

<b>Hefti v Brand Union Co., Inc.</b>
2014 NY Slip Op 31714(U)
July 2, 2014
Supreme Court, New York County
Docket Number: 150832/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 35

-----x  
 AMY HEFTI,

Plaintiff,

Index No.: 150832/2014

-against-

Motion Seq. Nos. 001 and  
 002

THE BRAND UNION COMPANY, INC. d/b/a THE BRAND  
 UNION NY, WPP, and DON FORRINGER,

Defendants.  
 -----x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for wrongful termination, defendant Don Forringer (“Forringer”) moves pursuant to CPLR 3211(a)(7) to dismiss the complaint (motion sequence 001).<sup>1</sup> Defendant The Brand Union Company, Inc. (“TBU”) moves, *in limine*, to limit damages sought in the complaint based on “after-acquired evidence” demonstrating wrongful conduct in breach of plaintiff Amy Hefti’s (“plaintiff”) fiduciary and contractual obligations to TBU (motion sequence 002).<sup>2</sup>

*Factual Background*<sup>3</sup>

Plaintiff is a former group account director at TBU, a global branding strategy and management agency. She worked at TBU from approximately May 15, 2013 until her termination on November 15, 2013.

Plaintiff has had clinical depression throughout her adult life. She sees a psychiatrist and

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<sup>1</sup> Before the motion was fully submitted, plaintiff discontinued the action against WPP Group USA, Inc. s/h/a WPP (“WPP”) with prejudice. Thus, although both WPP and Forringer moved under sequence number 001, the court will examine the motion only as it applies to Forringer.

<sup>2</sup> The motions are consolidated for the purpose of joint disposition herein.

<sup>3</sup> The following factual background is derived from the allegations contained in plaintiff’s complaint and, for the purposes of this decision, assumed as true.

regularly takes Lexapro (an anti-anxiety medication) to manage her condition.

During the course of her employment, plaintiff directed the largest worldwide advertising campaign TBU had ever launched for the company's largest client (a certain bank). Throughout her employment, plaintiff received excellent feedback from her superiors, including TBU's CEO. She was never the subject of disciplinary action before the events giving rise to this action.

On or about September 19, 2013, plaintiff's psychiatrist diagnosed her with bipolar disorder, and prescribed her two anti-psychotic medications that she had never before taken. Immediately following ingestion of the new medications, plaintiff began to suffer from adverse reactions, including tremors and insomnia. These symptoms continued for a week, which forced plaintiff to work from home over the week of September 23-28, 2013. Plaintiff received explicit permission from defendants to take sick leave during that time; in any event, she responded in a timely manner to her work email and remotely phoned into conference calls.

Plaintiff returned to work on September 30, 2013, and offered a physician's note to TBU to explain the necessity for her leave. However, Forringer – the CFO of TBU's United States branch -- told her that such a note was not necessary.

On or about October 1, 2014, Forringer and Diane Epstein, TBU's executive director and head of the Human Relations department, called plaintiff into a meeting regarding her medical condition. During the meeting, they pressured her to disclose personal medical information about her condition even though plaintiff repeatedly told them she wished to keep that information private. Also, Forringer told her that she did not "have to be here"; in other words, that plaintiff could leave TBU due to her condition. In response, plaintiff affirmed her commitment to her job and desire to remain at TBU.

Approximately two weeks later, plaintiff was again called in by Forringer for a meeting and asked to reveal information about her condition. Fearing that her employment would be in jeopardy if she refused, plaintiff explained that she had been diagnosed with bipolar disorder, and that her prior leave was taken due to an adverse reaction to improperly-prescribed medication. Again, plaintiff affirmed her commitment to TBU and expressed that she was “ready to work.” She also asserted that she did not expect to take any additional medical leave in the future as a result of her diagnosis, and that she was capable of fully performing the duties of her position. In plaintiff’s view, the meeting ended amiably, and the issue was resolved. She was given no reason to believe that her job was at risk or that she was on any kind of probation.

Nevertheless, on November 15, 2013, plaintiff was called into Forringer’s office, and “he fired her.” The stated reason for her termination was her “unprofessional” behavior. This occurred even though plaintiff had never received a complaint, write-up or comment from superiors or co-workers regarding any alleged unprofessional behavior. Also, plaintiff does not allege that her medical condition or medication caused her to engage in any of the above-alleged conduct that resulted in the given reasons for her termination.

Plaintiff commenced this action based on discrimination regarding her disability under the New York State Human Rights Law §§ 290 *et seq.* (“NYSHRL”) and New York City Human Rights Law §§ 8-101 *et seq.* (“NYCHRL”).

TBU, in response, alleges that it terminated plaintiff’s employment for unprofessional behavior, including lying to her superiors, trying to evade debt obligations to various financial institutions by giving them contact information of a former co-worker *in lieu* of her own, holding personal conversations about her nanny and falling asleep during work-related conference calls.

*Arguments**Forringer's Motion to Dismiss*

In the moving papers, Forringer asserts that he cannot be held individually liable in this case because there are no allegations that he has an ownership interest in TBU or has any power to do more than carry out the personnel decisions made by others. Moreover, all claims against Forringer must fail because the complaint fails to allege that he acted on behalf of TBU in hiring, firing, paying, or in administering the terms, conditions, or privileges of plaintiff's employment.

At most, the complaint alleges that Forringer was the one to notify plaintiff that her employment was being terminated due to her allegedly unprofessional behavior. The complaint does not allege that Forringer was acting on behalf of TBU when he informed her of her termination, that he made the decision to terminate her, or, even if he was the decision maker, that plaintiff's alleged disability was any factor in his decision.

In opposition, plaintiff argues that individual liability lies where the complaint alleges that the defendant aided and abetted discrimination; in other words, actually participated in the conduct giving rise to the discrimination claim. The person alleged to have engaged in the discrimination does not even have to possess power to hire and fire; all that is necessary is whether he participated directly in the discrimination.

The complaint alleges one specific act of discrimination: plaintiff's termination as a result of her previous misdiagnosis of bipolar disorder. It was Forringer himself who committed the discriminatory act by firing plaintiff, as plaintiff was called into his office and terminated by him.

Further information in the complaint supports Forringer's active role in plaintiff's employment. For example, he discussed with plaintiff her medical leave and assured her that she

did not have to provide a physician's note regarding her leave. Also, Forringer called a meeting with human resources regarding plaintiff's medical condition, at which he stated that plaintiff "did not have to be here," thus encouraging her to leave TBU.

The caselaw cited by Forringer does not control the scenario here, as it is irrelevant how high up Forringer is on the corporate ladder, as plaintiff alleged that Forringer himself actively participated in the discrimination by terminating her, at the least. On this note, liability under NYSHRL § 296(6), which imposes liability upon an employee who aids and abets the employer's discrimination is distinguishable from direct liability under NYSHRL § 296(1) against "employers." Thus, plaintiff stated a claim under NYSHRL § 296(6) and NYCHRL § 8-107(6).

In reply, Forringer contends that plaintiff cannot re-draft her complaint *via* her opposition papers to claim that Forringer made the decision to terminate her and that Forringer aided and abetted discriminatory conduct by TBU. Because such allegations are not actually within the complaint, the court should not consider them in opposition and in adjudicating the motion.

Plaintiff further concedes that she failed to plead that Forringer has an ownership interest in TBU; had authority to terminate plaintiff; had the power to make personnel decision at TBU; and was acting on behalf of TBU when he informed her of her termination. And, plaintiff has not sought to amend her complaint to rectify these omissions.

Additionally, plaintiff's potential damages are not made any different or greater by having Forringer remain as a named defendant in the case, as plaintiff's complaint against TBU survives this motion. Thus, plaintiff will not suffer any prejudice if the court grants Forringer's motion.

Essentially, plaintiff alleges that Forringer is a proper individual defendant under the NYSHRL and NYCHRL simply because he informed her that TBU had decided to terminate her

employment. However, she does not cite any cases in support of this overly broad interpretation of the law. Under plaintiff's theory, virtually every employee in New York could be subject to individual liability if they speak to a colleague about employment-related actions; however, that is clearly not what the NYSHRL or NYCHRL provide or intend.

*TBU's Motion to Limit Damages*

TBU argues that even assuming TBU is liable to plaintiff, plaintiff's damages must be limited under the "after-acquired evidence" doctrine to those damages allegedly suffered between her termination on November 15, 2013, and TBU's discovery on February 26, 2014, of her disloyal and wrongful conduct which took place during her employment.

TBU alleges that documentation shows that plaintiff engaged in surreptitious communications using her work email account with a senior executive of a competitor agency (the "Competitor") regarding a proposal to leverage her network and contacts (that she serviced on behalf of TBU) in the hopes of creating a new partnership with herself and the Competitor. TBU further claims that plaintiff lied to TBU about her whereabouts and traveled out-of-state to the Competitor to work out a deal. In this regard, TBU alleges that plaintiff falsely represented to her TBU supervisor that at the time of the trip, she would have to take time off work to visit a dying friend (or family member, as she had represented two days prior). Moreover, plaintiff's trip to the Competitor occurred on the same day that plaintiff claims that her psychiatrist diagnosed her with bipolar disorder.

TBU also claims that plaintiff fabricated a condition of contagious conjunctivitis ("pink eye") and an eye abrasion so she could not have to work at TBU's office during a given week. As to the Competitor, TBU asserts that plaintiff and the Competitor eventually reached a deal in

principle and that they made further plans to generate client interest for the proposed partnership.

TBU also contends that after plaintiff's termination, it became aware of an incident wherein one of plaintiff's subordinates confronted her and alleged that plaintiff had used the subordinate's credit card for her own personal use without permission.

In sum, TBU alleges that the above facts, had they been known during plaintiff's tenure, would have given it further legitimate grounds to terminate her. Plaintiff's actions violated not only her fiduciary duty and duty of loyalty to TBU, but also her contractual obligations pursuant to her employment agreement (which forbade her from using or disclosing confidential information, and required her to solicit or service TBU's clients only on TBU's behalf).

TBU contends that under New York law, after-acquired evidence of misconduct (like the kind detailed above) that is sufficient to justify an employee's termination curtails the accrual of damages after the date of discovery, even if it is deemed liable for any wrongdoing in the matter.

In opposition, plaintiff argues that the motion should be denied on its face because the relief it seeks has nothing to do with a traditional motion *in limine*. TBU cites no authority for the propriety of the motion, which, as opposed to a traditional motion *in limine*, *i.e.*, brought prior to or at trial to exclude evidence at trial, seeks a substantive judgment in its favor at the beginning of the litigation. Case law provides that motions *in limine* which effectively seek substantive rulings are in reality ones for summary judgment, and such motions are inappropriate vehicles to obtain that type of relief.

As to TBU's allegations in the moving papers, plaintiff avers that it can and will respond to them in her answer to TBU's counterclaims and through the regular discovery process. Alternatively, if defendants wish to move for summary judgment (presumably after some

discovery has taken place), plaintiff will respond to the substantive allegations in opposition.

In reply, TBU argues that plaintiff, by failing to respond in any way, concedes all factual allegations contained in the moving papers. Instead, plaintiff attempts to distract the court from her fatal admissions and evidence against her by mischaracterizing the motion as premature and on the merits. However, the motion seeks precisely what a motion *in limine* is designed for -- to limit the use of evidence. Here, TBU seeks preclusion of any evidence of alleged damages sustained after February 26, 2014, if plaintiff prevails as to liability.

Further, case law provides that there are no barriers to bringing a motion *in limine* at any time. Moreover, TBU asserts that there are no rules regarding such motions' content.

And, it is argued that the motion is not one for summary judgment, as it does not seek a ruling on the merits of plaintiff's discrimination claim or TBU's counterclaims, but seeks to limit the use of any evidence of post-February 26, 2014 damages. In any event, plaintiff's cited cases are inapposite, as they sought to resolve disputed issues of material fact. Here, TBU seeks only to preclude the introduction, use and/or consideration of such evidence.

Lastly, given that plaintiff did not submit any evidence in opposition to the motion, there are no disputed issues of material fact. Thus, even if the court were to consider the motion as one for summary judgment, it must be granted as unopposed.

#### *Discussion*

#### *Motion to Dismiss*

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and, if from its four corners factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, a

motion for dismissal will fail” (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1<sup>st</sup> Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1<sup>st</sup> Dept 2013]).

The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46, 558 N.Y.S.2d 917 [1<sup>st</sup> Dept 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205, 660 N.Y.S.2d 726 [1<sup>st</sup> Dept 1997] (on a motion to dismiss for failure to state a cause of action, the court must accept factual allegations as true)). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR 3026; *Siegmund Strauss, supra*) and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, supra*; *Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

Moreover, employment discrimination cases are generally reviewed under notice pleading standards, which means that the plaintiff need not plead specific facts, and only give the defendants fair notice of the nature and grounds of his or her claims (*see Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140, 885 N.Y.S.2d 74 [1<sup>st</sup> Dept 2009]).

Section 296(1)(a) of the NYSHRL provides, *inter alia*, that it shall be an unlawful discriminatory practice for an employer to discharge an individual from employment because of the individual’s disability. Section 296(6) provides that “[i]t shall be an unlawful discriminatory

practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.”

Under the NYSHRL, a corporate employee, even if he is an officer, manager or supervisor, is not subject to individual liability with respect to discrimination if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others (*see Patrowich v. Chemical Bank*, 63 N.Y.2d 541 [1984]; *Miloscia v. B.R. Guest Holdings LLC*, 33 Misc.3d 466, 928 N.Y.S.2d 905 [Sup Ct New York Cty 2011], *aff'd as modified*, 94 A.D.3d 563, 942 N.Y.S.2d 484 [1<sup>st</sup> Dept 2012]). However “carrying out personnel decisions” in a manner sufficient to impose individual liability has been interpreted to mean, “supervisors who, themselves, have the power to hire and fire employees” (*Asabor v. Archdiocese of New York*, 102 A.D.3d 524, 961 N.Y.S.2d 17 [1<sup>st</sup> Dept 2013] (denying individual defendants summary dismissal where there was an issue of fact as to whether they were plaintiff's employers for purposes of the State HRL, where they “had the authority to make and effectuate high-level managerial decisions [and] did more than carry out personnel decisions made by others”); *Emmer v. The Trustees of Columbia University in the City of New York*, 2014 WL 1805532, \* 9, 2014 N.Y. Slip Op. 31200(U) [Sup Ct New York Cty 2014], *citing Perks v. Town of Huntington*, 251 F.Supp.2d 1143, 1160 [EDNY 2003]).

Section 8-107 of the NYCHRL contains nearly identical provisions, but also extends potential liability to “an employer or an employee or agent thereof.” Thus, the NYCHRL includes “fellow employees under the tent of liability, but only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the ‘terms, conditions or privileges of employment’ -- in other words, in some agency or supervisory capacity” (*Priore v. New York*

*Yankees*, 307 A.D.2d 67, 74, 761 N.Y.S.2d 608 [1<sup>st</sup> Dept 2003]).

Here, plaintiff specifically alleges the following: (1) she was diagnosed with bipolar disorder;<sup>4</sup> (2) she received excellent feedback from her superiors and was never previously the subject of disciplinary action; (3) she received permission to take sick leave due to a poor reaction to medication prescribed for her disorder; (4) Forringer, the CFO of TBU's United States branch, called her into a meeting regarding her medical condition and pressured her to disclose personal medical information about her condition despite her repeated protests to keep such information private; (5) Forringer told her that she could leave the company because of her condition; (6) Forringer called her into a subsequent meeting and, after insisting that plaintiff reveal information about her condition, she explained she had been diagnosed as bipolar and the prior sick leave was due to a poor reaction to medication; and (7) Forringer later called her into his office, at which time "he fired her" purportedly due to her "unprofessional" conduct, but that the firing was in actuality due to her diagnosis of bipolar disorder.

Accepting the above as true, granting plaintiff all favorable inferences, and reading the complaint as a whole demonstrates that plaintiff adequately pleads causes of action directly against Forringer under both the NYSHRL and NYCHRL as plaintiff's "employer" and/or as an "employee" (under the NYCHRL). Specifically, and as detailed further below, plaintiff alleges that Forringer was a supervisor who had authority to hire and fire employees, and that he terminated her on behalf of TBU.

Plaintiff explicitly labels Forringer as a "superior" or "supervisor" in the complaint, and

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<sup>4</sup> For purposes of this motion, Forringer does not dispute that plaintiff alleges that: she is a member of a protected class, was qualified to hold her position, suffered an adverse employment action when she was terminated; and her discharge occurred under circumstances giving rise to an inference of discrimination (*see Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 [2004]) (detailing the standard for employment discrimination actions)).

alleges that he called her into *three separate meetings* regarding her employment and condition. With further respect to supervisory powers, plaintiff alleges that “defendants” (which includes Forringer) gave her permission to take sick leave, and that Forringer told her that she could leave the company due to her condition. Lastly, plaintiff alleges that Forringer -- the *CFO* of the American branch of TBU -- fired her at the last of the three meetings he orchestrated. Thus, reading the complaint’s allegations together and in a light favorable to plaintiff, Forringer’s contentions that plaintiff does not allege that: (a) he had no authority to fire her; and (b) he did not act on behalf of TBU are unavailing (*see Emmer, supra* (plaintiff’s broad allegations that individual defendants had authority to approve hiring and firing of employees sufficient to state discrimination claims under the NYSHRL and NYCHRL); *Asabor v. Archdiocese of New York*, 102 A.D.3d at 529 (issue as to defendant’s individual liability where she interviewed plaintiff for her position; made the decision to hire plaintiff; encouraged plaintiff to keep track of racial incidents, and advised plaintiff to come to her with any problems; and held a meeting concerning racial incidents, and promised to stem the hostile work environment); *Graaf v. North Shore University Hosp.*, 1 F.Supp.2d 318, 324 [SDNY 1998] (motion to dismiss denied when individual defendant was CEO and president of company, thus giving him the power to “do more than carry out personnel decisions made by others”; defendant also had personal knowledge of plaintiff’s issues in that plaintiff personally relayed complaints to that defendant); *Sanchez v. Brown, Harris, Stevens*, 234 A.D.2d 170, 651 N.Y.S.2d 477 [1<sup>st</sup> Dept 1996] (defendant managing agent’s motion denied when evidence existed indicating that the managing agent hired, supervised and fired plaintiff concierge, thus raising an issue as to whether an employment relationship existed between plaintiff and the managing agent); *Hahn v. Congregation Mechina*

*Mikdash Melech, Inc.*, 2013 WL 3491263 [Sup Ct Kings Cty 2013] (record showed individual defendant exercised authority over plaintiff; plaintiff went to defendant and requested a leave from work, suggesting that defendant functioned as a supervisor and not merely as a co-employee)).

Forringer essentially labels himself as “merely being the messenger” regarding plaintiff’s termination in an attempt to argue that TBU, and not Forringer, made the decision to terminate her. However, the instant motion is made under CPLR 3211, under which the court must take all of the allegations in the complaint as true and resolve all inferences in plaintiff’s favor. Thus, at this juncture, the court must accept plaintiff’s factual allegations that Forringer had authority to, and did, fire her due to her condition and/or revelation of same. The court notes the Court of Appeals’ mandate that “whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).

The Court notes that while plaintiff’s complaint does not expressly state “aid and abet” as TBU points out (see NYSHRL 296(6); NYCHRL 8-107(6)), an individual who “actually participates in the conduct giving rise to a discrimination claim” may be liable as an aider and abettor, even when the individual lacks the authority to hire or fire the plaintiff (see *Miloscia, supra*). Thus, Forringer’s contention that plaintiff failed to plead individual liability against him for failing to allege any ownership interest or power to do more than merely carry out personnel decisions made by others, is insufficient to defeat the complaint (see *Emmer, supra*; *Lee v. Overseas Shipholding Group, Inc.*, 2001 WL 849747 [SDNY 2001]; *Graaf v. North Shore University Hosp.*, 1 F.Supp.2d 318, 324 [SDNY 1998]).

Accordingly, Forringer's motion is denied.

*Motion to Limit Damages*

The function of a motion *in limine* is to "permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use" (*Jones ex rel. Jones v. Roman Catholic Archdiocese of New York*, 29 Misc.3d 1213(A) \* 6, 918 N.Y.S.2d 398 [Sup Ct New York Cty 2010], citing *State v. Metz*, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79 [1<sup>st</sup> Dept 1998]). And, while the majority of such motions are made close to or during trial, neither New York statute nor code prevents a party from bringing a motion *in limine* as its litigation strategy dictates (see *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 30 Misc.3d 1201(A), 958 N.Y.S.2d 647 [Sup Ct New York Cty 2010]). Likewise, no authority exists which would prevent a court from deciding such a motion made at any time (*id.*).<sup>5</sup> Indeed, the CPLR does not contain any time limitations applicable to motions *in limine*, and there are no general rules dictating their content (see *Sadek v. Wesley*, 117 A.D.3d 193, 986 N.Y.S.2d 25 [1<sup>st</sup> Dept 2014]).

Yet, although there are generally no rules about the content of motions *in limine*, it has been held that circumstances exist in which their use is improper. For example, the use of a purported motion *in limine* to obtain relief in the nature of summary judgment, or even partial summary judgment, is proscribed in the First Department (see *Carrasquillo v. New York City Dept. of Educ.*, 104 A.D.3d 516, 960 N.Y.S.2d 313 [1<sup>st</sup> Dept 2013]; *Downtown Art Co. v. Zimmerman*, 232 A.D.2d, 270, 648 N.Y.S.2d 101 [1<sup>st</sup> Dept 1996]) (plaintiff's motion to preclude

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<sup>5</sup> In *Countrywide*, the court adjudicated a motion *in limine* as to the admissibility of certain evidence despite motion being filed well before pre-trial conference date and prior to the determination of the subject evidence's relevance (*id.*).

defendant from offering evidence at trial to show that defendant owns or owned assets of certain company denied)).

On the same note, it is generally improper for a court to decide, or “convert,” a motion *in limine* to one for summary judgment without taking further action, such as noticing the parties that the court is treating the motion as one for summary judgment (*see Clermont v. Hillsdale Industries, Inc.*, 6 A.D.3d 376, 773 N.Y.S.2d 901 [2d Dept 2004]; *Rondout Elec., Inc. v. Dover Union Free School Dist.*, 304 A.D.2d 808, 758 N.Y.S.2d 394 [2d Dept 2004]). In this regard, “when a party misuses a motion *in limine* as the procedural equivalent of one for partial summary judgment, and the court decides that motion, resulting in an order that limits the issues to be tried, that order is appealable . . . [as such an order] clearly involves the merits of the controversy and affects a substantial right . . .” (*Rondout*, 304 A.D.2d at 811 (reversing the grant of defendant’s motion “*in limine*” to limit the amount of plaintiff’s recovery to the amount specified in the original notice of claim)).

*Scalp & Blade, Inc. v. Advest, Inc.* (309 A.D.2d 219, 224, 765 N.Y.S.2d 92 [4<sup>th</sup> Dept 2003]), which concerned a purported motion *in limine* to preclude plaintiffs from offering proof of additional market index damages, is further instructive. Therein, the court ruled that the defendant misused the motion on the grounds that the trial court’s granting of defendant’s motion “[did] not merely limit the production of certain evidence as immaterial to damages, but rather effectively [granted] defendants’ partial summary judgment on the critical substantive issue of what [constituted] the proper measure of damages on plaintiffs’ causes of action.”

Here, TBU’s motion, though dressed up as a motion *in limine*, is really one for partial summary judgment on the issue of damages. For one, the motion is explicitly entitled as a

motion “to limit damages.” The initial moving papers make clear that the purpose of the motion, as counsel states, is to limit damages to the period between plaintiff’s termination on November 15, 2013 and February 26, 2014, if plaintiff is ultimately able to establish that TBU was liable to her (*see* TBU Memorandum of Law, pp. 1-2). TBU’s initial submission seeks merely a ruling that the damages are limited to the aforementioned period. Moreover, all of TBU’s cited cases in the moving papers concern motions to dismiss or motions for summary judgment.

Further, TBU’s attempt, in reply, to modify its request to limit “the use of evidence” (*see* TBU Memorandum of Law, pp. 1-2) likewise fails. While TBU asserts that it does not seek a ruling on the merits of plaintiff’s claim or TBU’s counterclaims, its motion is based on lengthy factual submissions which purport to demonstrate additional reasons which would have legitimized plaintiff’s termination had they been known to TBU during her employment.

TBU’s request to limit the damages plaintiff can recover in this action is premised on its contention that plaintiff breached her fiduciary duty and employment agreement with TBU, and that based on such conduct, TBU’s liability, if at all is limited. Thus, contrary to TBU’s contentions, the motion requires a resolution of disputed issues of fact, namely, the additional reasons for plaintiff’s termination, so as to justify limiting plaintiff’s damages.

And, TBU’s intimation, in reply, that summary judgment in its favor should be granted since plaintiff “did not submit any evidence in opposition” and thus concedes TBU’s allegations ignores the procedural posture of this case. There is no basis to treat TBU’s motion *in limine*, *made in conjunction with its Answer and prior to any discovery*, as one for summary judgment. The parties have not held a preliminary conference and have yet to begin discovery, and more importantly, have not chartered a summary judgment course (*see Lerner v Prince*, 987 N.Y.S.2d

19 [1<sup>st</sup> Dept 2014] (“court providently exercised its discretion in refusing to convert the dismissal motions into summary judgment motions . . . as the record ‘does not establish that the parties deliberately chart[ed] a summary judgment course’”).

Therefore, TBU’s motion is denied.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendant Forringer’s motion under sequence no. 001 to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that Forringer shall serve his Answer within 20 days of entry of this order; and it is further

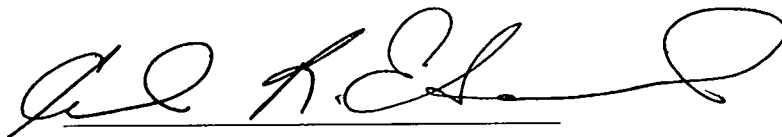
ORDERED that TBU’s motion under sequence no. 002, *in limine*, to limit damages sought in the complaint based on “after-acquired evidence” is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 19, 2014, at 2:15 p.m; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 2, 2014



Hon. Carol R. Edmead

**HON. CAROL EDMOAD**