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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Yuco Management Inc.,

- v -

Chi Hung Cheung et al.;

INDEX NO. 117368/06

MOTION DATE 8/4/10

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 31 were read on this motion ~~to~~/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-13
Answering Affidavits — Exhibits + Memo of Law	14-30
Replying Affidavits	31

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 10, 2010

JOAN M. KENNEY J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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YUCO MANAGEMENT, INC.,

Plaintiff,

-against-

CHI HUNG CHEUNG (a/k/a CHIHUNG CHEUNG a/k/a CHIHUNG H. CHEUNG a/k/a STEVEN CHEUNG) and LEDERER, LEVINE & ASSOCIATES, L.L.C.,

Defendants.

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DECISION AND ORDER
Index:117368/2006
Motion Seq: 004

JOAN M. KENNEY, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits	1-13
Opposition to Notice of Motion & Memo of Law	14-30
Reply Affirmation	31

Upon the foregoing cited papers, the Decision and Order of this motion, is as follows:

This action arises out of plaintiff, Yuco Management, Inc.'s (Yuco Management) claims that defendant Lederer, Levine & Associates, L.L.C. (LLA) is responsible for its own tortious conduct and the tortious actions of its former employee, defendant Chi Hung Cheung (Cheung).

LLA now seeks an Order, pursuant to CPLR 3212, dismissing plaintiff's second amended complaint (the complaint).

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff is a real estate management company which manages various commercial and residential properties (Yuco entities) owned by the Yu family. Catherine Yu (Yu) is plaintiff's vice-president

LLA is an accounting firm with its principal office located in New Jersey. Cheung is a former employee of LLA who was providing accounting services for plaintiff from 1991 until November 3, 2006, when plaintiff discovered that Cheung had stolen in excess of $500,000 from plaintiff by forging Yu's signature. The relevant facts leading up to the plaintiff's discovery of the theft are set forth below:

In 1991, the Yu family, after purchasing shares in a co-op entitled the 40 Third Street Owners, Inc., asked LLA to prepare the co-op taxes. LLA had been preparing the co-op taxes for this particular co-op prior to the Yu family's purchase. Cheung, an employee of LLA at the time, was assigned to prepare tax returns and compile financial statements for the co-op. Kenneth Lederer (Lederer), a principal at LLA, reviewed these tax returns and signed off as a preparer. Beginning in the late 90s, Lederer did not sign off on Cheung's work anymore; however, LLA was still listed as the preparer/firm of the tax returns on plaintiff's invoices and on the federal and state tax forms. Cheung testified at his deposition that LLA still reviewed his work and that the "fees were paid to [LLA] and I was an employee receiving no compensation" (see, Cheung's May 12, 2009, deposition, page 172; Exhibit "H" to Notice of Motion papers).

After this initial job, on LLA's behalf, Cheung performed accounting and related services for many of plaintiff's entities up

until November 3, 2006. These services included "bookkeeping work, reconciling bank statements, preparation of balance statements and preparation of tax returns." Yu Affidavit, ¶ 9. During the entire time that Cheung worked for plaintiff, plaintiff received invoices from LLA for the services performed. Plaintiff states that Cheung would visit plaintiff's offices on "an average of once a week, was given full and complete access to plaintiff's books and accounts, prepared annual tax returns for each of the Yuco Entities, and reconciled a substantial number of the bank accounts maintained by plaintiff on behalf of the Yuco Entities" (see, ¶ 9 of the complaint).

Plaintiff recounts that, over the years, Cheung developed a close relationship with the Yu family and was trusted as if he were a member of the family. Cheung, in addition to his accounting duties, testified that, on his own personal time, he assisted the Yu family with setting up a computer network.

Plaintiff's company utilized check-writing software which issued and kept records of checks. While Cheung was working in plaintiff's offices, he was given access to its check-writing software. Yu testified that Cheung would sometimes input tax payments into the computer system so that a check could be generated. She stated that, for at least eight years, Cheung was "performing payment" for the payroll taxes, and also prepared the W2, W3, tax returns and payroll work for many of the Yuco entities

(see Exhibit "G" to moving papers, Yu April 28, 2009 deposition transcript at page 44). According to the record, plaintiff was the authorized agent for at least 30 different entities.

In October 2006, plaintiff discovered that Cheung had been using plaintiff's check-writing software to forge checks made payable to either himself, LLA or Citibank, from plaintiff's accounts. Plaintiff describes that Cheung would use the software to affix Yu's signature on the checks and then Cheung's bank would deposit these checks in Cheung's accounts. Using a scanned version of Yu's signature, Cheung was able to steal over $500,000 from Yuco entities.

In February 2008, Cheung entered a plea of guilty to grand larceny in the third degree (Criminal Court, New York County). Cheng testified that he stole the money because he wanted to get fired and he wanted to hurt the Yu family. He stated that he felt like they treated him like a "slave." (Cheung deposition, transcript page 83). Cheung also felt that LLA did not treat him fairly in that anything he did "didn't matter" and he wanted to also be fired from LLA. *Id.* at 187. As part of his plea agreement, Cheung made payments totaling $512,811.40 in restitution to plaintiff. LLA contends that this amount is the "total and full amount calculated as being stolen by Defendant Cheung's criminal defense attorney and the assistant district attorney in the criminal matter." LLA's Memo of Law, at 1.

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Plaintiff alleges that, subsequent to the commencement of this action, the review of the accounts indicates that Cheung stole at least $568,000 from the plaintiff. Plaintiff believes that the amount given as part of the plea agreement is less than what was stolen, and did not include interest. It also states that it continued to find fraudulent checks after the conclusion of the criminal proceeding. Plaintiff contends that forged checks in the amount of at least $81,500.00 were made payable to LLA, and were subsequently cashed by LLA. Plaintiff maintains that "LLA has never accounted for or returned any of these fraudulent checks." Yu Affidavit, ¶ 14. It alleges that none of the forged checks made payable to LLA correspond to any legitimate invoices over that five-year period.

Cheung's Status as a CPA:

Although Cheung had advised Lederer around 1991 that he had passed his CPA exam, Cheung never passed the CPA exam. In 2000, Cheung was asked to be a partner of LLA and signed an operating agreement stating such. His name was listed as a partner on the LLA letterhead. Shortly after signing the agreement, Cheung allegedly advised Lederer that Cheung did not want to become a partner and that he was thinking about moving to Arizona. Cheung stated that he could not find the documents indicating that he was licensed in the State of New York, which was a requirement of becoming a partner. Lederer testified that, after the conversation

with Cheung, LLA changed his status back to employee. Cheung's name was then removed from the letterhead as partner. Lederer did not pressure Cheung to produce the documents because he considered LLA "trusting people." (Exhibit "I" to moving papers; Lederer June 2, 2009 deposition, transcript page 30.

In 2002, when LLA moved to New Jersey, Cheung provided LLA with a counterfeit registration certificate stating that Cheung was a registered accountant. Plaintiff states that it was never informed that Cheung was removed as a partner. At all times during Cheung's employment, the LLA letterhead and LLA business cards indicated that Cheung was a CPA.

Plaintiff filed a second amended complaint on February 4, 2010, seeking compensatory damages against LLA in the amount of $220,133.77, which allegedly represents interest on the amount stolen by Cheung and the difference between the amounts stolen and the amounts paid back in restitution. Five causes of action are brought against Cheung and LLA for conversion, fraud, wrongful retention of stolen monies, unlawful enrichment and breach of fiduciary duty. The sixth cause of action is against LLA for negligent retention and hiring of Cheung. Plaintiff also seeks punitive damages from defendants in the amount of at least $ 1.5 million.

ARGUMENTS

LLA argues that this action must be dismissed because: (1) LLA

is not liable for any of Cheung's actions under the doctrine of respondeat superior, since Cheung's wrongful acts were not committed within the scope of his employment; (2) although Cheung was given access to this software, Cheung was never authorized to print checks without Yu's approval and supervision; (3) the handling money, either directly or with authority from plaintiff's checking accounts, was never part of his job responsibilities to plaintiff; (4) LLA was unaware of Cheung's fraudulent behavior and (5) the cause of action grounded in negligent hiring and retention of Cheung must be dismissed since this alleged negligence was not the proximate cause of plaintiff's injuries.

Plaintiff maintains that dismissal of the complaint at this juncture is without merit because there are sufficient factual disputes between the parties to warrant a trial.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'"

People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997)

The doctrine of respondeat superior holds that an employer is "vicariously liable for torts committed by an employee acting with the scope of his/her employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment [internal quotation marks and citation omitted]." *Schilt v New York City Transit Authority*, 304 AD2d 189, 193 (1st Dept 2003).

> The determination of whether the doctrine applies depends upon the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated [internal quotation marks and citation omitted].

Ramos v Jake Realty Co., 21 AD3d 744, 745 (1st Dept 2005).

LLA contends that it has no respondeat superior liability for Cheung's acts since he committed them for personal reasons, and not

in furtherance of LLA's business. LLA also alleges that Cheung did not need to have access to plaintiff's money for the scope of his employment. It continues that only plaintiff was authorized to write checks on plaintiff's behalf and that Cheung's access to the computer system was purely due to the computer work he provided for plaintiff outside of his responsibilities as an accountant. LLA contends that Cheung only had physical proximity to the check-writing software and that this is not the same as "access" to plaintiff's funds.

Plaintiff alleges that Cheung's wrongful acts were performed during the scope of his employment. Plaintiff asserts that Cheung specifically required access to the check-writing software to be able to prepare financial statements and reconcile bank statements for plaintiff. Cheung testified that his knowledge of designing the plaintiff's computer system did not assist him with stealing checks. He stated, "[b]ecause forging checks, designing a server is two different things." LLA's Exhibit H, Cheung TR, at 162.

Plaintiff purports that LLA cashed fraudulent checks and retained these funds, which did not correspond to any services or invoices provided by LLA. As such, these funds would not be solely for personal motives, since LLA has benefitted from the fraudulent transactions. Although LLA claims that the criminal proceeding satisfied all of the amount stolen by Cheung, LLA has not offered any response in its papers regarding these specific allegations.

Determining whether or not a particular act falls within the scope of employment varies based on facts and circumstances of each case and the applicability of respondeat superior is "normally left to the trier of fact." *Schilt v New York City Transit Authority*, 304 AD2d at 193. Also, the court has held that "summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits." *Brunetti v Musallam*, 11 AD3d 280, 280 (1st Dept 2004).

Applying the above principles to the case at hand, LLA's motion for summary judgment must be denied because there is a triable issue of fact as to whether Cheung's requirement to utilize the check writing software was within the scope of his accounting services. LLA does not deny that Cheung was employed as a CPA in their firm until November 2006. Its records reflect that it was billing out Cheung's accounting services to plaintiff at a hourly rate for various accounting and tax preparation services. Cheung was undisputedly working on behalf of LLA, as LLA was listed as the preparer on the federal and state tax forms and also sent invoices on LLA letterhead directly to plaintiff. Cheung himself testified that he did not need the knowledge from designing a computer system in order to forge the checks.

Furthermore, "[i]t is certainly foreseeable that an agent entrusted with significant sums of money might convert such funds

to his [or her] own use [internal quotation marks and citation omitted]." *Holmes v Gary Goldberg & Company, Inc.*, 40 AD3d 1033, 1034-1035 (2d Dept 2007). Although LLA contends that Cheung's job responsibilities did not include handling large sums of money, it is evident that, as an accountant for multiple entities and properties, he was entrusted with sensitive financial information and the ability to input tax payments into the computer system so that a check could be generated. Accordingly, it could be foreseeable that Cheung might convert some of the plaintiff's funds for his own use.

Plaintiff recently amended its complaint to add the sixth cause of action claiming that LLA was negligent in the hiring and retention of Cheung. In an order dated March 3, 2010, this court granted plaintiff's request to amend its complaint and noted that LLA's claim that the amendment should not be granted is without merit because "the parties dispute the facts surrounding such cause of action for negligent hiring/retention (e.g. there is a factual dispute re: whether or not LLA took steps to verify that Cheung was a CPA)." Plaintiff's Exhibit A.

A claim for negligent supervision or retention arises when an employer places an employee "in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee."

Sheila C. v Povich, 11 AD3d 120, 129 (1st Dept 2004).

LLA did not investigate whether Cheung passed his CPA exam before it initially hired him. Cheung was LLA's employee and was sent by LLA to perform accounting services on behalf of LLA, for plaintiff. Had LLA performed a basic background check, plaintiff's injuries may never have occurred.

"An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." *Id.* at 129-130.

In 2000, after Cheung initially signed a partnership agreement, he asked to be removed as a partner since, among other things, he could not provide documentation that he was licensed as a CPA to work in New York. At that time, LLA did not follow up with any sort of investigation, and allowed Cheung to remain as an employee. Although, as LLA argues, Cheung did not have the propensity to steal money from clients, as far as it knew, Cheung did have a record of not being able to provide relevant documentation that he had even passed his CPA exam or was licensed as a CPA in the state of New York. Accordingly, as the court already noted on March 3, 2010, a triable issue of fact exists which regard to whether LLA was negligent in the hiring and retention of Cheung.

Since there are triable issues of fact as to whether LLA can

be held vicariously liable for Cheung's acts under the doctrine of respondeat superior, and whether LLA was negligent in the hiring and retention of Cheung, LLA's motion for summary judgment is denied in its entirety. Accordingly, it is

ORDERED that the motion of defendant Lederer, Levine & Associates, L.L.C. for summary judgment is denied, in its entirety; and it is further

ORDERED, that the parties appear for their scheduled Mediation on September 22, 2010.

DATED: 9/10/10

E N T E R:

Hon. Joan M. Kenney

J.S.C.