

**Votsis v ADP, LLC**

2019 NY Slip Op 34093(U)

January 15, 2019

Supreme Court, Monroe County

Docket Number: E2018/005210

Judge: Matthew A. Rosenbaum

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

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ELIZABETH VOTSIS and CRAVE L&D, LLC,  
Plaintiff,

v. Index #s:E2018/005210

ADP, LLC and DAVID THOMAS POLIT,  
Defendants.

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Special Term  
January 10, 2019

APPEARANCES

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DECISION

Rosenbaum, J.

Defendant ADP requests an order pursuant to CPLR 3211(a)(7) and 3016(b) dismissing the Verified Amended Complaint with prejudice in its entirety as to ADP.

Plaintiff opposes dismissal.

Defendant Polit did not take a position on the motion.

#### Discussion

Defendant ADP is one of the world's largest payroll services and other human resources management providers. (Complaint ¶¶8-14-17,18). Defendant Polit visited plaintiff's restaurant on May 21, 2018, introducing himself as a district manager, and offering to provide a quote for ADP's payroll services. (Id. ¶¶19-23). For Defendant Polit to provide a quote, he requested and was provided confidential business records and financial statements. (Id. ¶¶20-23).

Approximately four days after the sales meeting, Polit allegedly posted a statement on Crave's Facebook page which stated:

Stay away from this place. There are possible multiple health code violations and department of labor violations, possible money laundering and fraud—They use old and expired ingredients and treat their employees like animals and don't pay them for the hours they work.

An Employee is about to be evicted from their home because of the lack of wages paid. Multiple complaints have been filed with the DOL and Department of Health. Elizabeth Votsis is the owner and has been previously charged with fraud.

Do not support this business and force them out of the East Rochester community. All of the few "positive" reviews on Google, FB and Yelp are fake and created by the owners. The negative reviews are on point with the failure of this establishment. (¶24, Ex. A screenshot of the post).

Plaintiff has pled four causes of action against Defendant Polit and ADP. The complaint Paragraphs 75-114 set forth the purported basis of liability against ADP which claims are based upon information

and belief. (See Amended Verified Complaint). The First Cause of Action alleges a respondeat superior theory of liability against ADP by claiming that Polit was acting within the scope of his employment when the defamatory statements were published. The Second Cause of Action alleges intentional infliction of emotional distress claiming that the conduct of both defendants was extreme and outrageous. The Third Cause of Action, breach of fiduciary duty, plaintiff claims that they relied on ADP's Corporate philosophy of integrity when it shared its confidential information which duty was breached when the defamatory statements were published. (Amended Complaint ¶¶135-142). The Fourth Cause of Action, negligent supervision, plaintiff claims ADP "advised, encourages, permitted and condoned" Polit's collection of confidential information "upon information and belief" ADP, through Polit, recklessly reviewed business records and permitted or had knowledge of the defamatory publication. (Amended Verified Complaint ¶¶143-160).

#### Failure to State a Cause of Action

On a motion to dismiss pursuant to CPLR §3211(a)(7) the complaint must be given every favorable inference and the allegations in the complaint are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dep't 1992). When considering such a motion, it is the task of the court to determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." (Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995)(citations omitted). If the court determines "that plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. (See Id. at 318).

#### Respondeat Superior

Plaintiff in an attempt to maintain her theory of respondeat superior liability against ADP, as employer, asserts that Polit used his personal Facebook account during regular business hours, within the scope of his employment, and linked to or in conjunction with ADP's official Facebook page. ((Verified Amended Complaint ¶¶95-98). Incredulously, without factual support, plaintiff claims "upon

information and belief, Defendant ADP authorized Polit's tortious conduct on Facebook." (§99). The Court is surprised by plaintiff's claim that a global company with 700,000 customers in 113 countries would divert its resources to undermine a restaurant in the small town of East Rochester or condone or authorize an employee's self serving conduct to accomplish such a goal.

Although not initially clear, plaintiff's submissions and response make it abundantly clear, that Defendant Polit did not use ADP's social media or website while writing the review. What seemingly occurred, is that Defendant Polit posted on Crave's Facebook under reviews the alleged defamatory statement using his own private Facebook account. (See Votsis aff'd 12-6-18 Ex. A post). A person viewing the post could then take the affirmative step and click onto Polit's Facebook identifier which opened to his Facebook account. His personal Facebook page identified him as District Manager at ADP and contained an ADP logo, but it also provided other past employers, education and other common Facebook information. The actual restaurant review post did not contain any information referencing ADP nor did it identify Polit as an employee of ADP until someone clicked on his name and opened Polit's personal account.

Despite plaintiff's continued claim that Defendant ADP was complicit in Polit's conduct or the conduct was within the scope of his duties, there is absolutely no proof of such theory. Plaintiff attempts to make a greater connection with ADP by stating that Polit's Facebook page is linked to ADP, and that this creates liability. If the link creates or supports liability, surprisingly, plaintiff has not also named Polit's other/previous employers as parties to this litigation since his page also links those companies. (Votsis aff'd ¶15 Ex. B)

As the cases present, respondeat superior litigation focuses around the employee's scope of employment.

There is no single mechanical test to determine whether at a particular moment an employee is engaged in the employer's business (see, *Riley v. Standard Oil Co. of New York*, 231 N.Y. 301, 304, 132 N.E. 97), but decisional law has yielded various formulations, which are instructive. Did

the employee's act—here, alleged defamation—fall within the direction and control of the employer? (see, *Johnson v. Daily News*, 34 N.Y.2d 33, 356 N.Y.S.2d 1, 312 N.E.2d 148; *Lundberg v. State of New York*, 25 N.Y.2d 467, 306 N.Y.S.2d 947, 255 N.E.2d 177). Did the employee act under the express or implied authority of the employer? (see, *Cooke v. Drigant*, 289 N.Y. 313, 317, 45 N.E.2d 815). Was the employee's act in furtherance of the employer's interests? (*Sims v. Bergamo*, 3 N.Y.2d 531, 535, 169 N.Y.S.2d 449, 147 N.E.2d 1; *Sauter v. New York Tribune*, supra; *Clark v. Harnischfeger Sales Corp.*, 238 A.D. 493, 264 N.Y.S. 873). Were the employee's acts in the "discharge of duty" to the employer? (*Joseph v. City of Buffalo*, 83 N.Y.2d 141, 145, 608 N.Y.S.2d 396, 629 N.E.2d 1354). Was it an act in the execution of the employer's orders or part of the work assigned by the employer? (see generally, 53 N.Y.Jur. 2d, *Employment Relations* § 334). Were the acts "so closely connected" with what the employee was hired to do, and "so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment"? (*Prosser and Keeton, Torts* § 70, at 502 [5th ed.] ).

See *Rausman v. Baugh*, 248 ad2d 8,10-11 (2<sup>nd</sup> Dept 1998)

Here, even accepting plaintiff's allegations as true and providing plaintiff every favorable inference, the respondeat superior claim against ADP based upon information and belief fails each instructive formulation identified in *Rausman*. (*Id.*). There are no allegations that support plaintiff's theory that Polit's conduct was part of his job responsibilities or was in furtherance of ADP's business. Although plaintiff claims that the public knows ADP gets "access to the confidential business information and sensitive records of its client," thus the defamatory post are more believable, such theory is not supported by the allegations or law. (*Votsis aff'd* ¶27). Despite plaintiff's claims that the access to the confidential information is somehow connected to the defamatory statement, such claim is not supported by the written utterance. The statement as fully set forth

above clearly does not unveil any confidential information or data.

ADP is a payroll company not a restaurant review company, a competitor nor in the business of investigating and reporting on local restaurants. The facts as alleged do not connect Polit's self-serving conduct, outside the scope of his employment, to any cognizable legal theory against ADP. Polit's job responsibilities were to solicit businesses for payroll services, requiring him to review the company records to provide payroll solutions. Here there is no claim that his actual job duties or the confidential materials he received caused the injury to plaintiff. The posting makes no reference to those payroll materials. Rather, plaintiff only alleges the posting caused the injury without factual support connecting the posting to any confidential information. Contrary to plaintiff's claims, Polit's rant was completely personal and outside the scope of his job duties. In fact, further supporting ADP's theory that the posting was personal and outside Polit's job duties, Polit's girlfriend was an employee of Crave when the comments were posted creating the personal connection and likely the basis of the strife. (Skelly letter June 26, 2018; Ex. A Skelly aff'm 12/20/18).

Following plaintiff's rationale, one would be led to believe liability is created anytime there is a link between the creator and his/her employer. The Court found no case law nor legal guidance supporting imposition of broad liability through social media contacts or links. Since conclusory and/or inherently incredible allegations are not presumed true on a motion to dismiss, defendant's motion dismissing plaintiff's first cause of action is granted. (Miller v. Allstate Indem., 132 AD3d 1306 (4<sup>th</sup> Dept. 2015); Wiggins & Kopko v. Masson, 116 AD3d 1130, 1131-1132 (3<sup>rd</sup> Dept. 2014).

Accordingly, plaintiff's first cause of action alleging respondeat superior liability against ADP is dismissed.

#### Emotional Distress

To survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement of Torts, Second, which we adopted in Fischer v. Maloney, 43 N.Y.2d 553,

557, 402 N.Y.S.2d 991, 373 N.E.2d 1215, that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd. [1] ). Comment d to that section notes that: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community".

(Murphy v. American Home Products, 58 NY2d 293 (1983)).

Again, since Polit published the allegedly defamatory statement, outside the scope of his employment, through his private Facebook account, the cause of action against ADP fails.

Moreover, in review of the statements published by Defendant Polit, as set forth above, and as alleged in plaintiffs' complaint, the conduct alleged is not so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." (Walter v. NBC Television, 27 AD3d 1069, 1071 (4<sup>th</sup> Dept. 2006)).

In opposition, plaintiff has cited one case where the Court denied dismissal of an emotional distress cause of action where defendant knowingly made false accusations of food poisoning against several eateries. (See 164 Mulberry Street v. Columbia University, 4 AD3d 49, 56-59 (1<sup>st</sup> Dept. 2004)). The facts presented in Mulberry established that defendant, a professor at Columbia, carried out a study, as part of his employment, in which he admittedly made false accusations of food poisoning to see how each restaurant would react. (Id.). Apparently the health department was also notified, and as a result, employees were required to provide stool samples for testing. (Id.). The defamatory statements in Mulberry which resulted in the invasion of peoples' dignity and privacy (stool sampling) were far more egregious than the statements made by Polit. Likewise, unlike here, in Mulberry there was a clear connection between the University, and the conduct of the professor advancing the University's teaching objectives which implicated the University.

Here, plaintiff has failed to make the necessary connection between ADP and the conduct of Polit, and the emotional distress claim is based upon the same conduct as the defamation. Courts have routinely granted dismissal where the infliction of emotional distress claim, as here, is based upon the same facts, and duplicative of the defamation claim. (Durepo v. Flower City Television, 147 AD2d 934 (4<sup>th</sup> Dept. 1989); See also Matthaus v. Hadjedj, 148 AD3d 425 (1<sup>st</sup> Dept. 2017); Bacon v. Nygard, 140 AD3d 577, 578 (1<sup>st</sup> Dept. 2017).

Accordingly, the intentional infliction of emotional distress claim against ADP as employer must also be dismissed.

#### Breach of Fiduciary Duty:

Plaintiff in her third cause of action claims that a fiduciary relationship was formed when Polit requested and obtained plaintiff's confidential business records, then published a series of defamatory statements. Plaintiff claims that they possessed a high level of confidence and reliance on ADP based upon its corporate philosophy which in turn resulted in ADP exercising control over plaintiff. (§§135-142).

"A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation." Oursler v. Women's Interart Ctr., 170 A.D.2d 407, 408 (1991). See also, Friedman v. Anderson, 23 A.D.3d 163, 166 (1<sup>st</sup> Dept. 2005). "Rather a plaintiff must make a 'showing of special circumstances that could have transformed the parties' business relationship to a fiduciary one, such as control by one party of the other for the good of the other." DiTolla v. Doral Dental IPA of New York, LLC, 100 A.D.3d 586, 587 (2d Dept. 2012). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005), quoting Restatement [Second] of Torts §874, Comment a. See also, Roni LLC v. Arfa, 18 N.Y.2d 846 (2011) ("Put differently, 'a[] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other.'" (citation omitted). "Such a relationship, necessarily fact-specific, is grounded in a higher level of

trust than normally present in the marketplace between those involved in arm's length business transactions." EBC I, Inc., 5 N.Y.3d at 19.

Moreover:

"If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." However, it is fundamental that fiduciary "liability is not dependant solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."

*Id.*, quoting Restatement [Second] of Torts §874, Comment b.

"[A] cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract" the parties created "a relationship of higher trust." *Id.* "[T]he actual relationship between the parties determined the existence of a fiduciary duty." Carbon Capital Management, LLC v. Amer. Exp. Co., 88 A.D.3d 933, 938 (2d Dept. 2011). "Ascertaining the existence of a fiduciary relationship 'inevitably requires a fact-specific inquiry.'" Roni, LLC, 18 N.Y.3d at 848, quoting Eurycleai Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 561 (2009).

Plaintiff's Amended Verified Complaint fails to allege a commercial relationship for which a fiduciary duty would arise. Plaintiff merely alleges that Polit made a one-time solicitation which did not advance beyond that one-time meeting. When the allegations lack sufficient objective facts that ADP entered into a fiduciary relationship, dismissal is warranted. (See Eurycleia Partners v. Seward & Kissel, 12 NY3d 553, 561-562 (2009); Saul v. Cahan, 153 AD3d 947, 948-949 (2<sup>nd</sup> Dept. 2017). A single meeting which fails to create a business relationship is insufficient to support a claim for breach of fiduciary duty. (Ravenna v. Christie's Inc., 289 AD2d 15, 16 (1<sup>st</sup> Dept. 2001). Here, neither the negotiation, assuming the single meeting meets the standard of negotiation, or the turn over of sensitive business records is sufficient to support the claim on these facts. (Musalli Factory v. JP Morgan, 261 F.R.D. 13, 26-27 (S.D.N.Y. 2009); Wiener v. Lazard

Freres, 241 AD2d 114 (1<sup>st</sup> Dept. 1998). As previously determined, even assuming the material turned over constituted confidential information, the allegations and alleged defamatory statement make no reference to nor share any of that confidential information. There is simply no connection.

Moreover, Courts have rejected claims that companies providing payroll services are fiduciaries to their clients. (See Ironforge.com v. Paychex, Inc., 747 F. Supp. 384, 394-395 (W.D.N.Y. 2010).

Accordingly, reviewing the facts in a light most favorable to plaintiff, the breach of fiduciary duty claim against Defendant ADP must be dismissed since the supporting allegations fall short of the proof required to sustain the claim.

#### Negligent Supervision

Plaintiff claims upon information and belief, Defendant ADP "had actual and/or constructive notice of Defendant Polit's propensity to commit defamatory acts against individuals such as Plaintiffs." (Complaint ¶153).

"An employer may be liable for a claim of negligent hiring or supervision if an employee commits an 'independent act of negligence outside the scope of employment' and the employer 'was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act.'" (Lamb v. Baker, 152 AD3d 1230, 1231 (4<sup>th</sup> Dept. 2017) citing Seiden v. Sonstein, 127 AD3d 1158, 1160-1161, 7 N.Y.S. 3d 565). Here, similar to Lamb, plaintiff has failed to allege that Polit committed the act "outside the scope of his or her employment." Rather, the allegations in plaintiff's Amended Verified Complaint allege that defendant's acts were carried out within the scope of his employment, and done to advance the interests of ADP. Under these factual representations that the acts were committed under his scope of employment, a negligent hiring, supervision, or retention claim fails.

Even assuming plaintiffs plead in the alternative, lacking from plaintiffs' pleading is any factual basis for the Court to conclude that ADP had notice of Polit's tortious propensities. Although discovery may

uncover prior conduct, even assuming a known propensity, the proof submitted here only establishes that Polit made the remarks on plaintiff's Facebook page under restaurant reviews using his own social media account. Polit did not reference nor implicate ADP. The actual restaurant review post did not contain any information referencing ADP nor did it identify Polit as an employee of ADP. A viewer was required to affirmatively click on Polit's name which opened his account identifying him as an employee of ADP which also provided several other similar links to various businesses.

Although plaintiffs claim that the ADP logo and links to ADP's website were contained on Polit's Facebook page, that information was not available until the viewer clicked on Polit's name, which was not present while simply viewing the restaurant post. In any event, those identifiers on Polit's personal page do not link ADP or any of the other businesses to the alleged statement or conduct of Polit. While Polit's Facebook account also links viewers to other employers and other contacts, no liability is raised against them. In light of plaintiff's allegations that the conduct was within the scope of Polit's employment with ADP which this Court found was unsupported, and the lack of any proof that ADP had knowledge of the private post, the Fourth Cause of Action can not survive the motion to dismiss.

Plaintiff also seeks to impose liability against ADP on the basis that ADP "failed to define and implement corporate social media guidelines and policies" which created an environment encouraging employees to share ADP content on social media. However, contrary to that claim, ADP's Global Social Media Policy does provide guidelines and policies prohibiting conduct even on a private account that violates the policy and "could impact ADP's brand, products and services." (Franklin-van der Sanden aff'd 10-17-18 pg. 2). ADP also warns employees that they regularly review internet sites for such postings, and disciplinary action may be taken against the employee. Again, however, as set forth above, the actual restaurant review on plaintiff's Facebook account did not identify Polit as an employee of ADP. Rather, his account had to be opened which linked him to ADP and various other companies.

In the opposition memo, plaintiff in attempting to save its claim

against ADP submits that ADP acknowledges in their social media policy that they may have potential liability for the actions of their employees, and they may be in possession of documents demonstrating their actual and/or constructive knowledge of Polit's propensity to misuse social media. Again, contrary to these claims, Polit reviewed the restaurant on the restaurant's Facebook page under the review section, using his own private Facebook page. A viewer was then required to open Polit's Facebook page by tapping on his name, opening the page, and then the links were available. Finding ADP liable for Polit's private conduct under the facts here would open all employers up to potential liability for their employee's Facebook posts even where it is not as simple as tapping the name to open the site. For example, assuming for argument sake that Polit made the remark, but tapping his name was private or not linked to ADP. Rather, a viewer then independently did a Google search of Polit, found a LinkedIn account or other webpage that identified Polit as an employee of ADP, would ADP still be liable or would the other companies Polit was linked to on his page also be liable? What about the liability of Facebook for permitting or not appropriately monitoring content in the first instance? Although liability concerning social media is ever evolving, here the facts lack the necessary link to create liability against the employer under a theory of negligent supervision when an employee intentionally writes something on social media under a restaurant's review on the restaurant's individual Facebook page using the employee's private social media account.

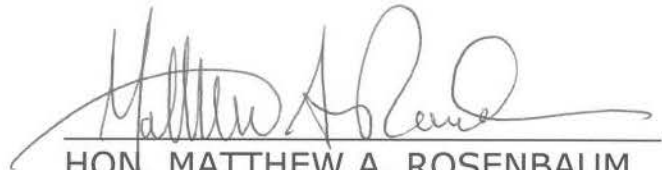
Accordingly, ADP's motion to dismiss plaintiff's Fourth Cause of Action is granted.

Lastly, plaintiffs' claim that ADP failed to timely remove the posting is without merit and does not create liability where none exists. ADP did not agree to remove the posting. They simply advised that they had investigated the claim, addressed the matter with Polit and took appropriate action. In regards to removal, they advised, "it has come to our attention that Mr. Polit's post from Crave's Facebook page has been withdrawn." ADP did not agree to remove the post as plaintiffs advance. Ironically, even plaintiff was unable to "remove" the post, and was required to hide the comment and later deactivate the Facebook page. (Votsis aff'd ¶¶28, 31; Cotter aff'm ¶¶8,9).

Accordingly, ADP's motion is granted dismissing plaintiffs' complaint against them.

This shall constitute the decision and order of the Court pursuant to CPLR 4213. Counsel for Defendant ADP shall submit the order on notice.

Dated: 1/15/19

  
HON. MATTHEW A. ROSENBAUM  
Supreme Court Justice