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

PRESENT: SHIRLEY WERNER KORNREICH Justice J.S.C. PART 54

Index Number : 603582/2004
WOODIE, PHILLIP R.
vs
AZTECA INTERNATIONAL
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/11/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for amended

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... A/Modified	1
Answering Affidavits — Exhibits	
Replying Affidavits 4 papers on Motion Sequence 006 & 008	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
APR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/6/07

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PHILLIP R. WOODIE

Plaintiff,

Index No.: 603582/04

DECISION and ORDER

-against-

AZTECA INTERNATIONAL CORPORATION, d/b/a AZTECA AMERICA; LUIS J. ECHARTE, Individually and as CEO of AZTECA AMERICA; JORGE JAIDAR, individually and as Chief Operating Officer, AZTECA AMERICA; TV ASTECA, S.A. de C.V.; MARIO SAN ROMAN, COO of TV AZTECA, S.A. de C.V.,

Defendants,

----------X

KORNREICH, SHIRLEY WERNER, J.:

Motion sequences 006 and 008 are hereby consolidated for disposition.

The Motions before the Court

Defendants move for summary judgment dismissing the plaintiff's claims for: 1) employment discrimination under the New York City and State Human Rights Laws;[1] 2) misappropriation of trade secrets; and 3) conversion. Defendants also move to strike portions of the affidavit of Gladys Ruiz-Abreu ("Abreu"), sworn to on October 26, 2006 ("Abreu Affidavit), submitted by plaintiff in opposition to defendants' summary judgment motion, on the ground that it contains hearsay.

[1]New York State Executive Law § 296 et. seq. and New York Administrative Code § 8-107 et. seq.

Facts

On May 15, 2002, plaintiff, Phillip R. Woodie, a Caucasian American, was hired by defendant Azteca International Corporation to be president of sales and marketing of television advertising time. Plaintiff was hired at a fixed annual salary of $600,000. Azteca International ("Azteca America") is a wholly owned subsidiary of defendant Azteca TV, a Mexican corporation ("Azteca Mexico"). Azteca America operates the Azteca America Network, a Spanish language television broadcast network focused n the Hispanic television market in the United States.

Defendant Mario San Roman, Azteca Mexico's COO ("San Roman")[2], testified that he decided to hire plaintiff in consultation with defendant Luis J. Echarte ("Echarte"), who was then the CEO of Azteca America. Echarte testified that plaintiff was hired by San Roman and Gustavo Guzman ("Guzman"), director of sales for Azteca Mexico. At the time that plaintiff was hired, Azteca America had little sales or marketing infrastructure in the U.S., and was controlled primarily from Azteca Mexico's offices in Mexico City. Defendants' Verified Answer, ¶25 admits that plaintiff reported directly or indirectly to Echarte, San Roman, Guzman and Vincente Laliere ("Laliere"). Laliere reported to Guzman. Plaintiff, however, states that he was also supervised by Jorge Jaidar ("Jaidar"), then COO of Azteca America. All of the aforementioned executives are Hispanic and Mexican, with the exception of Jaidar, who is Hispanic and Cuban.

Azteca America terminated plaintiff's employment on October 31, 2003, approximately a year and a half after he was hired, allegedly due to poor performance. Specifically, defendants allege that plaintiff failed to meet sales projection targets. San Roman testified that he made the

[2]San Roman testified at his EBT, pp. 8-9, that he was COO of Azteca Mexico until 2003, when he became its CEO.

termination decision in consultation with Jaidar and Laliere, who was plaintiff's immediate supervisor up until May of 2003, when San Roman took over the supervisory role. Although San Roman had stated that plaintiff and Jaidar were responsible for sales targets, Jaidar, a Cuban Hispanic, was retained when the goal was not met. Plaintifff was replaced by an Hispanic from Mexico, Carlos de la Garza, who had previously sold advertising time for Azteca Mexico. De la Garza was hired at a considerably smaller salary, part of which was based on commission.

Azteca America had no advertising revenue during the period of May 2002 to September 2002. The sales total for the final three months of 2002 was $64,000. On March 31, 2003, Laliere wrote to plaintiff saying that "sales have been disappointing." On July 8 and July 16, 2003, San Roman wrote to plaintiff and Jaidar stating that they were both responsible for sales targets and that he [San Roman] would not accept less than 7.75 million in advertising revenue for 2003. On October 31, 2003, Azteca America projected $8,286,566 in revenue from the May 2003 Upfront, an event for prospective advertisers, which plaintiff had organized.

Plaintiff's supplemental affidavit states that he realized $6,000,000 in sales in the first nine months of 2003 and had in place commitments for sales of between $7 million to $9 million to be realized through commercials airing October 1, 2003 through December 31, 2004. Plaintiff alleges that defendants sabotaged his efforts. He claims that the sales targets were unrealistic goals set in July of 2003, shortly before he was fired. He complains that Azteca America sabotaged his sales performance by: 1) failing to change its programming to appeal to the American market; 2) failing to increase the broadcast coverage area of the station; 3) not disclosing until after plaintiff was hired that he would be prohibited from selling in three major Hispanic markets; and 4) by not disclosing at the time plaintiff was hired that there was a pending legal dispute between Azteca Mexico and "Echostar," a satellite broadcasting company,

in which Echostar was claiming exclusive rights to broadcast all Azteca Mexico programs in the United States. Defendants counter that plaintiff wrote e-mails on November 10, 2002 and January 8, 2003, in which he set sales targets from 14.5 to 16 million.

Plaintiff correctly points out that the sales he projected were based explicitly on assumptions that the Echostar problem would be resolved, that Azteca America would have a ratings history to show advertisers for its May 2003 Upfront event ("Upfront"), that it would have 60-75% broadcast coverage of the U.S. Hispanic market, and that it had the Los Angeles, San Francisco and Houston markets. Plaintiff also produced evidence that he requested additional sales help, computer software and Nielsen ratings throughout his tenure, which he needed to generate sales. It is undisputed that shortly after he was fired, plaintiff's replacement, Mr. de la Garza, was provided with all three, although his new salespersons were paid on a commission basis. Defendants point out that in June 2003, San Roman wrote to plaintiff that he could hire additional sales help on a commission basis. It appears from the evidence submitted that plaintiff felt that it would not be possible to attract talented sales help on a commission basis before Azteca America had an earnings record.

Plaintiff submits evidence of other incidents to support his contention that his race and/or ethnicity was the true motive for his termination. After being hired, plaintiff sent a thank you email to Ricardo Salinas, then CEO of Azteca Mexico, who had interviewed plaintiff in Mexico City. Echarte allegedly approached plaintiff to caution him that Guzman had said that "he objected to some 'gringo' sending emails to Ricardo [Salinas]." Woodie EBT, p. 9.[3] In his deposition, Mr. Echarte claimed he "did not recall" the exchange, but did not deny its

[3]"Gringo" is a term sometimes used by citizens of Latin American nations as a derogatory reference to foreigners, especially United States nationals.

occurrence. Echarte EBT, pp. 34–36. In July 2004, around nine months after his dismissal, plaintiff employed a reference-checking service. In its report of October 28, 2004, the service reported that Echarte allegedly gave the following explanation for plaintiff's departure:

> It was a cultural problem—he didn't speak Spanish. There was a conflict of culture. We were a start-up company in America but between the language and culture it made it difficult for him to handle. The communication wasn't there. The person who took over his position [de la Garza] made things run a little smoother than [plaintiff]. It was a mutual agreement for him to leave.

Affirmation of Melvyn R. Leventhal, Ex. 5. In addition, Echarte allegedly gave plaintiff a rating of 5 for oral communication, 3+ for written communication, and 4 for overall performance, on a scale of one to five, where 3 was "satisfactory," 4 was "good" and 5 was "outstanding." Echarte reportedly said, "Yes, sure," when asked if he could recommend plaintiff. In describing plaintiff's strengths, Echarte allegedly said "good salesman" and "fairly good contacts with advertisers." *Id.* The "good salesman" reference directly contradicts defendants' reason for plaintiff's termination. Echarte's language and culture comment to the reference checker conflicts with his deposition testimony that it wasn't a problem that plaintiff did not speak Spanish. Echarte EBT, p. 30.

Defendants maintain that Echarte was not a manager with authority to give a reference for plaintiff and that the "culture" reference was referring to the business culture, including paying sales persons on a commission basis and not incurring expenses before there were profits.

The facts relating to plaintiff's claim for misappropriation of trade secrets involves a contact list. The complaint and plaintiff's deposition testimony contain differing accounts of how the list was created. Plaintiff claims that he built the list over the course of twenty years, beginning with his first job after college graduation at WSOC, a television station in Charlotte, North Carolina. Plaintiff testified that during subsequent employment, including at ABC and

Univision, the leading Hispanic television network, he would update his list using information on business cards he was given by his contacts. He claimed that the list eventually was put into electronic form. During his deposition, when asked whether his list ever included telephone numbers or email addresses of these contacts, he responded, "I have phone numbers and e-mail addresses that have been added . . . on a Palm Pilot." Phillips EBT, p. 93. In his verified complaint, plaintiff averred that he had two copies of the list, a hard copy and a copy on a computer disk, which he kept at home in a "secure location."

Initially, plaintiff testified at his deposition that his list was Exhibit 3. Later, he completed an errata sheet to which he attached Exhibit 31, stating that it was his list. The evidence is undisputed that Exhibit 3 is Univision's 2003 upfront mailing list ("Univision List"), which plaintiff was given by Judith Kenny, a friend who worked for Univision. Ms. Kenny confirmed that she gave the list to plaintiff to help him prepare for Aztec America's Upfront program. Plaintiff testified that he photocopied the Univision List in order to remove Univision's name at the top of each page and then accidently mistook it for his list when he produced it in discovery. He also testified that he misplaced the electronic copy he kept at home during a move. Ms. Kenny testified that she willingly gave the Univision List to plaintiff because the information on it was of the sort anyone could have acquired and because she expected plaintiff to have most of the names anyway. She staed that she gave the list to plaintiff so he could "find a couple of names that . . . he forgot or that he didn't put down." Kenny EBT, pp. 55–57 & 39–42.

A comparison of plaintiff's list with the Univision List reveals substantial overlap. Plaintiff's list features about 2,400 names of contacts, alphabetized according to the contact's employer's name. For each name, the person's employer is indicated, the person's job title is

specified, and the person's mailing address is given. No telephone numbers or email addresses appear on the list. This format is nearly identical to that of the Univision List. Many of the contact names on plaintiff's list appear precisely as featured on the Univision List.

Plaintiff's assistant at Azteca America, Abreu, provided plaintiff with clerical support while he was employed there. Abreu's affidavit avers that plaintiff furnished a hard copy of his list to her in 2003 for the purpose of preparing an invitation list for Azteca America's May 2003 Upfront. She claims that Jaidar and Laliere each contacted her around this time, asking her to send a copy of the list to them. Her affidavit states that she prepared a computerized mailing list culling information from highlighted markings made by plaintiff on Exhibit 31, put it on a CD and, with plaintiff's permission, sent it to Jaidar and Laliere at Azteca Mexico for the creation of mailing labels for the Upfront. Plaintiff testified that the list was prepared on Azteca America's computer and he did not know whether it remained there after Abreu prepared the mailing list. Plaintiff's EBT, pp. 493-494.

Defendants allegedly promised that the list would be kept confidential and returned. Plaintiff's testimony and Abreu's affidavit state that the disk has not been returned, despite their requests. Plaintiff's supplemental affidavit states that Azteca America's 2004 upfront list is his list with a few additions.

Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make such a *prima*

facie showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Discrimination Claim

The New York State and New York City Human Rights Laws declare it an unlawful discriminatory practice for an employer to discharge an individual from employment or to discriminate in "compensation or in terms, conditions or privileges of employment" on the basis of race or national origin. Executive Law, Section 296(1)(a); N.Y.C. Administrative Code § 8-107(1)(a). The standards for recovery under the New York City and New York State Human Rights Laws are in accord with Federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.). *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629 (1997); *Shah v. Wilco Sys., Inc.*, 2005 NY Slip Op 10232, 6 (1st Dept. 2005), *affirmed, Shah v. Wilco Sys.*, 76 Fed. Appx. 383 (2d Cir. 2003).

A plaintiff has the initial burden of establishing, by a preponderance of the evidence, a *prima facie* case of racial discrimination in employment. *Id.* To meet this burden, plaintiff must show that (1) he is a member of a protected class, (2) he was qualified to hold the position, (3) he

was terminated from employment or suffered other adverse employment action, and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Bailey v. New York Westchester Sq. Med. Ctr.*, 2007 NY Slip Op 99, 3 (1st Dept.. 2007), *citing Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004).

If the plaintiff meets this burden, the employer must produce evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *St. Mary's Honor Ctr. v Hicks*, 509 U.S. 502 (1993). If the employer produces such evidence, plaintiff must then show that the proffered reason was merely a pretext for discrimination by demonstrating "both that the reason was false, and that the discrimination was the real reason." *Dickerson v. Health Mgmt. Corp. of Am.*, 21 A.D.3d 326, 328 (1st Dept. 2005). The evidence used on plaintiff's *prima facie* case remains relevant to a consideration of whether the defendant's reason was a pretext for discrimination. *Ferrante v. American Lung Assoc.*, 230 A.D.2d 685 (1st Dept. 1996).

However, summary judgment may not be granted simply because the court believes that the plaintiff will be unable to meet his or her burden of persuasion at trial. *Danzer v. Norden Sys.*, 151 F.3d 50, 54 (2d Cir. 1998). There must either be a lack of evidence in support of the plaintiff's position, or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error. *Id.* Once a plaintiff has established a *prima facie* showing of discrimination, a plaintiff "need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Ferrante v. American Lung Assoc.*, 230 A.D.2d 685 (1st Dept. 1996).

Defendants concede that plaintiff has established the first three factors of his *prima facie* case. Defendant's Memorandum of law, p. 18. The Court need only address the fourth factor, which only requires a low threshold of proof. The fourth factor can be satisfied "merely from the

fact that the position was filled by a person not in the same protected class. *Sogg v. American Airlines*, 193 A.D.2d 153, 156–57 (1st Dept. 1993). An inference of discrimination can also arise from evidence that the employer creates poor performance by denying an employee funding needed to succeed. *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 55-56 (3d Cir. 1998). In this case, plaintiff has produced sufficient evidence to warrant an inference of discrimination by virtue of his replacement by Carlos de la Garza, a Mexican Hispanic. In addition, plaintiff presents other evidence that, if believed by a jury, would support an inference of discrimination, including, but not limited to, the sales help, computer program and Nielsen ratings given to de la Garza but denied plaintiff, the fact that Jaidar was retained when plaintiff was let go after San Ramon said he was holding them both responsible for meeting sales targets, and the "gringo" and "language and culture" comments. The reference given by Echarte that plaintiff was a good salesperson further buttresses the inference that the reason for plaintiff's termination was false.

Defendants argue that the "gringo" and "language and culture" comments are just stray remarks, because Echarte did not supervise plaintiff, or was not a decision maker. However, discriminatory remarks should be considered in light of the totality of the evidence, including whether they are made by someone with great influence in the decision-making process. *Tomassi v. Insignia Financial Corp.*, 478 F.3d 111 (2d Cir. 2007). Here, Echarte was the CEO of Azteca America and, according to defendants' own witnesses, Echarte or Guzman were involved in the process of hiring plaintiff and Guzman was the top supervisor of sales to whom plaintiff reported indirectly. If plaintiff is believed, Echarte took it upon himself to repeat Guzman's "gringo" remark to plaintiff. Moreover, the remarks must be considered in light of plaintiff's replacement by a Mexican Hispanic, who was given resources that plaintiff was denied, and the failure to dismiss a Cuban Hispanic, who, like plaintiff, was held responsible for, but did not meet, sales

expectations. The explanation of the culture remark as referring to business practices merely creates an issue of fact for the jury.

Defendants cite *Schwaller v. Squire Sanders & Dempsey,* 249 A.D.2d 195 (1st Dept. 1998) and *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 528-529 (3d Cir. 1992) for the proposition that a positive evaluation does not create an inference of discrimination. However, these cases hold that general positive evaluations unrelated to the skill or characteristic that the employer uses to justify an adverse action do not lead to an inference of discrimination. The cases relied upon stand for the proposition that an inference of discrimination can be made where the same skills praised in an evaluation close to the time of the adverse action are the asserted justification for the adverse action. *Id.*; *see also, Ferrante v. American Lung Assoc., supra,* 230 A.D.2d at 686 (1st Dept. 1996). In this case, after plaintiff was fired for poor sales performance, Echarte allegedly said that plaintiff was a good salesman.

Defendants also argue that there is a strong presumption negating intent to discriminate when one management-level employee played a substantial role in both the hiring and firing of the plaintiff in less than a two year period. *See, Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137-138 (2d Cir. 2000) and cases cited therein; *Thomas v. iStar Fin., Inc.*, 438 F. Supp. 2d 348, 361 (D.N.Y. 2006). While this a correct statement of the law, a presumption can be rebutted by evidence. On a summary judgment motion, where plaintiff does present countervailing evidence of discrimination, as he has done on this record, it remains for the trier of fact to weigh the evidence in light of the court's instruction regarding the presumption.

Finally, defendants posit that the inference of discrimination is rebutted because there are other Caucasians in their employ. However, it is not necessary for plaintiff to show that all other members of the class were discriminated against as well. *Sogg v. American Airlines, Inc., supra.*

Misappropriation of Trade Secrets

The Court of Appeals has adopted the definition of trade secret found in the Restatement of Torts, i.e., "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Ashland Management v. Janien,* 82 N.Y.2d 395, 407 (1993) citing Restatement of Torts, § 757, comment b. *Accord Marietta Corp. v. Fairhurst,* 301 A.D.2d 734 (3rd Dept. 2003). The Restatement sets forth the factors that should be considered in evaluating whether something is a trade secret:

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. (Restatement of Torts § 757, comment b).

A plaintiff claiming misappropriation of a trade secret must prove: (1) he possessed a trade secret, and (2) that defendant is using it in breach of an agreement, confidence, or duty, or as a result of discovery by improper means. *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.,* 920 F.2d 171, 173 (2d Cir., 1990) (citations omitted). A customer list will be treated as a trade secret where the names and addresses of the customers are not known in the trade or can be obtained only through extraordinary effort." *See Stanley Tulchin Assoc., Inc. v. Vignola,* 186 A.D.2d 183, (2nd Dept. 1992); *McLaughlin, Piven, Vogel, Inc. v. W. J. Nolan & Co.,* 114 A.D.2d 165, 174 (2nd Dept. 1986). "This is especially so where the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money." *Leo Silfen, Inc. v. Cream,* 29 N.Y.2d 387, 393 (1972). For a a customer list to qualify as a trade secret, the plaintiff must show that he employed precautionary measures to preserve the

secrecy of the list. *See, e.g., Precision Concepts, Inc. v. Bonsanti,* 172 A.D.2d 737 (2nd Dept. 1991). Moreover, there must be a showing that the trade secret was improperly used by the offending party. *Falconwood Corp. v. In-Touch Techs.,* 227 A.D.2d 215, 216 (1st Dept. 1996). Where an alleged trade secret is not secured, left accesssible, inadvertently disclosed, or capable of recreation due to a partial public release, the lack of secrecy vitiates trade secret status. *Ashland Mgt. v Janien*, 82 NY2d 395, 407 (1993)(financial analyst could, based on the public disclosures, reproduce calculations without access to the internal computer commands); *Downtown Women's Ctr. v. Carron*, 237 A.D.2d 209, 209-210 (1st Dept. 1997)(information left on computer); *Frederic M. Reed & Co. v. Irvine Realty Group*, 281 A.D.2d 352, 353 (1st Dept. 2001)(customer list scattered throughout office in unlocked files); *Defiance Button Mach. Co. v C & C Metal Prods. Corp.*, 759 F2d 1053 (2d Cir. 1985), cert denied 474 U.S. 844 (1985)(alleged trade secret inadvertently left on computer after business sold).

In this case, plaintiff testified that portions of Exhibit 31 were input into an office computer at his direction and that he did not know whether they were erased. There is no other evidence to prove that the information was removed from the Azteca America computer at any point in time. Plaintiff admitted at his deposition that he was not forced to give defendants the list and that he did agree to send the CD to Mexico City. Accordingly, based upon plaintiff's own admissions, he did not keep the list secret and the list was not taken without his permission. Furthermore, defendants correctly point out that based on R.S.V.P. responses, they had independent access to the list of customers who attended Azteca America's May 2003 Upfront. Therefore, as in *Ashland Mgt. v Janien, supra,* plaintiff gave defendants the ability to recreate at least part of the list.

Morever, a question of fact cannot be created by contradicting one's prior sworn statements. *Phillips v. Bronx Lebanon Hospital,* 268 A.D.2d 318 (1st Dept. 2000)(no issue of fact

created by affidavits of plaintiff and her relatives that contradicted plaintiff's deposition testimony); *Kistoov v. City of NY*, 195 A.D.2d 403 (1st Dept. 1993)(error to rely on plaintiff's affidavit that contradicted her prior deposition testimony). Here, plaintiff's claim that Exhibit 31 is his secret customer list is directly contrary to his own deposition testimony that Exhibit 3, which proved to be the Univision List, was his secret customer list. Plaintiff cannot contradict his prior admissions in order to defeat summary judgment. Accordingly, defendants are entitled to summary judgment dismissing plaintiff's claim for misappropriation of a trade secret.

The motion to strike hearsay portions of the Abreu affidavit is denied as moot in light of the determination to dismiss plaintiff's trade secret claim based upon other evidence.

Conversion

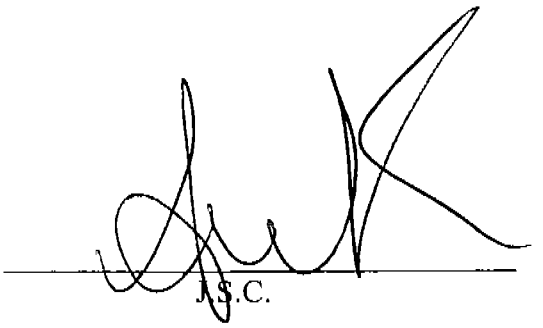
Defendants are also entitled to summary judgment dismissing plaintiff's claim that defendants converted plaintiff's unreimbursed business expenses. Movants are correct that a conversion claim requires a showing that the plaintiff has legal ownership or an immediate right to possession of a specific fund or property. *Kurzman, Karelsen & Frank v. Kaiser,* 283 A.D.2d 330 (1st Dept. 2001); *Soviero v. Carroll Group International, Inc.,* 27 A.D.3d 276 (1st Dept. 2006); *Peters Griffin Woodward, Inc. v. WCSC, Inc.,* 88 A.D.2d 883, 884 (1st Dept. 1982); Castaldi *v. 39 Winfield Assoc.*, 30 A.D.3d 458 (2d Dept. 2006).

Pursuant to its power to correct its prior interlocutory orders during the pendency of an action, *Liss v. Trans Auto Systems*, 68 N.Y.2d 15, 20 (1986), the court hereby modifies its order of July 1, 2005 to the extent that it held that plaintiff had stated a cause of action for conversion. Plaintiff's claim for unreimbursed business expenses cannot be the basis for a conversion claim because the money allegedly owed is not a specific fund. Therefore, the claim must be dismissed. Accordingly, it is

ORDERED that the motion of defendants for summary judgment dismissing the first, third and fifth causes of action in plaintiff's amended complaint is granted to the extent that plaintiff's third cause of action for conversion and the portion of his fifth cause of action for misappropriation of trade secrets are dismissed, and the motion with respect to the first cause of action for employment discrimination is denied; and it is further

ORDERED that the motion to strike hearsay portions of the affidavit of Gladys Ruiz-Abreu is denied as moot.

Dated: April 6, 2007



J.S.C.