SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61 IAS MOTION

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DAVID LANCE NEW YORK, INC.,

Plaintiff,

- v -

SCOTT SKOLLER, ADRIAN JULES, LTD., ARNIE ROBERTI, SS BESPOKE INC., and PATRICIA ESPINOZA

Defendants.

INDEX NO. 652892/2017

MOTION DATE 1/30/19

MOTION SEQ. NO. 007

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 229, 230, 231, 232, 233, 234, 235, 238, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 363

were read on this motion to/for SUMMARY JUDGMENT

HON. BARRY R. OSTRAGER:

Plaintiff David Lance New York, Inc. ("DLNY") is in the business of selling custom men's suits. Defendant Scott Skoller ("Skoller") was allegedly employed by DLNY from October 2003 until April 2017. In 2005, Skoller entered into an Employment Agreement with DLNY containing covenants purporting to restrict Skoller's use of certain confidential business information and otherwise limiting Skoller's ability to compete with DLNY during and after his employment. In April 2017, Skoller terminated his employment with DLNY and, allegedly, began soliciting DLNY customers and competing with DLNY in breach of the Employment Agreement's restrictive covenants.

Defendant Patricia Espinoza ("Espinoza") was allegedly employed by DLNY as an administrative assistant from 1996 until she was fired in September 2017. DLNY alleges that

Espinoza conspired with, and aided and abetted, Skoller by intercepting mail meant for DLNY and delivering it to Skoller, and otherwise providing Skoller with confidential business information about DLNY after Skoller's departure.

Plaintiff DLNY asserts claims against Espinoza sounding in tortious interference with business relations, aiding and abetting, and faithless servant violations. Espinoza asserts counterclaims related to DLNY's alleged unauthorized access of Espinoza's smartphone. Defendant Espinoza moves for summary judgment dismissing Plaintiff's claims against her and granting summary judgment on liability as to her claims against Plaintiff.

Legal Standard

CPLR 3212 provides that "[a]ny party may move for summary judgment in any action" to resolve claims that do not pose genuine issues of material fact necessitating a trial. The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012).

DLNY's Claims

DLNY asserts three claims against Espinoza: (1) tortious interference with business relations; (2) aiding and abetting; and (3) faithless servant violations.

First, "[t]o prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dep't 2009).

Second, to prevail on a claim for aiding and abetting, Plaintiff must allege: (1) the existence of an underlying tort; (2) knowledge on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in causing the tort. *See Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009).

Third, "[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of [her] services is generally disentitled to recover [her] compensation, whether commissions or salary." *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928 (1977). Thus, Plaintiff asserts that Espinoza acted as a faithless servant and must forfeit certain compensation.

Plaintiff DLNY alleges that Espinoza maintained constant contact with Skoller after Skoller's departure and provided Skoller with information about what was occurring at the DLNY office. DLNY also asserts that Espinoza intercepted mail intended for DLNY and showed such mail to Skoller after his departure from the company.

Defendant Espinoza readily admits that, after DLNY terminated Skoller's employment, she maintained contact with Skoller as friends given their fourteen-year relationship as colleagues at DLNY. Espinoza asserts that she never sent Skoller any of DLNY's customer lists or business files, and thus could not have tortiously interfered with DLNY's business relations.

The Court finds that Defendant Espinoza failed to tender sufficient admissible evidence such that the claims against her can be dismissed as a matter of law. Simply put, the *only* evidence Espinoza has tendered in support of dismissal is her own self-serving deposition testimony. (Espinoza Aff. Ex. C [NYSCEF Doc. 233]). Plaintiff DLNY has, at least, tendered circumstantial evidence from which a jury could potentially infer that Espinoza communicated confidential business information to Skoller and otherwise acted faithlessly with respect to her employer.

Specifically, DLNY submitted call and text logs that show constant communication between Espinoza and Skoller and several text messages that are related to DLNY's business operations. (*See* Miller Aff. Ex. 16 [NYSCEF Doc. 319]). While the text messages alone cannot plausibly be sufficient to prove Plaintiff's claims, those messages—in addition to call logs showing contemporaneous phone conversations—present at least a triable issue of fact regarding what information, if any, Espinoza conveyed to Skoller after his departure from DLNY. (*See* Miller Aff. Ex. 12 [NYSCEF Doc. 315]).

Therefore, while the text messages, call logs and testimony of the parties may establish, at trial, nothing more than a close friendship borne out of a fourteen-year working relationship in a small office, such cannot be decided as a matter of law given the credibility issues central to Plaintiff's claims against Espinoza. Thus, Defendant Espinoza's motion for summary judgment dismissing the claims against her is denied.

Espinoza's Counterclaims

Espinoza asserts two counterclaims: (1) violation of 18 U.S.C. § 1030; and (2) prima facie tort. Both claims relate to DLNY's alleged use of Espinoza's smartphone without her consent.

First, the Computer Fraud and Abuse Act ("CFAA"), provides a private cause of action where a party "intentionally accesses a computer without authorization" or "exceeds authorized access" to a computer. 18 U.S.C. § 1030. Further, because Espinoza does not allege physical injury to any person, a threat to public safety, or modification of medical information, she must necessarily show loss to one or more persons "aggregating at least $5,000 in value" because of DLNY's alleged violation. *See* 18 U.S.C. § 1030(c)(4)(A)(i).

Second, the "requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Feihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985). "A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages." *Id.* at 143.

Here, Espinoza alleges that DLNY's principal, David Schwartz ("Schwartz") accessed Espinoza's smartphone without her consent. In support of her claim, Espinoza relies on video evidence of Schwartz accessing Espinoza's smartphone (Espinoza Aff. Ex. D [NYSCEF Doc. 234])

Schwartz clearly videotaped himself accessing Espinoza's smartphone to examine her call logs and text messages. However, these videos do not prove that Schwartz did so without Espinoza's consent. Espinoza's deposition testimony seemingly indicates that she gave Schwartz her smartphone to use for a call with Verizon but not necessarily to provide Schwartz with access to her call logs and text messages. (*See* Miller Aff. Ex. 11 [NYSCEF Doc. 314]). Thus, whether Espinoza gave Schwartz consent to access her call logs and text messages presents a triable issue of fact precluding summary judgment on both of Espinoza's counterclaims.

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is denied in its entirety.

1/31/2019
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE