

Hey Jude Prods., Inc. v Simon
2019 NY Slip Op 32598(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 150464/2018
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 150464/2018

HEY JUDE PRODUCTIONS, INC.,

Plaintiff,

MOTION SEQ. NO. 002

- v -

TAMAR SIMON,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for DISMISSAL OF COUNTERCLAIMS

In this action by plaintiff Hey Jude Productions, Inc. seeking damages for conversion against defendant Tamar Simon, plaintiff moves, pursuant to CPLR 3211(a)(7), to dismiss defendant's counterclaims. Defendant opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in the decision and order of this Court entered April 17, 2019, Doc. 51. That order dismissed plaintiff's claim for punitive damages as well as all claims against defendant Mean Streets Management. Additional relevant facts are set forth below.

On April 23, 2019, defendant filed an answer denying all substantive allegations of wrongdoing and asserting counterclaims for breach of contract, quantum meruit, breach of fiduciary duty, tortious interference with economic advantage, promissory estoppel, defamation, and constructive trust. Doc. 53.

Plaintiff now moves, pursuant to CPLR 3211(a)(7), to dismiss defendants' counterclaims for failure to state a cause of action. Doc. 54.¹

As plaintiff asserts, since defendant pleaded that plaintiff breached her employment contract, her counterclaim for promissory estoppel must be dismissed as duplicative (*see Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535 [1st Dept 2016] [citation omitted]), as must be defendant's counterclaim for quantum meruit. *See Wald v Graev*, 137 AD3d 573, 574 (1st Dept 2016), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

Next, defendant's counterclaim for breach of a fiduciary duty must be dismissed since defendant alleges that she had an employment relationship with plaintiff and such a relationship does not give rise to a fiduciary duty. *See Wilson v Dantas*, 29 NY3d 1051 (2017) citing *Rather v CBS Corp.*, 68 AD3d 49 (1st Dept 2009).

Defendant further asserts that she is entitled to a constructive trust against plaintiff.

Generally, a constructive trust may be imposed "[when] property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386; 1 Scott, Trusts [3d ed], § 44.2, p 337; 4 Pomeroy's Equity Jurisprudence [5th ed], § 1053, p 119). In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (*see Janke v Janke*, 47 AD2d 445, affd 39 NY2d 786; *Vassel v Vassel*, 40 AD2d 713, affd 33 NY2d 533; *Foreman v Foreman*, 251 NY 237; *Sinclair v Purdy*, 235 NY 245; *Ahrens v Jones*,

¹ Although plaintiff's notice of motion seeks dismissal of all of defendant's counterclaims, this Court notes that plaintiff's affirmation in support does not set forth any grounds for the dismissal of defendant's counterclaim for breach of contract.

169 NY 555; *Matter of O'Hara*, 95 NY 403). Most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust (see Bogert, *Trusts and Trustees* [2d ed], § 482, p 132; 61 NY Jur, *Trusts*, § 146, pp 303-304).

Sharp v Kosmalski, 40 NY2d 119, 121-122 (1976).

Since, as noted above, plaintiff and defendant did not have a fiduciary relationship, defendant has failed to satisfy all of the prerequisites for this claim and this it must be dismissed.

Next, defendant asserts a counterclaim alleging plaintiff's tortious interference with the contract between the parties. "The elements of tortious interference with a contract are '[1] the existence of a valid contract, [2] [plaintiff's] knowledge of the contract, [3] [plaintiff's] intentional procurement of a breach of the contract, and [4] breach of the contract' (*RLR Realty Corp. v. Duane Reade, Inc.*, 145 AD3d 444, 445 [1st Dept 2016]). However, 'mere contentions . . . offered with no factual basis to support the allegations are insufficient to state a cause of action for tortious interference with contractual relations' (*M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [2d Dept 1995])." *Zazzarino v 13-21 E. 22nd St. Residence Corp.*, 2018 NY Slip Op 32573(U), *6-7 (Sup Ct, NY County 2018).

Here, defendant alleges that "[p]laintiff intentionally took actions to sabotage [d]efendant's existing or prospective deals with individuals and venues. By taking deliberate acts to interfere with [d]efendant's business, [d]efendant is entitled to recover compensatory and punitive damages, in an amount to be determined at trial . . ." Doc. 53 at par. 11. However, since defendant fails to substantiate this claim with any specific facts, this counterclaim must be dismissed as well. See *M.J. & K. Co.*, 220 AD2d at 490.

Defendant's counterclaim for defamation must also be dismissed. Since the counterclaim fails to set forth the allegedly defamatory language, the pleading of this claim is deficient. See CPLR 3016. Additionally, as plaintiff asserts, to the extent the allegedly defamatory statements were made to police officers, they were privileged and subject to qualified immunity. *See Present v Avon Prods.*, 253 AD2d 183, 188 (1st Dept 1999).

Although plaintiff argues that punitive damages "are not available in New York for breach of contract" (Doc. 55 at par. 30), this is not completely accurate. The Court of Appeals has stated that:

In *Rocanova v Equitable Life Assur. Socy.* [83 NY2d 603], we reiterated the principle that damages arising from the breach of a contract will ordinarily be limited to the contract damages necessary to redress the private wrong, but that punitive damages may be recoverable if necessary to vindicate a public right (*id.*, at 613; *see also, Garrity v Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358). Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as "gross" and "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Rocanova*, 83 N.Y.2d at 614, *supra*, quoting, *Walker v Sheldon*, 10 N.Y.2d 401). We set forth in the decision the pleading elements required to state a claim for punitive damages as an additional and exemplary remedy when the claim arises from a breach of contract. They are: (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker v Sheldon* (10 N.Y.2d 401, 404-405, *supra*); (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally (*Rocanova*, 83 N.Y.2d at 613, *supra*). Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract.

NY Univ. v Cont. Ins. Co., 87 NY2d 308, 315-316 (1995).

Here, since there is no allegation that plaintiff's conduct was part of a pattern directed at the public generally, defendant's counterclaim for punitive damages must be dismissed.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants counterclaims sounding in quantum meruit (second counterclaim), breach of fiduciary duty (third counterclaim), tortious interference with economic advantage (fourth counterclaim), promissory estoppel (fifth counterclaim), defamation (sixth counterclaim), and constructive trust (seventh counterclaim), as well as defendant's claim for punitive damages, are severed and dismissed; and it is further

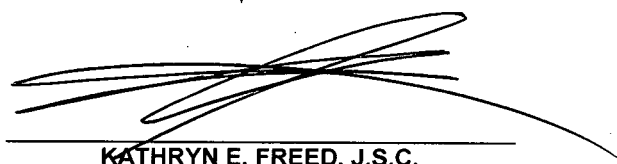
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties are to appear for a previously scheduled preliminary conference on October 29, 2019 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

9/3/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE