

**Pitchford Semerdjian, LLP v Salgado**

2006 NY Slip Op 30816(U)

September 6, 2006

Supreme Court, New York County

Docket Number: 116417/05

Judge: Rolando T. Acosta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

8

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 61**

Pitchford Semerdjian, LLP and David L.  
Pitchford,

Plaintiff,

– against –

Stacey E. Salgado and James McPartland,

Defendants.

**DECISION/ORDER**

Index No. 116417/05

Motion Seq. 3

**Present:**

**Hon. Rolando T. Acosta**  
Supreme Court Justice

The following documents were considered in reviewing defendants' motion to dismiss:

**Papers**

**Numbered**

**Notice of Motion, Affirmation In Support**

**1, 2 (Ex. A-D)**

**Affirmation In Opposition**

**FILED**

SEP 19 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs commenced an action again its former employee, defendant Stacey Salgado ("Salgado"), on the grounds that Salgado made fraudulent misrepresentations of material facts to plaintiffs which she knew to be false at the

time of her hiring (first cause of action), that Salgado was negligent in carrying out her duties as an attorneys' assistant (second cause of action), Salgado acted with gross negligence and willful misconduct during her employment (third cause of action), Salgado breached her duty of loyalty to her employer (fourth cause of action), Salgado was unjustly enriched by plaintiffs (fifth cause of action).

Plaintiffs also seek to impress a constructive trust upon all or part of the monies plaintiffs are seeking restitution which may be in the possession of defendant James McPartland ("McPartland").

Defendants in turn bring the present motion seeking to dismiss the complaint in its entirety on the grounds that plaintiffs have failed to state a cause of action. In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1<sup>st</sup> Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if "from [the]four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1<sup>st</sup> Dept 1998)("so liberal is th[is] . . . standard that the test is

simply ‘whether the pleading has a cause of action,’ not even ‘whether he has stated one’”).

Plaintiff has adequately pleaded a cause of action for fraud, deceit, and misrepresentation in alleging that plaintiffs reasonably relied on plaintiffs misrepresentations of her previous legal employments to their detriment. Specifically, plaintiff allege that Salgado made misrepresentations as to her work performance, work history, and reasons for her termination from previous employment. Plaintiffs further allege that they relied on such misrepresentations by Salgado and hired her as an attorneys’ assistant to their detriment. Thus, plaintiff have adequately pleaded a claim of fraud. See Van Kleeck v. Hammond, 25 A.D.3d 941 (3<sup>rd</sup> Dept. 2006).

Plaintiffs have also stated a cause of action for the breach of the duty of loyalty on the part of defendant Salgado. That is, plaintiffs have alleged that Salgado disloyally neglected her work on behalf of plaintiffs by engaging in activities such as, but not limited to, seeking other employment during working hours, shopping online, and making incessant personal phone calls. See Great American Trucking v. Swiech, 267 A.D.2d 1068 (4<sup>th</sup> Dept. 1999) ( an employee can breach his duty of loyalty to his employer by lessening his work on behalf of the employer).

Plaintiffs have also validly stated a cause of action for the imposition of a constructive trust upon all or part of the monies of which they seek restitution which may be in the possession of defendant McPartland. The purpose of the imposition of a constructive trust is to prevent unjust enrichment, precisely what plaintiffs are claiming. Matter of Estate of Knappen, 237 A.D.2d 677 (3<sup>rd</sup> Dept. 1997). Thus, a constructive trust will enable plaintiffs to “satisfy demands of justice” or a judgment they may be entitled to which may be in the possession of defendant McPartland, who plaintiffs have alleged lives with Salgado and raises their child together, and co-mingled his income, accounts, and finances with that of defendant Salgado. It is of no moment that McPartland is not guilty of any of the misconduct alleged by plaintiffs. The unjust enrichment “does not require the performance of any wrongful act by the one enriched.” Simonds v. Simonds, 380 N.E.2d 189, 194 (1978). All that is necessary is that the person hold the property “under such circumstances that in equity and good conscience he ought not to retain it.” Simonds at 194 citing Miller v. Schloss, 113 N.E. 337, 339 (1916).

Defendant’s motion to dismiss the second cause of action (negligence) and the third cause of action (gross negligence) is granted inasmuch as “under New York law employers may not assert a claim for damages against an employee for the employee’s alleged negligent acts, or sue employees for lost profits caused by

alleged poor performance.” Burke v. Steinman, 2004WL 1117891 (S.D.N.Y. 2004) citing Guepet v. International Tao Sys. Inc., 443 N.Y.S.2d 321 (N.Y.Sup.Ct. 1981).

Finally, defendants’ motion to dismiss plaintiffs’ cause of action for punitive damages is moot inasmuch as punitive damages do not “constitute a separate cause of action distinct from the substantive cause upon which it is grounded.” 1443 York Avenue Realty Co. v. Ronning, 2006 WL 2032436 (1<sup>st</sup> Dept. 2006). That is, punitive damages will be awarded to the plaintiffs only if it is determined that the conduct by which the plaintiff was aggrieved was so egregious and targeted at the public at large that it warrants damages above and beyond the compensatory damages ordinarily available to a party. See Rocanova v. Equitable Life Assoc. Soc., 83 N.Y. 2d 603(1994). Accordingly, based upon the foregoing it is hereby

ORDERED that defendants’ motion to dismiss the first (fraud), fourth (breach of the duty of loyalty), fifth (unjust enrichment), and sixth (constructive trust) causes of action is GRANTED; and it is further

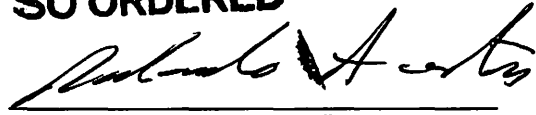
ORDERED that defendants’ motion to dismiss the second (negligence) and third (gross negligence) causes of action is DENIED.

This constitutes the Decision and Order of the Court.

Dated: September 6, 2006

ENTER

**SO ORDERED**



**ROLANDO T. ACOSTA**  
Rolando T. Acosta, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

To: Kaiser Saurborn & Mair, P.C.  
Attorneys for Defendants  
20 Exchange Place  
New York, New York 10005  
(212) 338-9100

David L. Pitchford, Esq.  
Pitchford Semerdjian, LLP  
444 Madison Avenue  
New York, New York 10022  
(212) 755-5885

**FILED**  
SEP 19 2006  
COUNTY CLERK'S OFFICE  
NEW YORK