

Long Island Assoc. of Aids Care, Inc. v Jacinto

2015 NY Slip Op 30228(U)

February 10, 2015

Supreme Court, Suffolk County

Docket Number: 33534/2013

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NO. 33534/2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

LONG ISLAND ASSOCIATION OF AIDS
CARE, INC., LONG ISLAND NETWORK OR
COMMUNITY SERVICES, INC. AND
BiasHELP, INC.,

Plaintiffs,

-against-

MARIA JOSEPHINA JACINTO,

Defendant.

<p>ORIG. RETURN DATE: 9/19/14 & 11/21/14 FINAL SUBMISSION DATE: 1/14/15 MOTION SEQ#002 & 003 MOTION: #002-MD & #003 MotD</p>
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PLAINTIFFS' ATTORNEY:

STAGG, TEREZI, CONFUSIONE LLP
401 FRANKLIN AVE, STE 300
GARDEN CITY, NY 11530
516-812-4500

DEFENDANT'S ATTORNEY:

HAMBURGER MAXSON YAFFE KNAUER
225 BROADHOLLOW RD, STE 301E
MELVILLE, NY 11747
631-694-2400

Upon the following papers numbered 1 to 35 read on this motion to dismiss the counterclaims; cross motion to dismiss the complaint, and for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7 - 23, 24; Answering Affidavits and supporting papers 25, 26; Replying Affidavits and supporting papers 27, 28, 29 - 35; Other _____; and upon due deliberation; it is,

ORDERED that the plaintiffs' motion (002) and the defendant's cross motion are consolidated for the purpose of this determination; and it is further

ORDERED that the plaintiffs' motion (002) for an order dismissing the counterclaims is denied; and it is further

ORDERED that the defendant's cross motion (003) is granted to the extent that the first, second, fifth, and sixth causes of action are dismissed, and all other requested relief is denied; and it is further

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ORDERED that the parties are directed to appear in Commercial Part 48, at One Court Street, Riverhead, New York, in the court room of the undersigned, for a preliminary conference on Monday, March 2, 2015, at 9:30 a.m.

In this action, the plaintiffs, Long Island Association for Aids Care, Inc. ("LIAAC"), Long Island Network of Community Services ("LINCS"), and Biashelp, Inc., seek monetary damages, punitive damages, injunctive relief, and attorney's fees as a result of the defendant's alleged actions while employed by the plaintiffs as Chief Financial Officer. The court notes that the facts of this case have been detailed in the court's prior order, dated March 19, 2014 (Whelan, J.), and will not be repeated here. The record reveals that the defendant executed a Confidentiality Statement on March 15, 2013, in which she agreed not to disclose, among other things, client health related information, and administrative information including personnel salaries, and the identities of agency contributors. The defendant was terminated on March 28, 2013. This action was commenced on December 20, 2013.

The complaint alleges that the defendant neglected her duties, failed to perform audits in a timely manner, and failed to discover and report the alleged embezzlement of agency funds by the former CFO, whom the defendant replaced. The complaint further alleges that, some time in October 2013, the defendant sent packets of information to the agency's donors and corporate sponsors containing outdated printed news stories regarding audits undertaken by municipal officials of the plaintiffs. The complaint alleges six causes of action: tortious interference with prospective business relations, breach of the duty of loyalty, breach of the March 15, 2013 Confidentiality Statement, breach of fiduciary duty, fraud, and defamation. The defendant served an answer and asserted eight counterclaims: abuse of process, retaliatory firing pursuant to Human Rights Law § 296, retaliatory actions pursuant to Labor Law § 215, discrimination pursuant to Human Rights Law § 296, termination without a vote from the LIAAC's Board of Directors in violation of the Not For Profit Corporations Law, frivolous lawsuit pursuant to NYCRR § 130-1.1, and harassment pursuant to NYCRR § 130-1.1.

The plaintiffs now moves to dismiss the first, second, fourth, sixth, seventh, and eighth counterclaims pursuant to CPLR 3211. The defendant cross-moves for summary judgment pursuant to CPLR 3212 and to dismiss the plaintiff's first, second, third, fifth and sixth causes of action pursuant to CPLR 3211 (a) (7), for an order imposing sanctions pursuant to 22 NYCRR § 130-1.1, and awarding costs. In her opposition papers, the defendant has withdrawn her second, third, seventh, and eighth counterclaims.

Initially, the plaintiffs' motion is denied for its failure to specify in its notice of motion the exact relief sought, pursuant to New York Commercial Division Rules (NYCRR 202.70 [16] [a]).

Pursuant to CPLR 3211(a)(7), on such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Board of Education v State Education Dep't*, 116 AD2d 939, 498 NYS2d 516 [3d Dept 1986], *later proc* 135 AD2d 903 [3d Dept 1987]).

Turning to the branch of the defendant's cross motion to dismiss the first cause of action which alleges a tortious interference with prospective business relations, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiff has failed to adequately state a cause of action. To establish a such a claim, a plaintiff must demonstrate that (a) the plaintiff had business relations with a third party, (b) the defendants interfered with those business relations, (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means, and (d) there was resulting injury to the business relationship (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 20 - 21, 953 NYS2d 96, 108 [2d Dept 2012]). Here, the sponsors and contributors do not qualify as clients or customers, as determined by the court in its prior order, dated March 19, 2014 (Whelan, J.). Therefore, the first cause of action is dismissed.

Turning to the branch of the defendant's cross motion to dismiss the second cause of action, which alleges breach of duty of loyalty, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiffs have failed to adequately state a cause of action. The duty of loyalty has been limited to cases where the employee, acting as agent of the employer, unfairly competes with his employer, diverts business opportunities to himself or others to the financial detriment of the employer, or accepts improper kickbacks (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530, 918 NYS2d 448, 449 [1st Dept 2011]). The court finds that no such allegations were made in this matter. Therefore, the second cause of action is dismissed.

Turning to the branch of the defendant's cross motion to dismiss the third cause of action, which alleges breach of contract, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every

favorable inference, the court finds that the plaintiffs have adequately stated a cause of action. A complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach (*JP Morgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). Here, there is no dispute that the defendant executed the Confidentiality Statement. While the defendant may refute the plaintiffs' factual allegations, the allegations set forth in the complaint are clearly sufficient to state claims under the general category of breach of contract.

Turning to the branch of the defendant's cross motion to dismiss the fifth cause of action, alleging fraud, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiff has failed to adequately state a cause of action. An action for fraud must be pled "with particularity, including specific dates and items, if necessary and insofar as practicable" (CPLR 3016 [b]), which the plaintiffs have failed to do. Conclusory allegations of fraud will not be sufficient (*Robertson v Wells*, 95 AD3d 862, 944 NYS2d 194 [2d Dept 2012]; *Dumas v Fiorito*, 13 AD3d 332, 786 NYS2d 106 [2d Dept 2004]). Here, the conclusory allegations in the complaint do not rise to the level of fraud, as contemplated by the statute. Therefore, the fifth cause of action is dismissed.

Turning to the branch of the defendant's cross motion to dismiss the sixth cause of action, alleging defamation, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiffs have failed to adequately state a cause of action. In a complaint alleging defamation, the plaintiff must include the "particular words complained of" (CPLR 3016[a]), the time, place, and manner of publication, and the person to whom it was published (*Glazier v Harris*, 99 AD3d 403, 952 NYS2d 112 [1st Dept 2012]; *Epifani v Johnson*, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]; *Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). The reason for the requirement of specific pleading in defamation cases is to give adequate notice to the defendant as to the occurrence constituting the wrong and to discourage the institution of vexatious actions (see *Foley v D'Agostino*, 21 AD2d 60, 248 NYS2d 121 [1st Dept 1964]; 3 Weinstein-Korn-Miller, NY Civ Prac, par 3016.01). "This requirement may be satisfied by inclusion of the purported libelous words directly in the complaint or by incorporation" (quoting *Pappalardo v Westchester Rockland Newspapers, Inc.*, 101 AD2d 830, 475 NYS2d 487 [2d Dept 1984]; see *Seltzer v Fields*, 20 AD2d 60, 244 NYS2d 792, aff'd 14 NY2d 624 [1st Dept 1963]; *Liffman v Booke*, 59 AD2d 687, 398 NYS2d 674 [1st Dept

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1977]), which the plaintiffs have failed to do.

Here, the complaint generally alleges that sometime after October, 2013, prior fund-raising sponsors and the plaintiffs' management employees received packets that contained old and outdated information which caused the sponsors to withdraw their support for the upcoming fund-raiser to be held in November, 2013. The complaint further alleges that the packet contained, among other things, a news report stating that one of the plaintiffs was not cooperating with the Nassau County 2010 Comptroller's Audit. The court finds, upon a plain reading of the complaint, that the plaintiffs have failed to comply with the statutory requirements for pleading a libel cause of action pursuant to CPLR 3016 (a), by neglecting to state the particular words complained of (*Sassower v New York News, Inc.*, 101 AD2d 1020, 476 NYS2d 698 [4th Dept 1984]). Therefore, the sixth cause of action is dismissed.

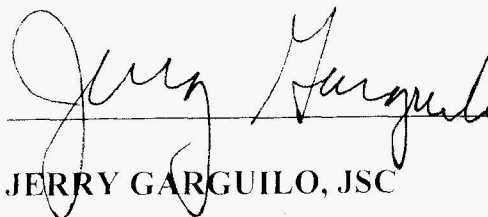
With regard to the branch of the defendant's motion for summary judgment, a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court finds that the application is premature at this juncture, and is denied with leave to renew upon the close of discovery.

Accordingly, the plaintiffs' motion is **DENIED**. The defendant's cross motion is **GRANTED** to the extent that the first, second, fifth, and sixth causes of action are dismissed. All other requests for relief by the defendant are denied. The court further notes that the defendant withdraws her second, third, seventh and eighth counterclaims.

The parties are directed to appear in Commercial Division Part 48, at One Court Street, Riverhead, New York on Monday, March 2, 2015 at 9:30 a.m. for a preliminary conference.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: February 10, 2015


HON. JERRY GARGUILO, JSC