

McDougall v EISA Am., Inc.

2021 NY Slip Op 31110(U)

April 7, 2021

Supreme Court, New York County

Docket Number: 155698/2018

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

ELAINE MCDUGALL,

Plaintiff,

- v -

EISA AMERICA, INC., ANTONIO NAVALON SANCHEZ,
CARLA PESCI FELTRI,

Defendants.

-----X

INDEX NO. 155698/2018
MOTION DATE 03/09/2021
MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 112, 113, 114, 116, 118

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 115, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133, 134

were read on this motion to/for DISCOVERY

Motion sequence numbers four and five are consolidated for disposition. Plaintiff's motion to dismiss defendants' counterclaims is denied. Defendants' motion to compel discovery is granted in part and denied in part.

Background

This action arises out of plaintiff's employment with defendants. In March 2016, plaintiff was hired as a personal assistant for defendants and was issued a laptop and iPhone for work. After her employment ended in January 2018, defendants requested the return of the work items. Plaintiff claims that she was gifted the items and was under no obligation to return them, but she alleges that she returned them anyway in a timely manner. According to defendants, the items were returned around March 8, 2018, more than a month after she was terminated.

Plaintiff claims that her employment was terminated because she demanded to be paid for her overtime hours. Defendants counterclaimed for conversion, claiming that plaintiff kept the work items after her employment had ended and deleted files from them before the items were returned. Defendants also claim a violation under the Computer Fraud and Abuse Act (“CFAA”), claiming that plaintiff continued to access the work accounts and defendants’ data after her employment ended.

Motion to Dismiss – MSQ 4

Plaintiff moves to dismiss defendants’ counterclaims of conversion and violations of the CFAA (NYSCEF Doc. No. 98). As for conversion, plaintiff claims that defendants have failed to plead actual damages, ownership of the items at issue, that plaintiff had exercised unauthorized dominion over the items, or injury (*id.* at 5-9). As for the counterclaim under the CFAA, plaintiff argues that defendants have not been injured in excess of \$5,000, only that they have accrued monetary expenses as a result of this suit (*id.*). Plaintiff lastly argues that defendants failed to verify their counterclaims and so they must be dismissed (*id.* at 10).

In opposition regarding the conversion counterclaim, defendants argue that they did plead that the items were theirs, that plaintiff maintained dominion over the items and data files because they remained in her possession and she continued to access the accounts (NYSCEF Doc. No. 113 at 7). As for their claim under the CFAA, defendants argue that they have successfully pled a violation under the CFAA because plaintiff continued to access the work emails and accounts after her employment had ended and have properly pled damages (*id.* at 10-11). With respect to the unverified counterclaims, defendants argue that plaintiff is not entitled to verified counterclaims and, even if she was, she waited too long to object (*id.* at 14).

In reply, plaintiff reiterates her position, argues that defendants did not quantify their damages and that defendants conflate their attorney's fees and costs with economic damages (NYSCEF Doc. No. 116).

This Court declines to allow defendants to submit a sur-reply and will not consider the arguments submitted in the letter (NYSCEF Doc. No. 118).

“[O]n a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration.” (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006])”

Ownership

Plaintiff first claims that defendants have failed to plead ownership of the items. The Court finds that claim is without merit.

The amended answer states “Plaintiff was issued among other things, an iPhone 5s and a laptop computer for work purposes upon being hired by Defendant EISA” and that “the iPhone,

laptop and all of the data, files, emails, messages etcetera contained therein are Defendants' property" (NYSCEF Doc. No. 97 ¶ 5). Further, under the First Counterclaim (Conversion), the amended answer states "at all relevant times, defendants were and continue to be the rightful property owners of the iPhone and all of its data, files, applications and messages" (*id.* at ¶ 35). Defendants clearly plead ownership of the items.

Unauthorized Dominion

Plaintiff also claims that defendants have failed to plead plaintiff's unauthorized dominion over the property in question and derogation of defendants' rights. Plaintiff argues that defendant issued plaintiff the items and so the dominion was authorized. But the amended answer states "Upon cessation of Plaintiff's employment with Defendant EISA ... she refused to return the iPhone or the laptop... despite being asked to do so" (*id.* at ¶ 10) and that "plaintiff ... intentionally took dominion over defendants' properties..." (*id.* at ¶ 36). Therefore, defendants clearly pled that plaintiff's dominion over the items was unauthorized.

Intent

"A wrongful intent is not an essential element of the conversion." (*Leve v. Itoh & Co. (Am.), Inc.*, 136 AD2d 477, 478 [1st Dept 1988]).

Plaintiff's argument that defendant has failed to plead wrongful intent is unpersuasive because wrongful intent is not an essential element of conversion.

Damages

Although plaintiff argues that defendants did not plead damages, the amended answer alleges that defendants¹ have "sustained damages in the amount to be determined at trial" (*id.* at ¶ 38). Therefore, defendants have successfully pled a counterclaim of conversion.

¹ This Court notes that the answer reads that "Plaintiffs have sustained damages" but believes this to be a typographical error. It is unlikely that defendants would be pleading plaintiff's damages in their answer.

Computer Fraud Abuse Act

Pursuant to CFAA § 1030(e)(11), “‘loss’ means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service” CFAA § 1030[e][11] (emphasis added). Subsection (c)(4)(A)(i) provides, in relevant part, that “loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value.”

Plaintiff claims that defendants have failed to plead that plaintiff “obtained” something of value in excess of \$5,000, but the statute does not require that defendants plead that plaintiff “obtained” something, only that defendants have suffered a loss aggregating at least \$5,000 in value. According to the amended answer, defendants “have suffered losses in excess of \$5,000 as a result of Plaintiff’s conduct, including ... conducting a damage assessment.” (NYSCEF Doc. No. 97 ¶ 42). A plain reading of the statute and amended answer show that defendants have properly pled damages under the CFAA.

Verified Counterclaims

CPLR 3022 provides “A defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.” The Court of Appeals, however, has “never specified a uniform time period by which to measure due diligence. A

defendant who does not notify the adverse party's attorney with due diligence waives any objection to an absent or defective verification". (*Lepkowski v State of N.Y.*, 1 N.Y.3d 201, 210 [2003]).

Plaintiff argues that the counterclaims are not verified and so must be dismissed pursuant to CPLR 3022. Plaintiff also argues that she did not need to notify defendants of her intention to treat the counterclaims as a nullity with due diligence because "this only applies where the adverse party is entitled to a verified pleading." (NYSCEF Doc. No. 98 at 10) but she was not "entitled to a verified pleading of those counterclaims, as Defendants were not required to plead counterclaims at all" (*id.*). Defendants argue that plaintiff is not entitled to verified counterclaims and, even if she was, she waited too long to object to them now.

The record shows that the amended answer with counterclaims was filed on March 28, 2019 (NYSCEF Doc. No. 17). Plaintiff filed her answer to the counterclaims on August 5, 2019 (NYSCEF Doc. No. 64) and never objected to the lack verification. She first objected in this motion, filed on December 2, 2020, fifteen months after her answer to counterclaims and more than twenty months after the counterclaims were served. This Court finds that Plaintiff did not notify defendants with due diligence that she intended to treat the counterclaims as a nullity, she did not treat them as a nullity by answering them and she has waived any objection to the absent verification.

Motion for Discovery – MSQ 5

Defendants seek a "readable production of plaintiff's job search history," inspection of plaintiff's personal devices and Apple iCloud, production of documents that they believe plaintiff preserved from the work devices, and production of the serial number for plaintiff's personal

computer (NYSCEF Doc. No. 130). Defendants do not believe plaintiff when she says she that she has produced everything demanded (*id.* ¶ 30).

In opposition, plaintiff argues that discovery was previously stayed and, further, that the motion to compel is based “entirely on speculation and bad-faith skepticism” (NYSCEF Doc. No. 128). However, plaintiff admits that she does owe some discovery and promises to produce full copies of emails relating to plaintiff’s search for employment after she was terminated (*id.* at 8).

In reply, defendants seek attorney’s fees for the motion to compel, and argue that because plaintiff did not oppose producing her AppleID or Mac serial number, those items should be produced (NYSCEF Doc. No. 134).

Standard for Discovery

“Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.’ We have emphasized that the words, ‘material and necessary’, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’” (*Forman v Henkin*, 30 NY3d 656, 661, 70 NYS3d, 157 [2018] [internal quotations and citations omitted]).

Production of Documents

Defendants seek a reproduction of documents relating to plaintiff’s search for employment because a number of the items previously produced are incomplete or “cut off,” rendering them

unreadable (NYSCEF Doc. No. 103 at 28). Plaintiff indicated that she would voluntarily reproduce the documents sought.

This Court orders the production of documents relating to plaintiff's search for employment after she was terminated. Not only is this information relevant to the issue of mitigating damages, but plaintiff agreed to produce them. Plaintiff is ordered to produce legible, full and complete copies of the documents previously produced relating to her job search by May 12, 2021.

This Court also orders that plaintiff is to either produce any additional documents that she has retained from the work computer, work phone, or work cloud storage by May 12, 2021. If plaintiff has no further documents to produce, she is to submit a detailed *Jackson* affidavit attesting to as much by that date.

Personal Computer, Apple ID, and Mac Serial Number

Defendants argue that they need to inspect plaintiff's personal computer and data storage to determine what documents she allegedly deleted from the work laptop and phone prior to returning them. Defendants argue that "it is simply not believable that Plaintiff would only have retained and stored the small number of sent emails and their attachments from the Work Email Account..." (NYSCEF Doc. No. 103 ¶ 30).

This Court will not order an inspection of plaintiff's personal devices and accounts based solely on defendants' disbelief that a former employee did not maintain extensive files from her work computer. This Court has already ordered that plaintiff either produce a supplemental response with any other documents that she may have retained and an affidavit swearing that she has nothing else. Further discovery, such as plaintiff's deposition, may reveal a basis to revisit the

request as the case proceeds. In addition, defendants are free to have the returned iPhone and laptop examined and perhaps someone with the technical know-how can retrieve any deleted items.

Attorney Fees

This Court also declines to award attorney’s fees for the motion to compel. Defendants made the demand for fees for the first time in their reply papers, denying plaintiff the chance to oppose it.

Accordingly, it is hereby

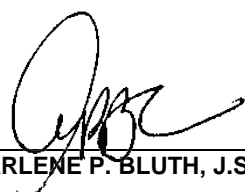
ORDERED that plaintiff’s motion to dismiss the counterclaims is denied; and it is further

ORDERED that defendants’ motion to compel is granted to the extent that plaintiff must produce full and legible copies of the documents discussed above and relating to her employment by May 12, 2021; and it is further

ORDERED that plaintiff must also produce any supplemental documents that she has saved from her work computer, phone, or cloud storage and execute a *Jackson* affidavit swearing that she has no further documents by May 12, 2021.

Next Conference: June 24, 2021.

4/7/2021
DATE


ARLENE P. BLUTH, J.S.C.

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