

Long Is. Network of Community Servs., Inc. v Kinzer
2013 NY Slip Op 30860(U)
April 16, 2013
Supreme Court, Suffolk County
Docket Number: 19053-2012
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:**HON. EMILY PINES**

J. S. C.

Motion Date: 07-11-12; 12-18-12; 1-22-13**Submit Date:** 04-09-2013

Motion No.: 001 MD
002 MG
003 MOTD

[] Final

[x] Non Final

_____ X
**LONG ISLAND NETWORK OF
COMMUNITY SERVICES, INC.,**

Plaintiff,**- against -****DEBORAH KINZER,****Defendant.**

_____ X

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ORDERED that the motions (001, 002, 003) are consolidated for the purpose of this determination; and it is further

ORDERED that the plaintiff's motion (001) seeking a preliminary injunction is denied; and it is further

ORDERED that the plaintiff's motion (002) for an order granting leave to amend the complaint is granted; and it is further

ORDERED that the plaintiff is directed to file and serve the supplemental summons and amended complaint within twenty (20) days of service of a copy of this order with notice of its entry; and it is further

ORDERED that the defendant shall serve and file an answer to the supplemental summons and amended complaint within twenty days of receipt of service of same; and it is further

ORDERED that the defendant's motion (003) to strike the plaintiff's First Notice for Discovery and Inspection and First Set of Interrogatories and for a protective order is denied; and it is further

ORDERED that the defendant is directed to respond to the plaintiff's discovery requests within forty-five (45) days of service of a copy of this order and notice of its entry; and it is further

ORDERED that the plaintiff's counsel shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and other defendants, pursuant to CPLR 2103 (b) (1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear for a conference in the chambers of the undersigned on July 8, 2013 at 11 a.m.

In this breach of contract action, the plaintiff, Long Island Network of Community Services, Inc. (LINCS) seeks to recover sums paid to the defendant, Deborah Kinzer, in the form of a life insurance policy in the amount of \$125,215 upon her resignation pursuant to a Separation Agreement. The plaintiff also seeks additional amounts which were allegedly stolen during the defendant's employment as the plaintiff's Chief Financial Officer. The record reveals that the defendant was hired by the plaintiff in October 1996 as a bookkeeper. In January, 2001, the defendant was promoted to Chief Financial Officer for the plaintiff and another entity called Long Island Association for Aids Care ("LIAAC"), and worked half-time for

each entity. The defendant resigned her employment in 2011 and was paid the proceeds of a life insurance policy in the amount of \$125,215 pursuant to a Separation Agreement.

The Separation Agreement, dated September 6, 2011, provided, in pertinent part, as follows:

1. Last Day of Employment. Kinzer's employment terminated effective June 30, 2011. As of July 15, 2011, she was paid her full salary, including all accrued holiday and vacation.

2. Consideration. Kinzer hereby elects and authorizes LINC'S to surrender and terminate LINC'S's Key Life Insurance Policy number 90223001 on Kinzer from John Hancock. In consideration of the mutual promises and benefits of this Agreement, LINC'S will provide Kinzer with the surrender value of the Key Life Policy as determined by John Hancock.

3. General Release of Claims. In consideration for the Insurance Payment and other good and valuable consideration, Kinzer and her heirs and assigns, releases and forever discharges LIAAC and its affiliates of and from any and all claims, known and unknown, Kinzer has, had, or may have, including, but not limited to, any alleged violation of

* * *

The Employment Retirement Income Security Act of 1974;
Any benefit, payroll or other plan, policy or program;
Any public policy, contract, third-party beneficiary, tort or common law claim; and /or
Any claim for costs, fees, or other expenses including attorneys' fees.

* * *

5. Confidentiality, Disclosure.

a. * * *

b. * * *

c. Kinzer shall cooperate fully with LIAAC with respect to any audit or investigation relate dot any actions taken during Kinzer's employment with LIAAC. Further, Kinzer will cooperate fully with LIAAC in its defense of or other participation in any administrative, judicial or other proceeding arising from any charge, complaint or other action that has been or may be filed.

* * *

7. Breach of Agreement. Kinzer understands and agrees that any breach by her of any of the foregoing covenants shall entitle LIAAC to bring an action for failure to comply with the terms of this agreement and, further, should LIAAC prevail in any such action, LIAAC shall be entitled to reasonable attorneys' fees and costs as part of such action.

The record reveals that after the defendant resigned and a new Chief Financial Officer was hired, the plaintiff performed an audit of the organizations' finances and discovered that the defendant had improperly taken funds totaling approximately \$55,000. The plaintiff notified the Suffolk County District Attorney, who conducted an investigation which resulted in the defendant's arrest. On October 12, 2012, the defendant pled guilty to the charge of Grand Larceny Third Degree, a Class D Felony. On December 12, 2012, the defendant was sentenced to 420 hours of community service and five years of probation. During the pendency of the criminal proceeding, the plaintiff discovered another \$21,685 missing from a further investigation of its records in 2006. The defendant paid the original \$54,797.78 in restitution to the plaintiff prior to her sentencing, and offered to pay the remaining \$21,685, however, the plaintiff refused to accept the second payment. This action was commenced in or about June, 2012.

The complaint alleges five causes of action. In the first cause of action, the complaint alleges that the defendant intentionally deceived the plaintiff to enter into the Separation Agreement and pay to the defendant the proceeds of the life insurance policy, causing damage to the plaintiff in the amount of \$125,215. In the second cause of action, the complaint alleges that the defendant breached the terms of the Separation Agreement, and as a result, the plaintiff has been damaged in the amount of \$125,215, reasonable attorneys' fees and costs. In the third cause of action, the complaint alleges that the defendant breached a fiduciary duty to the plaintiff, causing damage to the plaintiff in the amount of \$125,215. In the third cause of action, the complaint alleges that the defendant converted the Key Life Insurance Policy funds for her own use, causing damage to the plaintiff in the amount of \$125,215. In the

fifth cause of action, the complaint alleges that the defendant should be restrained and enjoined from any distribution, devaluation and/or dissipation of any monies or other consideration she received as a result of her fraud.

The plaintiff now moves for a preliminary injunction to restrain the defendant from distributing, devaluing and/or dissipating any monies or other consideration the defendant received, any monies remaining from plaintiff's \$125,215 payment to the defendant, any profits derived from the stolen funds and/or the separation payment, any real or personal property purchased from the stolen funds and/or the separation payment, and the assets of her pension. The plaintiff moves separately for leave to amend the complaint. The defendant moves for an order striking the plaintiff's first notice for discovery and inspection and first set of interrogatories, and for an order granting a protective order.

Turning first to the plaintiff's motion for a preliminary injunction, a preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v Leon*, 283 AD2d 423, 424, 723 NYS2d 871 (2d Dept 2001); *Peterson v Corbin*, 275 AD2d 35, 36, 713 NYS2d 361 (2d Dept 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 (1990); *W. T. Grant Co. v Srogi*, 52 NY2d 496, 517, 438 NYS2d 761 (1981); *Merscorp, Inc. v Romaine*, 295 AD2d 431, 743 NYS2d 562 (2d Dept 2002); *Neos v Lacey*, 291 AD2d 434, 737 NYS2d 394 (2d Dept 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v Axelrod*, 73 NY2d 748, 750, 536 NYS2d 44 (1988); *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1073, 857 NYS2d 229 (2d Dept 2008); *City of Long Beach v Sterling Am. Capital, LLC*, 40 AD3d 902, 903, 837 NYS2d 572 (2d Dept 2007); *Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 (2d Dept 2006). Here, the plaintiff has not suffered irreparable harm

warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enters., Ltd. v Newsday, Inc.*, 258 AD2d 520, 685 NYS2d 257 (2d Dept 1999). Accordingly, the plaintiff has not demonstrated its entitlement to a preliminary injunction.

Turning to the plaintiff's second motion seeking leave to amend the complaint, the plaintiff seeks to add an allegation that the defendant stole funds in February, 2006, in the approximate amount of \$21,000. The plaintiff seeks to add that in addition to the \$125,215 paid in October, 2011, an additional \$6,000 was applied toward attorneys' fees incurred in connection with the Separation Agreement. The plaintiff also added allegations concerning the defendant's plea in criminal court. The plaintiff also increases the amount that the defendant allegedly stole from \$55,000 to \$76,500. The plaintiff added the sixth cause of action alleging that the defendant was unjustly enriched by her receipt and retention of the \$76,500, and seeks interest on the \$54,797.78 which was paid in restitution at the Criminal Proceeding, and the payment of \$21,000 plus interest. The plaintiff adds a seventh cause of action alleging the faithless servant doctrine, seeking forfeiture of all compensation earned by the defendant, including the amount paid in the Separation Agreement.

It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise. CPLR 3025 [b]; *Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 544 NYS2d 580 (1989); *McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 463 NYS2d 434 (1983). Although the Court notes that defendant strenuously opposed the motion, she failed to show either that she has been prejudiced or surprised. In addition, the defendant fails to provide support for her assertion that the new cause of action lacks no merit. Accordingly, the plaintiff's motion seeking leave to amend the complaint is granted.

Turning to the motion by the defendant seeking an order striking the plaintiff's

first notice for discovery and inspection and first set of interrogatories, and for a protective order, the Court notes that both parties are objecting to each other's discovery demands. In support, the defendant contends that she paid restitution for the amount she took from the company, has tried to repay the remaining \$21,000 but the plaintiff has refused to accept the payment. The defendant further objects to the discovery demands on the ground that the plaintiff has received restitution for the stolen moneys and has no further damages. The defendant also states that the discovery of the defendant's bank and credit card statements are not material and necessary to the prosecution fo this action and have no bearing as to whether the defendant breached the Separation Agreement.

Contrary to the defendant's contention, New York Penal Law § 60.27 (6) provides that the payment of restitution or reparation as part of a criminal disposition " 'shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.'" *City of New York v College Point Sports Assn, Inc.*, 61 AD3d 33, 876 NYS2d 409 (2d Dept 2009), quoting *Farber v Stockton*, 128 Misc2d 560, 562, 490 NYS2d 685 (NY Civ. Ct.1985), *lv dismissed* 131 Misc2d 470, 502 NYS2d 901 (NY App. Term 1986), Penal Law § 60.27 (6). The amount of money paid by a criminal offender as restitution must be deducted from the amount of damages otherwise due to the crime victim in the subsequent civil proceeding to avoid the possibility of a duplicative civil recovery. *Id.* Therefore, the requested discovery is necessary and material to the instant matter. Accordingly, under the present circumstances, the defendant's motion is denied. The defendant is directed to serve responses within 45 days of service of a copy of this order with notice of entry.

The parties are directed to appear for a conference on Monday, July 8, 2013 at 11 a.m.

Dated: April 16, 2013
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final