SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI
J.S.C.

----------X TRIAL/IAS PART 20

MANGOES CAFÉ INC. d/b/a MANGOES MEXICAN BAR & GRILL,

Plaintiff,

- *against* -

RODOLFO SUCHITE MORALES, MARVIN HERNANDEZ and THOMAS HERNANDEZ,

Defendants.

Index No. 601898/2015
Mot. Seq. #001
Mot. Date: 6-27-15
Submit Date: 8-18-15

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The following papers have been read on this motion:

Notice of Motion, dated 5-28-15.....1
Verified Complaint, dated 3-25-15.....2
Affirmation in Opposition, dated 7-7-15.....3
Defendants' Memorandum of Law
In Further Support, dated 8-4-15.....4

The motion by the defendant pursuant to CPLR 3211 to dismiss the verified complaint is granted to the extent that the first, fourth and fifth causes of action are dismissed, and is otherwise denied.

This action stems from the alleged theft of food belonging to the plaintiff by the defendants, employees who worked in the food preparation area of plaintiff's restaurant. The defendants move to dismiss the complaint for failure to state a cause of action as to each of the six causes of action alleged, in effect pursuant to CPLR 3211(a)(7).

At the outset, the Court must give no weight to defendants claim that this law suit is brought in retaliation for defendants' own action in federal court against plaintiff for wages owed. Whether this claim regarding plaintiff's motivation is true or not, the presence of that other action cannot be a factor in reviewing the complaint and this pre-answer motion to dismiss.

The law regarding dismissals for failure to state a cause of action is well established. In evaluating a motion made pursuant to CPLR 3211(a)(7), the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg,* 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Konidaris v Aeneas Capital Mgt., LP,* 8 AD3d 244 (2d Dept. 2004); *Leon v Martinez,* 84 NY2d 83 (1994). Applying these standards to the complaint, the Court concludes that certain of the causes of action asserted should be sustained as a matter of pleading. The Court agrees with the defendants, however, that the first, fourth and fifth are inadequately pled and should be dismissed.

The first cause of action, sounding in breach of fiduciary duty, must be dismissed because there are no allegations other than that the relationship between plaintiff and each defendant was one of employer and employee. As nothing more regarding the defendants' status is alleged, their role as employees, standing alone, does not give rise to fiduciary duties; plaintiff therefore does not plead the existence of a fiduciary duty that might be breached. *See Eden v St. Lukes-Roosevelt Hosp. Ctr.,* 96 AD3d 614 (1st Dept. 2012); *Schenkman v New York College of Health Professionals,* 29 AD3d 671 (2d Dept. 2006); *Rogers v Lenox Hill Hosp.,* 239 AD2d 140 (1st Dept. 1997); *Michnick v Parkell Prods.,* 215 AD2d 462 (2d Dept. 1995).

Notwithstanding the absence of a pled fiduciary relationship, and given the generous reading to be given complaints where the plaintiff stands solely on the pleading (*Leon v Martinez, supra*), the complaint adequately states a claim for breach of the duty of loyalty an employee owes an employer based on the allegations that the defendants stole food. *Qosina Corp. v C & N*

Packaging, Inc., 96 AD3d 1092 (2d Dept. 2012). The motion is therefore denied as to the second cause of action. Further, the Court sustains as a matter of pleading the third cause of action, which is based on the faithless servant doctrine, as plaintiff seeks return of compensation paid in view of the alleged thefts. *See Matter of Blumenthal (Kingsford),* 32 AD3d 767 (1st Dept. 2006).

The fourth cause of action, sounding in tortious interference with prospective economic advantage, and the fifth cause of action, which alleges tortious interference with business relations, are dismissed.

To state a claim in interference with prospective economic advantage, the plaintiff must allege some act damaging its relations with a third party with whom the plaintiff sought profitable economic relations. Here, the mere allegations of theft are insufficient, as these actions, though wrongful, involved only the defendants and the plaintiff. No wrongful action is alleged to have been directed to the third party or parties with whom plaintiff wishes to have a relationship, such as customers or other businesses. Such allegations are necessary to sustain the tort. *See Carvel Corp. v Noonan,* 3 NY2d 182, 192 (2004). Further, the plaintiff does not plead that the sole reason for the alleged thefts of food was to harm the plaintiff, as opposed to the more prosaic reason for stealing property, personal economic gain. The motivation to injure is also a necessary element of the tort. *Simaee v Levi,* 22 AD3d 559 (2d Dept. 2005).

The fifth cause of action, whether read as tortious interference with contract, or tortious interference with existing, as opposed to prospective, business relations, also fails. There are no allegations that a breach of contract or relationship with a third party was procured by the defendants, which is a necessary element. *White Plains Coat & Apron Co., Inc. v Cintas Corp.,* 8 NY3d 422, 426 (2007). To the extent plaintiff pleads that defendants alleged wrongful acts

interfered with its ability to attract or retain customers, with whom there was no binding agreement, the claim is essentially duplicative of the fourth, and subject to dismissal for the same reasons. *See Law Offices of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583, 585-586 (2d Dept. 2015).

The Court sustains the sixth cause of action in conversion, again based on the theft of food. Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. *State of New York v Seventh Regiment Fund,* 98 NY2d 249, 259 (2002). For purposes of pleading, the Court disagrees with the defendants that the claim fails because plaintiff has admitted here that defendants regularly received free meals from plaintiff during the course of their employment, and that there was no request to return food taken for that purpose. Aside from the fact that this requires a finding regarding these meals that goes beyond the Court's role in evaluating a pleading, the complaint does not allege (and plaintiff also disputes) that the food taken was the same given to the defendants. An inquiry leading to a further explanation of the allegations of the thefts may be made through a demand for a bill of particulars, but the allegations of a theft of food is sufficient to sustain a conversion claim at this stage. *Leon v Martinez, supra.*

In sum, the motion is granted as to the first, fourth and fifth causes of action, and is otherwise denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: October 13, 2015

HON. DANIEL PALMIERI
Supreme Court Justice

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