of the defendant's position and all of the underlying issues of fact have been appropriately injected into the case, the court may permit an amendment to add the request for affirmative relief as a counterclaim as long as no party can claim prejudice (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:17, at 320). The defendants' request for affirmative relief is raised for the first time in their post-trial memorandum of law. Thus, the plaintiff has not had any notice of, or an opportunity to respond to, the defendants' claim for damages. The court finds that, under these circumstances, it would be highly prejudicial to the plaintiff to allow the defendants to assert a counterclaim. In any event, the defendants' claim is a derivative claim. Like the plaintiff's derivative claim, it seeks to recover for the purported diversion of corporate assets that were paid out as bonuses, resulting in an injury to the corporation. It, therefore, should be prosecuted in Delaware with the plaintiff's derivative claims.

Finally, the record reveals that the plaintiff's pro rata share of the shareholder distributions that were paid to Jansing in 2010 and 2011 were paid to the plaintiff's accumulated capital account at ICE. Kalaygian testified that, in 2007, that account had a negative balance of $118,000 and that, when the 2010 and 2011shareholder distributions were paid into the account, they merely reduced the amount that the plaintiff owed to ICE. As previously discussed, Kalaygian is Jansing's personal accountant and a CPA. The court credits his testimony over contradictory testimony by the plaintiff, who is not an accountant and has no formal training in accounting. Kalaygian also testified that, in 2011, the plaintiff's accumulated capital account had a positive balance in the amount of $60,307. The defendants contend that the $60,307 was paid to the plaintiff in 2012 in connection with ICE's reverse stock split. The record reveals that the plaintiff received a check in June 2012 for $495,778.71, which represented the value of her ICE stock. Although Jansing testified that he believed the $60,307 was included in that amount, he presented no evidence of how the $495,778.71 was computed. Accordingly, the court finds that the plaintiff is entitled to a judgment in the amount of $60,307.

In view of the foregoing, a trial on the issue of damages will not be necessary. Settle judgment.

Dated: March 20, 2013

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J.S.C.