SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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H. ROSKE & ASSOCIATES, LLP,

Plaintiff,

- v -

CHRISTIAN BURGHART, SCHUMANN BURGHART LLP, LUKE GYURE, HEIKO MEYENSCHEIN, HENRY ROSKE

Defendants.

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CHRISTIAN BURGHART AND SCHUMANN BURGHART LLP
Counterclaim Plaintiffs,

- v -

H. ROSKE & ASSOCIATES LLP AND HENRY ROSKE,
Counterclaim Defendants

INDEX NO. 657328/2017

MOTION DATE 12/09/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 125, 126, 127, 128, 129, 133, 134, 166

were read on this motion to/for DISMISS.

Plaintiff/Counterclaim Defendant H. Roske & Associates LLP ("Roske Firm") and Counterclaim Defendant Henry Roske ("Roske") (collectively "Counterclaim Defendants") move to dismiss certain counterclaims asserted by Defendants/Counterclaim Plaintiffs Christian Burghart ("Burghart") and Schumann Burghart LLP ("SB Firm") (collectively "Counterclaim Plaintiffs") and to dismiss the Tenth Affirmative Defense asserted by Counterclaim Plaintiffs.

The Roske Firm is a law firm that specializes in providing legal services to clients from German-speaking countries seeking to do business in the United States.[1] Roske is the managing partner and owner of the firm. Non-party Moritz Schumann ("Schumann")[2] and defendants Burghart and Luke Gyure ("Gyure") are former employees of the Roske Firm. Burghart is a former non-owner "name partner" of the Roske Firm and Gyure served as an administrative assistant to Roske. Defendant Heiko Meyenschein ("Meyenschein") is a lawyer who also specializes in providing legal services to German-speaking clients but was not employed by the Roske Firm.[3]

Both Burghart and Gyure terminated their employment with the Roske Firm in 2016. The Roske Firm alleges that Burghart and Gyure terminated their employment to form their own firm with Schumann and Meyenschein (the SB Firm) to compete with the Roske Firm. The Roske Firm also claims that Schumann and Burghart were secretly practicing law together and competing with the Roske Firm at least two months before they left the Roske Firm. According to the Roske Firm, Schumann and Burghart used the Roske Firm's resources to service clients but did not record or bill any of their time directly to the firm, thereby misappropriating its funds.

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[1] All of the factual allegations herein are based on the allegations set forth in the Second Amended Complaint (NYSCEF Dkt. No. 62) and the Answer to the Second Amended Complaint (NYSCEF Dkt. No. 115).

[2] Schumann was originally a defendant in this action, but the Roske Firm subsequently amended its complaint to remove him.

[3] Meyenschein has not asserted any counterclaims against Counterclaim Defendants.

In the Second Amended Complaint, The Roske Firm asserted causes of action for breach of contract, tortious inducement of breach of contract, breach of fiduciary duties, aiding and abetting breach of fiduciary duties and unjust enrichment. The Roske Firm seeks monetary relief in the form of damages and "disgorgement of all monies, benefits or property obtained or received by defendants through their criminal scheme and misconduct including, but not limited to, disgorgement by defendants Burghart and Gyure of compensation …" (NYSCEF Dkt. No. 62 at ¶ 5).

The Court heard a partial motion to dismiss the complaint and dismissed the breach of contract and tortious inducement of breach of contract claims (NYSCEF Dkt. No. 89). Defendants, now Counterclaim Plaintiffs, Burghart and the SB Firm answered the Second Amended Complaint and asserted several affirmative defenses and counterclaims against the Roske Firm and Roske, individually. Counterclaim Defendants, the Roske Firm and Roske now move to dismiss the Counterclaim Plaintiffs' counterclaims for defamation, tortious interference with business relations and violation of Labor Law § 193. Counterclaim Defendants also move to dismiss Counterclaim Plaintiffs' Tenth Affirmative Defense, which states that "The New York Labor Law bars Plaintiff [the Roske Firm] from any entitlement to the disgorgement of salary and other compensation earned by Defendants [Burghart, the SB Firm, and Gyure] during their employment with Plaintiff" (NYSCEF Dkt. No. 115 at ¶ 70).

Discussion

On a motion to dismiss, "the pleading is to be afforded a liberal construction" -- the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citations omitted). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003) (citation omitted).

The Defamation Counterclaim

In the first counterclaim Burghart alleges that Roske, on behalf of the Roske Firm, defamed Burghart when Roske sent an email to a client which stated the following: "Mr. Burghart left the office about 1.5 years ago . . . After his disreputable departure we discovered embezzlement in a substantial matter which led us to file the following lawsuit . . . We think Mr. Burghart will also have problems with his lawyer's license"[4] (NYSCEF Dkt. No. 115 at ¶ 85).

Counterclaim Defendants move to dismiss the defamation cause of action, arguing that it is based on general allegations and does not provide the "specificity required because it fails to allege the name of the client or persons to whom the communication

[4] This email was originally written in German but has been translated into English.

was sent, the form of the communication (letter, email or otherwise), or the specific words communicated in German" (NYSCEF Dkt. No. 126 at p.6).

In opposition, Burghart argues that the defamation cause of action was pled with sufficient detail because Burghart quoted directly from the alleged defamatory email, which also contained the date that the email was sent. Burghart also argues that the fact that the pleading does not publicly disclose the name of the recipient (due to client privacy and confidentiality) does not render the pleading deficient. Additionally, Counterclaim Defendants were provided an unredacted copy of the email in German, which Counterclaim Defendants do not deny.

The elements of a defamation cause of action are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999) (citation omitted). "The complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time, place, and manner of the false statement and specify to whom it was made." *Arvanitakis v Lester*, 145 A.D.3d 650, 651 (2d Dept. 2016) (citation omitted).

Here, Burghart's defamation allegations are pled with particularity, stating the exact language used in the email. The defamation counterclaim also states that the email was sent on March 22, 2018 and that it was sent to a client. Failure to state the identity of the client, to protect the client's confidentiality, does not render the counterclaim deficient, particularly because the client's identity was privately disclosed.

Moreover, statements that "suggest[] improper performance of one's professional duties or unprofessional conduct" constitute defamation per se. *Frechtman v Gutterman*, 115 A.D.3d 102, 104 (1st Dept. 2014). Roske's email suggests that Burghart embezzled in his role as an attorney, thus Roske's statement is sufficient to allege a cause of action for defamation per se. For these reasons I deny the Counterclaim Defendants' motion to dismiss the defamation counterclaim.

The Counterclaim Alleging Violation of Labor Law § 193

In his second counterclaim Burghart alleges that Counterclaim Defendants refused to pay him commissions that he allegedly earned while employed at the Roske Firm, and expenses he incurred on behalf of the Roske Firm, in violation of Labor Law § 193. According to Burghart, he earned commissions based on the business that he brought to the firm, but those commissions were never paid to him. Burghart also alleges that the Roske Firm has refused to reimburse him for expenses incurred in developing clients and generating new business (NYSCEF Dkt. No. 115 at ¶ 93-98).

Counterclaim Defendants move to dismiss the Labor Law counterclaim, arguing that a breach of contract cause of action is a prerequisite to establishing a violation of Labor Law § 193, and that breach of contract was not established here (I previously dismissed the breach of contract cause of action). Counterclaim Defendants also argue that the counterclaim fails because Labor Law § 193 applies only to a *specific deduction* of wages. They argue that here, Burghart is not alleging a specific deduction but rather, a wholesale withholding and refusal to pay wages. In opposition, Burghart argues that a

breach of contract cause of action is not a prerequisite to establishing a violation of Labor Law § 193. He further argues that bonuses and commissions fall under the purview of "wages" and therefore a deduction of a bonus or commission is a deduction from wages and thus a violation of the Labor Law.

Labor Law § 193 provides in relevant part, that "[n]o employer shall make any deduction from the wages of an employee, except deductions which: are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency including regulations promulgated under paragraph c and paragraph d of this subdivision; or are expressly authorized in writing by the employee and are for the benefit of the employee …" (Labor Law § 193 [1-b]). The statute provides a list of authorized deductions, stating,

> Such authorized deductions shall be limited to payments for:
>
> (i) insurance premiums and prepaid legal plans;
> (ii) pension or health and welfare benefits;
> (iii) contributions to a bona fide charitable organization;
> (iv) purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization;
> (v) United States bonds;
> (vi) dues or assessments to a labor organization;
> (vii) discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
> (viii) fitness center, health club, and/or gym membership dues;
> (ix) cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
> (x) pharmacy purchases made at the employer's place of business;
> (xi) tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
> (xii) day care, before-school and after-school care expenses;

> (xiii) payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
> (xiv) similar payments for the benefit of the employee.

Labor Law § 193 [1-b] [i]-[xiv]

Here, Burghart alleges a general withholding of pay, and not a deduction as described in the statute. The First Department has held that "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193." *Perella Weinberg Partners LLC v Kramer* 153 A.D.3d 443, 449 (1st Dept. 2017). The Roske Firm's alleged failure to pay Burghart's earned commissions and expenses is not the unauthorized deduction, as that term is defined (and illustrated) in Labor Law § 193.

In support of his position, Burghart cites cases that predate the holding in *Perella* and do not address the issue of whether the Labor Law applies to a general withholding of wages. For example, he cites to *Ryan v Kellogg Partners Institutional Servs.,* 19 N.Y.3d 1 (2012) and *Wachter v Kim*, 82 A.D.3d 648 (1st Dept. 2011), neither of which address the issue here and instead, deal with the definition of wages under the Labor Law. In fact, the Court in *Perella* expressly noted that the issue of wholesale withholding of wages was not addressed by the Court in *Ryan* or *Wachter* (*Perella,* 153 A.D.3d at 449). Because Burghart's claims relate to a withholding of pay and not an unauthorized deduction of pay, the second counterclaim alleging a violation of Labor Law § 193 is dismissed.

The Unjust Enrichment Counterclaim

All parties agree that the third counterclaim for unjust enrichment should be dismissed because the amount in dispute has been paid by Counterclaim Defendants (Tr. p.44, lines 10-15).

The Tortious Interference with Business Relations Counterclaim

In the fourth counterclaim, Counterclaim Plaintiffs allege that Counterclaim Defendants tortiously interfered with the SB Firm's business relationships by causing clients to refrain from working with the SB Firm through wrongful means. Specifically, Counterclaim Plaintiffs allege that certain Roske Firm clients were interested in retaining the SB Firm, however, "the clients abruptly reversed their decision and decided not to work with the SB firm because, on information and belief, Roske and the Roske Firm made false and disparaging statements about Burghart and the SB Firm" (NYSCEF Dkt. No. 115 at ¶ 91).

Counterclaim Defendants move to dismiss this counterclaim, arguing that it is not pled with particularity and that Counterclaim Plaintiffs have not established that they had a "business relationship" with the clients with whom Roske communicated.

"To 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 Dept. 2009).

Further, "[a] claim for tortious interference with prospective business relations does not require a breach of an existing contract, but the party asserting the claim must meet a "more culpable conduct" standard. This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party." *Law Offices of Ira H. Leibowitz v Landmark Ventures, Inc.* 131 A.D.3d 583, 585 (2d Dept. 2015) (citations omitted). Examples of wrongful means include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*id*. at 586).

With respect to Counterclaim Plaintiffs' general and unspecific allegations concerning certain Roske clients -- Almamet USA, SternMaid America LL, and Vierol AG clients -- Counterclaim Plaintiffs have failed sufficiently to plead that Roske used wrongful means to interfere with these clients.

However, the allegedly defamatory email sent by Roske on March 22, 2018 may serve as a basis for the interference with business relationship counterclaim. Counterclaim Plaintiffs allege that they had a business relationship with the client to whom the email was sent and that Roske knew about this relationship. They further adequately allege that Roske used improper means, *i.e.,* a defamatory communication, that amounted to an independent tort causing injury to Counterclaim Plaintiffs. As to these allegations, I deny the motion to dismiss the fourth counterclaim.

Tort Counterclaims Asserted Against Roske Personally

Counterclaim Defendants argue that the first and fourth counterclaims (defamation and tortious interference with business relations) as asserted against Roske individually should be dismissed pursuant to New York Partnership Law § 26(b). They reason that because the statute protects limited liability partners against tortious causes of action brought against them solely by reason of being a partner, Roske is protected under the statute and the tort counterclaims against him must be dismissed. Further, they argue that "The SB Answer appears to assert tort counterclaims against Henry [Roske] for his alleged conduct on behalf of the Roske Firm, a New York limited liability partnership" and because the claims are asserted on behalf of the firm, Roske is not personally liable (NYSCEF Dkt. No.126 at p.17). In opposition, Counterclaim Plaintiffs argue that New York Partnership Law § 26 does not shield Roske from liability because the allegations made against him are on an individual level and not solely based on his position as a partner at the Roske Firm.

"Partnership Law § 26(a) imposes liability on all partners jointly and severally for a partner's misconduct." *Dawes v J. Muller & Co.,* 176 A.D.3d 473, 474 (1st Dept. 2019). [E]ach partner, employee or agent of a partnership which is a registered limited liability partnership *shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or her* or by any person under his or her direct supervision and control while rendering professional services on behalf of such registered limited liability partnership." Partnership Law § 26[c][i] (emphasis added). *See*

Lifeline Funding, LLC v Ripka, 114 A.D.3d 507, 508 (1st Dept. 2014)(First Department reasoned that "even if plaintiff's cause of action for breach of contract against the individual defendant was not properly pleaded, the remaining causes of action sufficiently allege individual wrongdoing pursuant to Partnership Law § 26 (c) which provides that a partner may be liable for wrongful conduct committed by him.")

Here, the allegations in the Counterclaim Plaintiffs' counterclaim against Roske are that Roske *personally* committed the tortious acts. They allege that Roske wrote the alleged defamatory email, which serves as the basis for the tort counterclaims. The allegations do not state that Roske is liable simply because he is a partner at the Roske Firm. Rather, the counterclaims contains allegations against Roske individually. Because the allegations are both against Roske individually and against the Roske Firm, I deny the motion to dismiss the tort counterclaims on the basis of New York Partnership Law.[5]

Counterclaim Plaintiffs' Tenth Affirmative Defense

According to its Second Amended Complaint, the Roske Firm seeks disgorgement of compensation that the Roske Firm paid to Burghart and Gyure. In Counterclaim Plaintiffs' answer and counterclaims, they allege that the New York Labor Law bars the Roske Firm from asserting the remedy of disgorgement. Counterclaim Defendants move

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[5] Furthermore, as stated in this decision, I am denying the motion to dismiss the causes of action for defamation and tortious interference with business relations as it relates to the March 22, 2018 email on grounds that are distinct from Counterclaim Defendants' arguments regarding Partnership Law § 26. I am granting the motion to dismiss the cause of action for tortious interference as it relates to the general and unspecific allegations concerning certain Roske clients -- Almamet USA, SternMaid America LL, and Vierol AG client.

to dismiss this affirmative defense, arguing that New York courts recognize the common law faithless servant doctrine, which allows courts to grant the remedy of disgorgement. They claim that because this doctrine existed well before the adoption of the New York Labor Law and because courts continue to apply it in conjunction with the Labor Law, Counterclaim Defendants are permitted to assert this remedy.

In opposition, Counterclaim Plaintiffs allege that the affirmative defense is proper because Labor Law § 193 prohibits an employer from making any deductions from an employee's wages unless authorized under the statute. Because "[r]ecovering wages paid to an allegedly disloyal employee is not one of the authorized deductions under the [sic] Section 193," Counterclaim Defendants may not seek disgorgement of Counterclaim Plaintiffs' wages (NYSCEF Dkt. No. 133 at p.21).

Under the faithless servant doctrine, courts permit employers to disgorge an employee's compensation if that employee has violated duties of loyalty. *See Visual Arts Found., Inc. v Egnasko*, 91 A.D.3d 578, 579 (1st Dept. 2012). Even after the enactment of Labor Law § 193, New York courts have continued to apply this doctrine and allow employers to disgorge an employee's compensation when there is a breach of duty. *See Mahn v Major, Lindsey, & Africa, LLC*, 159 A.D.3d 546, 547 (1st Dept. 2018) (First Department upheld an arbitration award, stating that "[t]he arbitrator did not exceed her power in finding that petitioner was a faithless servant. Nor was the award itself, which included disgorgement of petitioner's past salary and commissions, violative of public policy") (internal citations and quotations omitted). Because the faithless servant doctrine

and the remedy of disgorgement has been properly pled, I grant the motion to dismiss Counterclaim Plaintiffs' tenth affirmative defense, which seeks to bar the remedy of disgorgement.

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss the first counterclaim for defamation is denied; and it is further

ORDERED that the motion to dismiss the second counterclaim for violation of Labor Law § 193 is granted; and it is further

ORDERED that the motion to dismiss the third counterclaim for unjust enrichment is denied as moot; and it is further

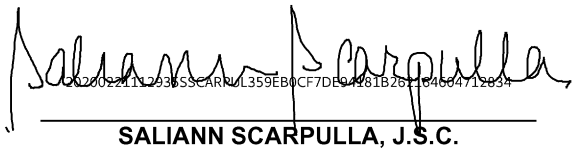
ORDERED that the motion to dismiss the fourth counterclaim for tortious interference with business relations is granted only to the extent that it relates to the general allegations of tortious interference with clients Almamet USA, SternMaid America LL, and Vierol AG. The motion to dismiss the counterclaim for tortious interference with business relations as it relates to the March 22, 2018 email is denied; and it is further

ORDERED that the motion to dismiss the tort counterclaims (defamation and tortious interference with business relations) against Roske in an individual capacity, based on New York Partnership Law, is denied; and it is further

ORDERED that the motion to dismiss Counterclaim Plaintiffs' Tenth Affirmative Defense is granted.

The parties are directed to appear for a conference on April 22, 2020 at 2:15 p.m.

This constitutes the decision and order of the court.



2/21/20
DATE

SALIANN SCARPULLA, J.S.C.

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