

Lynch v Stevelman

2019 NY Slip Op 30884(U)

April 3, 2019

Supreme Court, New York County

Docket Number: 654377/2012

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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KATE LYNCH,

Plaintiff,

- v -

IAN STEVELMAN, BWAY.NET, INC., OPEN NET, INC.

Defendants.

INDEX NO. 654377/2012

MOTION DATE 10/17/2018

MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents and for the reasons set forth on the record (4/1/2019), the defendants' motion for summary judgment is granted in its entirety and the plaintiff's cross-motion for summary judgment is denied.

The Relevant Facts and Circumstances

Kathleen Lynch and Ian Stevelman co-founded Bway.net, Inc. (f/k/a Outernet., Inc., hereinafter Bway.net) in 1995. Complaint, ¶ 9. In April 1997, Ms. Lynch and Mr. Stevelman both entered into employment agreements and shareholders agreements whereby they became Co-Presidents and one-half equity partners. Id. In 2001, Mr. Stevelman was terminated under his employment agreement. Id.

Bway.net brought an action seeking a declaration that Mr. Stevelman was terminated "for cause" and Mr. Stevelman brought a separate action alleging, among other things, improper termination. The lawsuits were ultimately consolidated and pursuant to Bway.net, Inc. v Ian Stevelman (Index No.: 113778/01), New York State Supreme Court Justice Shirley Kornreich determined that Mr. Stevelman was terminated "for cause" and awarded him a money judgment (the 2004 Judgment) for \$476,500.72 pursuant to the terms of the employment and shareholder agreements. Id., ¶ 12.

Subsequently, Mr. Stevelman filed the 2004 Judgment and appropriate restraining notices, and as a result, Bway.net's bank accounts were frozen. Id., ¶ 13. Bway.net did not pay Mr. Stevelman. Instead, Ms. Lynch formed Open Net, Inc. (Open Net) in 2004 to continue the operations of Bway.net (See Ms. Lynch Deposition Transcript, NYSCEF Doc. No. 150, at 36-37). The parties subsequently entered into a stipulation of settlement, dated August 25, 2005, (the 2005 Settlement Agreement) pursuant to which, among other things, Bway.net was to pay Mr. Stevelman \$310,000 in two installments - i.e., a lump sum of \$110,000 and an additional sum of

\$200,000 payable in monthly instalments of \$3,500, beginning on September 1, 2006 (*See Decision and Order of New York State Supreme Court Justice Saliann Scarpulla*, NYSCEF Doc. No. 146, at 2). To make these payments, Bway.net borrowed money from Songbird Company. The loan was secured by a lien against Bway.net. Complaint, ¶ 14. Although Bway.net made the initial payment (i.e., the \$110,000 lump sum payment), by 2006, Bway.net was unable to repay Songbird Company or Mr. Stevelman. *Id.* By reason of Bway.net's default under the 2005 Settlement Agreement, a judgment in the amount of \$219,448.56 was entered by the Clerk of the County of New York on September 18, 2006 (*See* NYSCEF Doc. No. 155).

In 2006, Mr. Stevelman initiated another action, alleging among other things, that Open Net and Ms. Lynch engaged in a scheme to defraud Mr. Stevelman: *Ian Stevelman v. Bway.net, Inc. et al* (Index No.: 604201/2006). Justice Kornreich referred the matter to mediation. Pursuant to a Settlement Agreement (the **2007 Settlement Agreement**), dated September 26, 2007, by and between B'Way.net, Inc., Open Net, Inc., Kate Lynch and Ian Stevelman, Open Net d/b/a/ Bway.net was to pay Mr. Stevelman a lump sum of \$25,000 and an additional sum of \$165,000 payable in monthly instalments of \$2,500 (*See* NYSCEF Doc. No. 155).

Pursuant to the 2007 Settlement Agreement, Open Net made monthly payments to Mr. Stevelman from November, 2007 to April, 2010. However, thereafter, Open Net defaulted. Complaint, ¶ 19. In a Decision and Order (the **2010 Judgment**), dated November 15, 2010, Justice Kornreich enforced the 2007 Settlement Agreement (NYSCEF Doc. No. 156) by ordering and declaring, among other things, that Mr. Stevelman owned Ms. Lynch's shares in Bway.net and Open Net (together the **Corporate Defendants**), that Mr. Stevelman be designated the sole officer and director of the Corporate Defendants, that Ms. Lynch withdraw as officer and director of the Corporate Defendants, that judgment be entered against Ms. Lynch in the amount of \$15,000 and that a temporary restraining order which had been issued by the court on June 16, 2010 preventing removal of Bway.net's assets be continued until Mr. Stevelman could assume ownership and control of the companies.

On November 23, 2010, Mr. Stevelman filed the 2010 Judgment and on or about November 24, 2010, Mr. Stevelman and two associates entered the office of the Corporate Defendants at midnight to change the locks and take control of the accounts. *Id.* Ms. Lynch claims that she was subsequently unable to gain physical access to the office of the Corporate Defendants without an attorney. *Id.*

On November 25, 2010, Ms. Lynch filed a motion to reargue/renew because she remained the possessory guarantor under the lease of Bway.net (NYSCEF Doc. No. 1). Following the hearing, Justice Kornreich recused herself from the case in an order, dated December 7, 2010 (*See Recusal Order*, NYSCEF Doc. No. 7). Justice Kornreich also issued an interim decision, dated December 7, 2010, providing that

Kathleen Lynch may have access to the office of Broadway Net, Inc. ***in order to obtain her possessions but she must be accompanied by her attorney*** (emphasis added) (NYSCEF Doc. No. 107).

The case was subsequently assigned to New York State Supreme Court Justice Doris Ling-Cohan who undertook a review and settlement process. Complaint, ¶ 23. After Ms. Lynch submitted her demands for accrued compensation and the return of her personal property in January 2011, Justice Ling-Cohan ordered that the motion to reargue/renew be sent back to Justice Kornreich. *Id.*, ¶ 24. In a hearing on June 7, 2011, Justice Kornreich ordered Mr. Stevelman to indemnify Ms. Lynch against any of Bway.net's liabilities guaranteed by Ms. Lynch personally and against any claims arising from Mr. Stevelman's control of the Corporate Defendants. *Id.*, ¶ 24.

The Present Action

In 2012, Ms. Lynch commenced this action against Mr. Stevelman and the Corporate Defendants (together the **Defendants**). Ms. Lynch asserts six causes of action against the Defendants: (1) breach of the employment agreement (first cause of action), (2) violation of BCL § 630 (second cause of action), (3) unjust enrichment (third cause of action), (4) quantum meruit (fourth cause of action), (5) accounting (fifth cause of action), and (6) conversion (sixth cause of action).

In a Decision and Order (the **2013 Decision**), dated December 11, 2013, New York State Supreme Court Justice Saliann Scarpulla granted the Defendants' motion to dismiss the causes of action for breach of the employment agreement (first cause of action), violation of BCL § 630 (second cause of action) and an accounting (fifth causes of action) in their entirety. The claims for unjust enrichment (third cause of action) and quantum meruit (fourth cause of action) were dismissed only against Mr. Stevelman (NYSCEF Doc. No. 146).

The Defendants now move for summary judgment under CPLR 3212 to dismiss Ms. Lynch's remaining claims for unjust enrichment (third cause of action), quantum meruit (fourth cause of action), and conversion (sixth cause of action). Ms. Lynch cross-moves for summary judgment under CPLR 3212.

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Zuckerman v New York*, 49 NY2d 557, 562 [1980]. A mere conclusions of fact or law is insufficient to raise a triable issue of fact. *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973].

I. Defendants' Motion for Summary Judgment Based on Unjust Enrichment, Quantum Meruit and Conversion

A. Third and Fourth Causes of Action (Unjust Enrichment and Quantum Meruit)

Ms. Lynch's claims she is entitled to accrued compensation based on unjust enrichment and quantum meruit because she asserts that the Corporate Defendants did not pay her between January 15, 2006 to November 24, 2010. Complaint, ¶¶ 54-61. Ms. Lynch claims that she was not properly terminated pursuant to her employment agreement and is therefore entitled to her

unpaid salary. *Id.* The court notes that the Defendants had previously moved to dismiss the third and fourth cause of action arguing that Ms. Lynch's claims could "only be directed at Open Net because [Ms.] Lynch did not perform any services for [Mr.] Stevelman or Bway.net from 2006-2010," that she failed "to set forth any details as to what services she rendered for Open Net and how Open Net benefitted from such services," and that she "chose to stop taking a salary, and instead just received whatever benefits arose from her equity in the corporations during that time" (NYSCEF Doc. No. 44, p. 6). In her 2013 Decision, which denied the Defendants' motion to dismiss the unjust enrichment and quantum meruit claims as against Bway.net and Open Net, Justice Scarpulla found that, "further discovery [was] required to shed light on the relationship between Open Net and Bway.net during the relevant time period, and to determine which company, if any, can be held liable to Lynch" (*id.*, p. 9). Justice Scarpulla dismissed the quasi-contract claims as against Mr. Stevelman "because he had no involvement with Bway.net or Open Net during the applicable time period for these claims" (*id.*).

The Defendants now argue that Ms. Lynch's claims in quasi-contract are barred because her rights to accrued compensation are governed by her employment agreement and a party may not seek recovery in quasi-contract where the relationship between the parties is defined by a written contract that details the applicable terms and conditions. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389. The Defendants further assert that Ms. Lynch forfeited her rights to accrued compensation because (1) she was removed as director and officer of Open Net by the 2010 Judgment, and because (2) she was voluntarily managing Open Net without a salary to satisfy personal and corporate debts during the period for which she claims unpaid compensation.

During oral argument, Ms. Lynch argued that she was entitled to her annual salary of \$60,000 for the period when she was allegedly unpaid and she conceded that this claim was for accrued compensation. This court is bound by the 2013 Decision of Justice Scarpulla when she dismissed Ms. Lynch's first cause of action for breach of the employment agreement, holding that

[Ms.] Lynch's employment was never "terminated" pursuant to the employment agreement, so as to trigger any right to severance or accrued compensation. Rather, pursuant to the 2007 stipulation, when the corporate defendants defaulted in making payments to [Mr.] Stevelman, [Ms.] Lynch forfeited her rights as officer and director of the corporate defendants.

Accordingly, Ms. Lynch's claim in quasi contract must be dismissed because those claims are brought pursuant to the employment agreement under which her rights were ultimately forfeited. Ms. Lynch's third and fourth cause of action are dismissed.

B. Sixth Cause of Action (Conversion)

Ms. Lynch's claim for conversion relates to two types of property: (1) her personal property and (2) certain funds held in a corporate bank account.

In her complaint, Ms. Lynch asserts that the Defendants converted her personal property. Complaint, ¶ 67. The Defendants argue the conversion claim should be dismissed because Ms. Lynch fails to sufficiently describe the items she claims were converted, identify their ownership, and assess their value. 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.” *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007].

The Defendants adduced evidence from Ms. Lynch’s deposition testimony that the allegedly converted personal property did not belong to Ms. Lynch, including the MacBook, the email account and documents belonging to her brother, sister and ex-boyfriend (*See Ms. Lynch Deposition Transcript*, NYSCEF Doc. No. 150, 38-57). Ms. Lynch’s conclusory allegations of conversion, without evidentiary support, are insufficient to create an issue of fact to defeat the Defendants’ motion for summary judgment. Moreover, during oral argument, Ms. Lynch confirmed that the MacBook did not belong to her. As a result, Ms. Lynch’s claim for conversion of her personal property is dismissed.

Ms. Lynch also claims that the Defendants converted \$20,000 deposited in the bank account of the Corporate Defendants. The Defendants argue that Ms. Lynch’s conversion claim for \$20,000 fails because the allegedly converted sum was held in a corporate account which belonged to the Corporate Defendants. When the allegedly converted property is money, “it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner.” *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]. In the 2010 Judgment, Mr. Stevelman was designated the sole officer and director of Open Net (NYSCEF Doc. No. 156). At her deposition, Ms. Lynch confirmed that her claim for conversion related to the withdrawal of funds from the Open Net bank account sometime after November 16, 2010 (*See Ms. Lynch Deposition Transcript*, NYSCEF Doc. No. 150, at 17-22). As a matter of law, Ms. Lynch’s claim of conversion for money fails because it was never her money. It was the Corporate Defendants’ money. There was no obligation that the Open Net funds be returned to Ms. Lynch because such funds never belonged to her personally in the first instance. Therefore, Ms. Lynch’s claim for conversion in relation to funds in the Open Net account is dismissed. Accordingly, the sixth cause of action is dismissed.

II. Plaintiff’s Cross-Motion for Summary Judgment

Ms. Lynch’s cross-motion for summary judgment is denied as improper because she did not file a notice of cross-motion. For the avoidance of doubt, even if Ms. Lynch’s cross-motion was deemed properly made, it is still denied as moot per the above.

Accordingly, it is

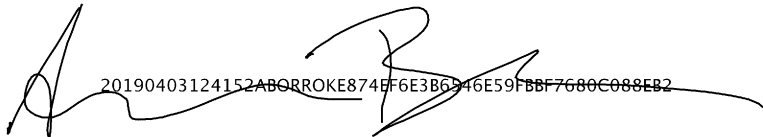
ORDERED that the defendants motion for summary judgment is granted and the complaint is dismissed against the defendants; and it is further

ORDERED that the counter-claims against the plaintiff are severed and the balance of the action shall continue; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of the defendants; and it is further

ORDERED that the parties are to appear for a pre-trial conference at 60 Centre Street, Courtroom 238 on April 22, 2019 at 11:30am.


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4/3/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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