Malmandi v TV Direct LLC
2021 NY Slip Op 31648(U)
May 13, 2021
Supreme Court, New York County
Docket Number: 656845/2019
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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INDEX NO. 656845/2019

MOTION SEQ. NO. 002

POOJA VERMA MALMANDI,

Plaintiff,

- v -

TV DIRECT LLC, KISHORE SAMTANI, KEVIN SAMTANI

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 37, 38

were read on this motion to/for DISMISS COUNTERCLAIMS.

BACKGROUND

Plaintiff commenced this action pursuant to a summons and complaint filed on November 18, 2019, seeking damages under New York Labor Law for failure to pay agreed upon wages and commissions, and for retaliation. Defendants have appeared by counsel, and pursuant to an amended answer, have asserted two counterclaims against plaintiff for breach of the faithless servant doctrine, and breach of contract. Presently before the Court is plaintiff's motion to dismiss the counterclaims based on plaintiff's allegation that the counterclaims fail to state a cause of action [CPLR § 3211(a)(7)], and that the claims are barred by documentary evidence [CPLR § 3211(a)(1)]. For the reasons stated herein, the motion is denied.

ALLEGED FACTS

The facts as alleged in the counterclaims are as follows. TV Direct LLC (TD) is a company engaged in selling a wide variety of products to customers primarily in the New York City area. On or about March 14, 2013, plaintiff and TD entered into an employment agreement pursuant to

which plaintiff was employed as a full-time salaried salesperson through April 2019. The terms of the agreement were memorialized in a series of emails between the parties, which addressed plaintiff's salary, commission, and that plaintiff agreed to give 100% of her dedicated efforts to the position.

Defendants allege that plaintiff breached her obligation under the parties' agreement by engaging in a scheme to charge defendant double commissions, and purchasing excessive and unnecessary inventory, causing defendants to sustain losses. Defendants further allege plaintiff was excessively absent from the office; specifically, that plaintiff was absent from work 81 days in 2014, 166 days in 2015, 119 days in 2016, 71 days in 2017, and 73 days in 2018, thereby breaching her obligation to use her best efforts in exercising her obligations as an employee.

DISCUSSION

In determining a motion to dismiss counterclaims under CPLR §3211(a)(7), the pleading is to be afforded a liberal construction, the allegations accepted as true, and the Court is to provide defendant the benefit of every possible inference. Whether defendant can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d 11, 19 (2005).

CPLR § 3211(a)(1) provides for dismissal of a cause of action based on documentary evidence. A motion to dismiss under CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). As pertains to the documentary evidence, both sides agree that the emails set forth the terms of their agreement.

Plaintiff's Motion to Dismiss Defendants' Counterclaim under the Faithless Servant Doctrine

It is well established that in order to state a cause of action under the faithless servant doctrine an employee must be alleged to have worked against her employer's interest and to her own benefit. The Court of Appeals summarized the faithless servant doctrine as follows:

> One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary (Restatement, Agency 2d, s 469). Nor does it make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent (see *Wechsler v. Bowman*, 285 N.Y. 284, 291-292, 34 N.E.2d 322, 325-326, remittitur and 286 N.Y. 582, 35 N.E.2d 930; *Lamdin v. Broadway Surface Adv. Corp.*, 272 N.Y. 133, 138-139, 5 N.E.2d 66, 67).

Feiger v. Iral Jewelry, Ltd., 41 N.Y.2d 928, 928–29 (1977).

A reading of the counterclaim on this cause of action shows that defendants have made sufficient allegations to defeat plaintiff's 3211 motion. As their employee, plaintiff owed defendants a duty of fidelity, also referred to as a duty of loyalty. The allegation that plaintiff engaged in a fraudulent scheme to cause defendants to pay out double commissions is sufficient to state a cause of action on this basis. Defendants allege that the parties had an express agreement that plaintiff would not receive commissions on indirect sales, or sales that resulted during periods when plaintiff was not working in New York, and that plaintiff caused commissions to be paid to companies with which she was affiliated, without defendant's knowledge.

Plaintiff's argument that this cause of action must fail because the agreement was not in writing does not warrant a different result. The written agreement does limit plaintiff's commission to sales generated by plaintiff, and on a motion to dismiss for failure to state a cause

of action, defendants are entitled to the inference that they give this clause, which is that "generated" means only direct sales.

Plaintiff's submission of an affidavit denying her affiliation with the companies also does not warrant a different result. CPLR 3211 allows defendants to submit affidavits in opposing a motion to dismiss counterclaims, but it does not oblige them to do so on penalty of dismissal, as is the case under CPLR 3212. As the court has not converted this to a motion for summary judgment, defendants cannot be penalized because they have not made an evidentiary showing in support of their counterclaims. See, *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976).

Based on the foregoing, plaintiff's motion to dismiss the first counterclaim based on the faithless servant doctrine is denied.

Plaintiff's Motion to Dismiss Defendants' Counterclaim for Breach of Contract

To state a cause of action for breach of contract, defendants must allege: (1) the existence of a contract, (2) their performance thereunder, (3) plaintiff's breach thereof, and (4) resulting damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (2010). Here both parties agree that the email correspondence constitutes their contract. Defendants further allege that they performed under the contract and that plaintiff breached. Specifically, defendants allege she breached her obligation to give 100% to her employment duties. This breach is further described by two allegations – one, that she was absent for significant periods of time, and two, that she ordered millions of dollars of inventory that was not necessary and sold at a loss.

Plaintiff's argument that a "best efforts" clause is unenforceable is not supported by case law. *See e.g., Errant Gene Therapeutics, LLC v Sloan-Kettering Institute for Cancer Research,* 174 AD3d 473. Additionally, plaintiff's argument that she would put in a full workday, even when

she had to leave early to pick up her son, by working on any unfinished work later in the day, is also unavailing. The best efforts reference by defendants appears to relate to plaintiff's alleged breach of her commitment to work a full day based on her alleged failure to regularly show up for work, and the extended absences referenced in the counterclaim.

Finally, the damages alleged on the counterclaims are sufficient to defeat a motion to dismiss for failure to state a cause of action. In New York, as evidenced by CPLR 3017, "[t]here is no requirement that the measure of damages be stated in the complaint so long as facts are alleged from which damages may properly be inferred," with which the verified complaint herein adequately complies. *See, A.S. Rampell, Inc. v. Hyster Co.,* 3 N.Y.2d 369, 383 (1957); *See also*, *Kensington Pub. Corp. v. Kable News Co.,* 100 A.D.2d 802 (1st Dept. 1984). The facts alleged in the counterclaim are sufficient to infer that defendants suffered damages as a result of being stuck with inventory they could not sell and the other claims made therein.

As such, plaintiff's motion dismiss the 2nd counterclaim for breach of contract is denied.

CONCLUSION

Accordingly, plaintiff's motion to dismiss the counterclaims is denied. Plaintiff is directed to serve and file a reply within thirty days of receipt of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.