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

PRESENT: Hon Joan B. Madden Justice

PART 11

Index Number : 101972/2010

NYP HOLDINGS, INC.

VS.

CUCCHIARA, CHARLES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 8, 2011

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 11

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NYP HOLDINGS, INC.,

Plaintiff,

Index No.: 101972/10

-against-

CHARLES CUCCHIARA,

Defendant.

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JOAN A. MADDEN, J.:

Plaintiff NYP Holdings, Inc. (plaintiff or the Post) moves, pursuant to CPLR 3212: (1) for summary judgment on its first and second causes of action in the amount of $121,374.84, plus interest and costs; (2) for summary judgment dismissing all of defendant's counterclaims; and (3), pursuant to 22 NYCRR § 130-1.1, for the imposition of sanctions against defendant.

BACKGROUND

According to the complaint, defendant was employed by the Post from July 2001 through December 2007. Motion, Att. Aff., Ex. A. On February 14, 2007, defendant was made an assistant foreman, a position that he held until December of 2007. In December, 2007, defendant began a leave of absence from the Post, from which he has not returned and, since December of 2007, defendant has not worked for, nor provided services to, the Post.

Plaintiff avers that, through a mistake of fact, it inadvertently continued to pay defendant his full weekly salary

from January 2008 through July 2009, despite the fact that defendant was not working for the Post during this period and was, therefore, not entitled to receive a salary.

The complaint alleges that defendant knew that he was wrongfully receiving and retaining this salary in addition to receiving workers' compensation benefits and social security benefits during the same period.

Plaintiff states that it overpaid defendant during this period $171,365.93, which represents gross wages, employer matches to the company's 401K plan, employer FICA contributions and company medicare. Plaintiff has recouped $49,991.09 of the amount that it alleges that it inadvertently overpaid defendant, leaving an amount due of $121,374.84, plus interest. Plaintiff asserts that it has made repeated demands for repayment from defendant, but that defendant has refused to repay the funds. Motion, Ex. 2.

Plaintiff alleges three causes of action: (1) unjust enrichment; (2) recovery of payment made under mistake of fact; and (3) conversion.

Defendant has asserted three counterclaims, which plaintiff maintains are frivolous: (1) conversion; (2) intentional infliction of emotional distress; and (3) negligent infliction of emotional distress.

Plaintiff states that it was able to recoup $49,991.09 of the alleged overpayment by reversing contributions incorrectly made to defendants's 401K account, in the amount of $25,580.32,

and by assisting defendant in applying for retroactive disability benefits, in the amount of $24,410.77, which defendant subsequently endorsed over to the Post.

Plaintiff argues that defendant knew, or should have known, that he was not entitled to receive the overpayments because he was receiving workers' compensation benefits and social security benefits at the same time, thereby receiving well over 100% of his full salary.

In support of its motion, plaintiff has provided the following: (1) copies of the notices and demands for payment sent to defendant (Motion, Ex. 2); (2) a copy of plaintiff's employee handbook detailing the employee benefits offered by the Post (*id.*); (3) the supporting affidavit of Michael Racano (Racano), plaintiff's senior vice-president for finance, who confirms, from his own personal knowledge that defendant was mistakenly paid his full salary for the period in question, and includes a spreadsheet prepared by Racano outlining the alleged overpayments (Motion, Ex. 1); and (4) the affidavit of Amy Scialdone, plaintiff's vice-president of human resources, who affirms, from her own personal knowledge, that defendant is entitled to only one long-term disability plan pursuant to his employment with the Post, and she has attached a copy of defendant's calculated disability benefits.

In opposition to the instant motion, defendant has submitted his affidavit stating the following:

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"1. I have been under the care of a psychiatrist, Dr. Mark DiBuono, since early 2008 for depression relating to work, my disability, my wife's illness and the subsequent death of my wife.
2. I am on various medications for my depression and anxiety which was exacerbated by the behavior of plaintiff in attempting to recoup monies they claimed that I owed to them and the lawsuit brought against me by the plaintiff.
3. My attorney's responses to each and every allegation in the complaint were given to her by me and were not within her own personal knowledge.
4. As a result of my depression and the medications I take, my responses were to the best of my knowledge and belief and as such my attorney responded in like manner.
5. There are issues of fact as to whether I owe the plaintiff for sums that I received from them and my right to receive those funds. I relied upon the Post and their Human Resources Department to pay me the sums that were due and owing to me and their personal knowledge in this area. At no time was I made aware that I may be receiving payments that I was not entitled to until my wife's diagnosis and after the Post had already paid me the sums of money they now claim that I was not entitled to.
6. When I received payment from the Post, it was my belief that I was entitled to those payments since they were privy to my condition and disability but continued to pay me.
7. The Post took money that belonged to me from my 401K plan without notice or entitlement.
8. Plaintiff was aware of my wife's grave condition and continued to harass me during this time. The fact that my wife was terminally ill with cancer did not prevent Plaintiff from harassing me even at her deathbed. Such harassment caused me extreme emotional distress. Such harassment impacted both my wife and me, though I have chosen not to bring a claim on her behalf. My treating psychiatrist is willing to testify to this in relation to my Counterclaims which I wholeheartedly believe in and which I believe are founded in law and therefore should not be dismissed.
As I stated, my treating psychiatrist will attest to my condition and the emotional distress that I felt as a result of the Post's harassment toward me and therefore, I should be given that opportunity by the Court to present evidence of my Counterclaims.
I believe that after the evidence has been presented, the Court will not only see that such Counterclaims are viable,

> but such evidence will show the extreme nature of the harassment and the damages that I have suffered as a direct result."

In addition to the foregoing affidavit, defendant's opposition consists of his attorney's affirmation, which defendant concedes is not made with her personal knowledge. The court notes that the attorney's affirmation alleges various facts not appearing in defendant's affidavit and are not supported by any other evidence submitted with the opposition.

Defendant's answer and counterclaims assert that plaintiff's harassment consisted of making unspecified telephone calls and initiating the instant lawsuit to recoup the funds that plaintiff asserts are due and owing to it. Defendant's counterclaim for conversion is based on plaintiff taking of contributions to defendant's 401K plan mentioned above.

Oral argument was held on this motion on August 19, 2010, at which time defendant's counsel argued that a request for summary judgment is premature because no discovery has yet taken place. For the reasons discussed below, the court finds that based on the record before it, it cannot be said that summary judgment is premature. Significantly, defendant does not deny plaintiff's allegations regarding defendant's receipt of the monies at issue.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That branch of plaintiff's motion seeking summary judgment on its first two causes of action is granted.

The affidavits and other evidence presented by plaintiff establish its prima facie entitlement to the relief sought. In opposition, defendant has failed to come forward with any evidentiary facts in admissible form that create triable issues of fact.

In his affidavit, reproduced verbatim above, defendant does not deny that he received the funds claimed by plaintiff, but merely asserts that he accepted those monies in reliance on plaintiff's knowledge of the amounts that were due and owing to him. Defendant has failed to controverted evidence that he was in any way legally entitled to receive those funds, nor does he so claim.

> "The principle that a party who pays money, under a mistake of fact, to one who is not entitled to it should,

> in equity and good conscience, be permitted to recover it back is longstanding and well recognized and applies even if the mistake is due to the negligence of the payor. The rule has its underpinnings in unjust enrichment and rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another [internal quotation marks and citations omitted]."

Manufacturers Hanover Trust Company v Chemical Bank, 160 AD2d 113, 117 (1st Dept 1990).

There are only two exceptions applicable to this principle: the first occurs if the payee can demonstrate that his position has so changed by reason of the mistaken payment that it would be inequitable to require repayment; and the second, known as the voluntary payment doctrine, bars recovery under circumstances in which the payor voluntarily made overpayments without any mistake. *Kirby McInerney & Squire, LLP v Hall Charne Burce & Olson, S.C.*, 15 AD3d 233 (1st Dept 2005). Neither of these exceptions has been alleged or argued by defendant.

Therefore, based on the foregoing, plaintiff is entitled to recover the amounts mistakenly paid to defendant.

That branch of plaintiff's motion seeking to dismiss defendant's counterclaims is also granted.

Defendant's first counterclaim alleges that plaintiff converted is based on allegations that plaintiff took money belonging to defendant from his 401K pension plan. Plaintiff argues that this counterclaim must be dismissed as the claim is pre-empted by the provisions of the federal Employee Retirement Income Security Act (ERISA). This argument has merit.

"It is well settled that ERISA was designed to have a sweeping preemptive effect in the employee benefit plan field... and that all state laws related to employee benefit plans are preempted." *TAP Electrical Contracting Service, Inc. v. Hartnett*, 207 AD2d 547, 549 (2d Dept 1999)(internal citation and quotation omitted); *see also Eastdil Realty Inc. v. Gallagher*, 152 AD2d 478 (1st Dept 1989)(holding that breach of fiduciary duty claim against chief investment manager of ERISA pension fund was preempted by ERISA); see *generally*, Aetna *Health Inc. v Davila*, 542 US 200 (2004).

In keeping with these principles it has been held that state common law conversion claims involving ERISA funds are preempted by ERISA. *LoPresti v Terwilliger*, 126 F3d 34, 41 (2d Cir 1997)(holding that common law conversion claim must be dismissed as "undoubtedly, ERISA preempts such a claim"); *District 65, UAW v. Harper Row Publishers, Inc.*, 576 F Supp 1468, 1487 (SD NY 1983)(holding that ERISA preempted common law claims, including claim for conversion).

Next, to the extent the first counterclaim alleges an unconstitutional taking of funds, it is not viable as plaintiff is not a governmental entity but a private company. *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 NY2d 152, 157-158 (1978). Accordingly, the first counterclaim must be dismissed.

Defendant's second counterclaim for the intentional infliction of emotional distress is also dismissed, as the

conduct alleged is not so outrageous in character as to go beyond all possible bounds of decency.

> "The cause of action for intentional infliction of emotional distress was properly dismissed as the conduct alleged - faxes and phone calls, including to the individual plaintiff's parents, threatening his arrest and criminal prosecution; instigation of the individual plaintiff's arrest by means of false statements to the police concerning plaintiff's indebtedness to defendant - is not so outrageous as to be utterly intolerable."

Slatkin v Lancer Litho Packaging Corp., 33 AD3d 421, 422 (1st Dept 2006); *Borisovki v Church Avenue Merchants Block Association, Inc.*, 26 Misc 3d 131A, 2010 NY Slip Op 50056(U) (app Term, 1st Dept 2010).

Defendant's third counterclaim for negligent infliction of emotional distress is dismissed as barred by the exclusivity provisions of the Workers' Compensation Law. *Thomas v Northeast Theatre Corp.*, 51 AD3d 588 (1st Dept 2008).

That portion of plaintiff's motion seeking the imposition of sanctions against defendant and his counsel is denied in the exercise of the court's discretion. 22 NYCRR 130-1.1.

Lastly, the court is unpersuaded by defendant's oral argument that plaintiff's motion is premature because discovery has yet to take place. Defendant has failed to provide a proper evidentiary basis supporting his request for discovery. *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 (1st Dept 2006).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the amount of $121,374.84, plus interest from the date of this decision and order at the statutory rate as calculated by the Clerk together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiff's motion seeking to dismiss defendant's counterclaims is granted and defendant's counterclaims are hereby dismissed; and it is further

ORDERED that the portion of plaintiff's motion seeking the imposition of sanctions is denied.

Dated: July 8, 2011

J.S.C.