

**Starlite Media LLC v Pope**

2014 NY Slip Op 30984(U)

April 11, 2014

Supreme Court, New York County

Docket Number: 114163/2010

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 3

-----X  
STARLITE MEDIA LLC,

Plaintiff,

-against-

SUZANNE POPE,

Defendant.  
-----X

Index No. 114163/2010  
Motion Seq. No. 001  
Motion Date: 12/4/2013

**Hon. Eileen Bransten, J.S.C.:**

In motion sequence 001, defendant Suzanne Pope seeks summary judgment, pursuant to CPLR 3212, dismissing all causes of action in plaintiff Starlite Media LLC's ("Starlite") complaint. In addition, Starlite cross-moves, pursuant to CPLR 3212, for summary judgment on Pope's first counterclaim for unpaid commissions. Both motions are opposed. For the reasons that follow, defendant Pope's motion for summary judgment is granted in part and denied in part, while Starlite's cross-motion for summary judgment on the first counterclaim is denied.

**I. Background**

This action arises out of a terminated employment relationship between Plaintiff Pope and Defendant Starlite. After Pope's termination, a dispute arose as to the compensation owed to her for her work as an independent contractor. In addition, the parties disputed Pope's entitlement to commissions after her termination.

Starlite is an advertising company that specializes in reaching consumers at shopping centers and retail stores in the top advertising markets in the United States, using necessity media locations or locations that consumers visit on a daily or weekly basis, such as grocery stores, banks, or pharmacies.

According to the complaint and the parties' moving papers, Starlite hired Pope as an independent contractor in August 2008. As an independent contractor, Pope alleges that her compensation provided for a 15% commission on the total revenue generated by the clients she secured for Starlite, in addition to a \$100,000 salary. However, Starlite contends that Pope's compensation was limited to a 15% commission in addition to a \$100,000 draw. A draw differs from a salary because it must be repaid.

The parties do not dispute that Starlite later hired Pope as a full-time employee in November 2009 and that she was given a salary of \$50,000, plus an annual draw of \$70,000 against earned commissions. In this new position, Pope retained her 15% commission on certain accounts but would receive only a 8% commission on certain other accounts.

On June 15, 2010, Starlite terminated Pope's employment. Upon her termination, a dispute between Pope and Starlite arose with respect to the amount of unpaid commissions that Pope was owed.

On August 12, 2010, Starlite informed Pope that adverse information concerning her performance at Starlite had surfaced and that it was considering withholding or reducing Pope's unpaid commissions based on the time and effort necessary to service her client accounts after her termination. To that extent, Starlite offered Pope \$35,000 to settle the dispute. On August 17, 2010, Pope, through her counsel, declined the offer, and asserted that she was owed \$153,000 in unpaid commissions.

Thereafter, Starlite commenced this action, asserting causes of action based on misrepresentation, fraud and fraud in the inducement, unjust enrichment, prima facie tort, the faithless servant doctrine, and declaratory judgment. Starlite sought damages of \$1 million. On December 3, 2010, Pope answered the complaint and asserted six affirmative defenses and three counterclaims seeking damages for the unpaid commissions, slander, and sanctions.

## II. Analysis

### A. *Summary Judgment Standard*

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (internal quotations omitted). Summary judgment is a drastic remedy and should only be granted where the moving party has demonstrated the absence of any triable issue

of fact through sufficient evidence. *Id.* “The moving party’s failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.* (internal quotations and emphasis omitted). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial.” *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 82 (1st Dep’t 2013). “When deciding a motion for summary judgment, the court’s function is issue finding rather than issue determination.” *Id.*

Pope’s motion seeks summary judgment and dismissal of each cause of action in Starlite’s complaint.

#### B. *Count One - Fraud*

Pope first moves for summary judgment on Starlite’s first claim for fraud. Starlite grounds its fraud claim in the allegation that Pope “made numerous misrepresentations about her advertising sales experience and expertise in the field of outdoor advertising and media” and “did not perform at the level of someone purporting to have such extensive experience.” (Compl. ¶¶ 16, 17.)

To prevail on a claim for fraudulent misrepresentation, Plaintiff must demonstrate “a misrepresentation or a material omission of fact which was false and known to be false

by [Pope], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.”

*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011) (internal quotations and citations omitted).

In support of its claim, Starlite contends that Pope’s failure to provide accurate information regarding the status of the Florida Department of Citrus (“FDC”) account in her internal reports and records to conceal her poor performance, constitutes a material omission of fact that Starlite reasonably relied upon to its detriment.

Specifically, Pope allegedly failed to accurately report the amount of additional advertising revenue that the FDC would be allocating to Starlite on sales forecasts. Pope represented there would be an additional \$325,000 in revenue from the FDC, but Starlite discovered that statement was untrue after Pope’s termination. *See* Affidavit of Robert Rathke in Opposition to Defendant’s Motion for Summary Judgment ¶ 24. Daniel Perez, an employee who took over the FDC account after Pope’s termination, provides in his affidavit that Peter Palmer, the Director of Retail Communications for the FDC, informed Pope, prior to her termination, that no additional funds would be allocated to Starlite for 2010-2011 because the FDC was not satisfied with Pope’s management of the account. *See* Affidavit of Daniel Perez in Opposition to Defendant’s Motion for Summary Judgment ¶¶ 10-11. Palmer further stated to Perez that Starlite’s performance was so

dissatisfactory that it prevented Starlite from obtaining additional business in the region from the FDC. Perez further averred that no additional advertising orders have been placed by the FDC with Starlite since Pope's termination. *Id.* ¶ 21.

Starlite contends that, if Pope had not concealed this information, it would have been able to repair the client relationship; instead her concealment resulted in a loss of business. Furthermore, the evidence indicates that Pope had knowledge of the FDC's dissatisfaction with her before her termination, but failed to inform Starlite.

Pope fails to submit any evidence that would warrant dismissal of this cause of action. Notably, Pope's motion for summary judgment fails to articulate any arguments in favor of dismissal beyond her affidavit that focuses solely on her alleged entitlement to compensation. Pope fails to submit any additional relevant evidence that would establish that summary judgment in her favor is appropriate. Consequently, Pope is denied summary judgment on this cause of action.

### C. *Count Two - Fraudulent Inducement*

Starlite's second cause of action, for fraud and fraudulent inducement, alleges that Starlite was fraudulently induced into hiring Pope as a Vice President and Account Executive, by relying on Pope's misrepresentations regarding her experience and expertise in the outdoor advertising industry. Starlite purportedly relied on her

misrepresentations to its detriment, resulting in a loss of significant revenues and a loss of reputation.

“To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury.” *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70 (1st Dep’t 2002). Here, Pope failed to make a prima facie showing of her entitlement to summary judgment, as she did not submit any evidence regarding this claim, let alone evidence demonstrating the absence of any triable issue of fact. Accordingly, Pope’s motion for summary judgment is denied.

#### D. *Count Three - Unjust Enrichment*

Through its third claim, Starlite asserts that Pope “has been unjustly enriched by receiving unearned payments under fraudulent circumstances she created to deceive and mislead her employer.” (Compl. ¶ 28.) This claim, while dressed as an unjust enrichment cause of action, is, in fact, a restatement of Plaintiff’s fraud claim. Starlite contends that Pope committed fraud and seeks damages. To the extent that Plaintiff’s fraud claim succeeds, this unjust enrichment claim is rendered duplicative. Moreover, if the fraud claim fails, the unjust enrichment claim likewise fails. As the Court of Appeals explained in *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), “[a]n unjust

enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” However, that is just what Plaintiff’s unjust enrichment claim does here. Therefore, Pope is granted summary judgment to dismiss the third cause of action in the complaint.

E. *Count Four - Prima Facie Tort*

Pope likewise seeks summary judgment on Starlite’s fourth claim for prima facie tort. The elements of prima facie tort are: “(1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful.” *DeMicco Bros., Inc. v. Consol. Edison Co. of New York, Inc.*, 8 A.D.3d 99, 100 (1st Dep’t 2004).

In support of its fourth cause of action for prima facie tort, Starlite contends that Pope “acted with disinterested malevolence with the sole intent to damage Starlite Media by making material misrepresentations and omissions in her sales forecaster reports and other communications regarding Florida Citrus and Skinny Cow.” *See* Starlite’s Opp. Br. at 20. Further, Starlite maintains that it suffered damage to its professional reputation. *Id.* at 21.

Such allegations are duplicative of Starlite’s fraud claims. “Prima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and

for which no traditional tort provides a remedy.” *Curiano v. Suozzi*, 63 N.Y.2d 113, 118 (1984). However, here, Plaintiff’s fraud claim provides it a potential remedy. Moreover, Plaintiff’s arguments in support of its prima facie tort claim echo its fraud allegations. As a result, Pope is granted summary judgment dismissing Starlite’s fourth cause of action for prima facie tort.

F. *Count Five - Faithless Servant Doctrine*

Starlite’s fifth cause of action, under the faithless servant doctrine, seeks the forfeiture of any commissions paid to Pope during her employment by misrepresenting her sales performance in order to increase her commissions.

“[F]undamental to the principal-agent relationship is the proposition that an employee is to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.” *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416 (2001) (internal quotations omitted). “An employee forfeits his right to compensation for services rendered by him if he proves disloyal.” *Visual Arts Found., Inc. v. Egnasko*, 91 A.D.3d 578, 579 (1st Dep’t 2012).

Having failed to submit any evidence in support of her motion for summary judgment as to this claim, Pope fails to demonstrate a lack of material facts in dispute

regarding whether she was a loyal employee as a matter of law. Accordingly, summary judgment is denied on this cause of action.

G. *Count Six - Declaratory Judgment*

Lastly, Starlite's sixth cause of action for declaratory judgment seeking a declaration that Pope is not entitled to any commissions and that she forfeited her salary and commission as a result of her disloyalty is dismissed. A cause of action for declaratory judgment "is generally appropriate only where a conventional form of remedy is not available and a declaratory judgment will serve some practical and useful purpose." *Automated Ticket Sys., Ltd. v Quinn*, 90 A.D.2d 738, 739 (1st Dep't 1982), *aff'd* 58 N.Y.2d 949 (1983) (internal quotations and citations omitted).

The remaining causes of action and counterclaims are sufficient to determine the issues for which Starlite is seeking a declaration. A resolution of the remaining claims will require a determination of Pope's compensation arrangement and an accounting of the commissions she is owed, if any, in light of Starlite's remaining causes of action.

H. *Counterclaim One - Unpaid Commissions*

Starlite cross-moves for summary judgment to dismiss Pope's first counterclaim for unpaid commissions.

Pope's first counterclaim for unpaid commissions alleges that she is owed \$727,266.20. She alleges that of that amount, \$226,266.20 in commissions are owed to Pope as of the date of her termination, and that \$500,000 in commissions are owed from revenues generated after her termination by clients that she secured while at Starlite.

Starlite seeks dismissal of this counterclaim on the grounds that Pope's draws exceeded her commissions for her period of employment. In support, Starlite submits statements detailing Pope's history of draws and commissions for 2008 through her termination in 2010. *See McDonough Affirm. Ex. 6.* The statements clearly provide that the shortfall between Pope's commissions and her draws in 2008 were carried over to 2009 and annually thereafter. The record does not provide that Pope ever objected to the draws as improper. As a result, Starlite argues that Pope is not owed any commissions because she never accrued commissions in an amount sufficient to repay her draws.

Pope maintains that her compensation as an independent contractor did not include a draw. Thus, Starlite's carry over of the draw shortfall is improper. Further, neither compensation was ever reduced to a formal writing. While Pope attempts to argue that the letter from Starlite offering to settle the commission dispute is an admission of liability but it is well established that settlement offers are "inadmissible as proof of liability for or invalidity of the claim or the amount of damages." *See CPLR 4547.*

Thus, this court finds that a triable issue of fact has been raised with respect to Pope's compensation arrangement. Based on the evidentiary record, the court cannot conclude as a matter of law that Pope agreed to a draw as an independent contractor. Therefore, Starlite is denied summary judgment on Pope's first counterclaim.

### III. Conclusion

Accordingly it is,

ORDERED that the defendant Suzanne Pope's motion for summary judgment is granted in part, to the extent of dismissing the third and fourth causes of action in the complaint, and denied in all other respects, and it is further

ORDERED that the plaintiff Starlite Media LLC's cross-motion for summary judgment is denied in its entirety, and it is further

ORDERED that the counsel are directed to appear for a pretrial conference in Room 442, 60 Centre Street, on May 13, 2014, at 10:45 AM.

Dated: New York, New York  
April 11, 2014

ENTER:



Hon. Eileen Bransten, J.S.C.