

Errico v Concepts in Time LLC
2012 NY Slip Op 33803(U)
October 4, 2012
Supreme Court, New York County
Docket Number: 116098/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JAMIE ERRICO,

Plaintiff,

Index No. 116098/10

-against-

DECISION/ORDER

CONCEPTS IN TIME LLC and SAUL JEMAL,
individually,

Defendants.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers

Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3,4
Exhibits.....	5

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Plaintiff commenced the instant action against defendants Concepts in Time LLC ("Concepts") and Saul Jemal ("Mr. Jemal") alleging employment discrimination. Defendants now move for an order dismissing plaintiff's complaint in its entirety due to spoliation of evidence, or in the alternative, directing that an adverse inference be drawn against plaintiff that (1) the reason her employment was terminated had nothing to do with the fact that she is not male and is not Jewish; and (2) plaintiff was a disloyal employee; and (3) that she breached her fiduciary duty to the defendants and misappropriated their trade secrets. For the reasons set forth below, defendants' motion is denied.

The relevant facts are as follows. Plaintiff, a Catholic woman, was hired by Concepts in 2002 as the Vice President of Sales but she did not sign a formal employment contract. Her job duties included running Concepts' watch division, opening new accounts, generating sales and overseeing ordering and shipping, among other duties. On or about August 25, 2006, plaintiff signed an employment contract with defendants, which specified plaintiff's terms of employment as Vice President of Sales. During her employment, plaintiff alleges that she would periodically download Concept's data onto her personal laptop computer and forward important e-mails to her personal e-mail account so that she could access the data and work from home. She alleges that Concepts knew about this practice and employees of Concepts helped her download said information. Further, she alleges that this practice was not prohibited by the employment contract.

Concepts terminated plaintiff from her position on December 12, 2009. After plaintiff's termination, Mr. Jemal allegedly contacted the New York City Police Department ("NYPD") to potentially bring a claim against plaintiff regarding information stored on her laptop computer. As Mr. Jemal failed to follow through on said claim, plaintiff alleges she was told by Detective Lattuga of the NYPD that if she voluntarily wiped her laptop clean, he would rescind Mr. Jemal's right to bring any such claim against her as such claim would thereafter be moot. Plaintiff alleges that her attorney contacted defendants' counsel to let them know she was agreeing to meet with a Concepts representative to witness the wiping of the laptop. However, despite numerous attempts by plaintiff's attorney to set up such a meeting, plaintiff alleges neither defendants nor their attorneys ever responded. Finally, on January 25, 2010, after speaking with NYPD Detective Lattuga, plaintiff had her laptop's hard drive deleted and defragmented, thereby

removing all information in any way related to Concepts from her laptop.

On or about April 30, 2010, Concepts and Mr. Jemal filed a complaint against plaintiff for alleged violations of the Computer Fraud and Abuse Act (“CFAA”). However, this action was thereafter dismissed. In a June 4, 2010 decision by Judge Lewis Kaplan dismissing the complaint, Judge Kaplan found that plaintiff had not breached any laws by downloading information that, by defendants’ own words, “[s]he was permitted to access” and thus, the complaint failed to state a cause of action.

In or around December 2010, plaintiff brought the instant employment discrimination lawsuit against defendants alleging that she was terminated from her job at Concepts based on the fact that she is a woman and not Jewish. Concepts alleges that it terminated plaintiff because she was a disloyal employee who was violating her contractual and fiduciary duties to the company. Specifically, defendants allege that plaintiff informed co-employees and Concepts’ customers that she was going to work for a competitor and she was caught downloading Concepts’ proprietary pricing and customer information onto her personal laptop computer. Concepts alleges that plaintiff later used this information while employed by Concepts’ competitor, Kimaya USA, Inc. (“Kimaya”).

“A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind’; and finally, (3) that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense.” *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept 2012). Under New York law, a party is required

