

Townsend v Gibson-Borelli
2021 NY Slip Op 33465(U)
December 22, 2021
Supreme Court, Orange County
Docket Number: Index No. 012013-2018
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CLAYDEAN TOWNSEND, individually and derivatively on behalf of Heart and Souls Caring Angels Staffing, Inc.,
Plaintiff,

DECISION AND ORDER

INDEX NO.: 012013-2018
Motion Date: 10/19/21
Sequence No. 2

-against-

ALBALIRA GIBSON-BORELLI,
Defendant.

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SCIORTINO, J.

The following papers numbered 1 to 24 were read on plaintiff’s motion for summary judgment:

<u>PAPERS:</u>	<u>NUMBER:</u>
Notice of Motion/Affidavit of Plaintiff/Exhibits A- O ¹	1 - 17
Plaintiff’s Memorandum of Law	18
Affirmation in Opposition (Gurda)/Exhibits 1-3	19 - 22
Defendant’s Memorandum of Law	23
Affirmation in Reply	24

Background

The parties to this matter are shareholders, officers, directors and employees of plaintiff Heart and Soul Caring Angles Staffing, Inc. (HS), a licensed home health care agency. This action was commenced by the filing of a Summons with Notice by plaintiff on December 10, 2018. The Summons identified the nature of the action as “to be removed from the corporation board due to

¹In future, plaintiff’s exhibits should be marked numerically and defendant’s exhibits should be marked alphabetically.

[defendant's] stealing payroll funds amount up to \$27,000 and unauthorized change of address and forwarding mail to a different location." Among the relief sought by plaintiff was return of \$27,000, plus interest and legal fees. Defendant filed a Notice of Appearance and Demand for Complaint on January 15, 2019. An undated Complaint was thereafter served, asserting three causes of action: breach of contract, breach of fiduciary duty and conversion. On April 17, 2019, defendant served a Verified Answer and Counterclaim for dissolution of HS. (Exhibit A)

By Notice of Motion filed on July 10, 2019, plaintiff sought summary judgment on the third cause of action for conversion, claiming that defendant formed a competing home health care agency, Kind Hearts Caring Angels Staffing Agency (KH), on September 24, 2018. On September 28, 2018, defendant withdrew \$10,500 from the HS business account for her personal use. In October 2019, defendant improperly indorsed checks totaling \$27,000 from an insurance company, Fidelis, and took them for her personal use. She was also alleged to have placed an unauthorized forwarding order with the post office to have HS mail delivered to her. Finally, plaintiff asserted that defendant has stolen existing and potential new clients from HS and is now competing with HS, thereby misappropriating corporate opportunities.

In opposition, defendant asserted that, on September 11, 2018, plaintiff announced to her that she had clients that she had not run through the business and had not previously disclosed to the defendant. The defendant then began to receive phone calls from employees reporting that their paychecks were returned by the bank for insufficient funds. On September 14, 2018, defendant discovered that plaintiff was transferring business funds into her own account and using corporate debit cards for thousands of dollars of charges or transfers of which she had no knowledge. On September 21, 2018, plaintiff removed all of the business files and books from the corporate office

in Middletown to her home. Defendant decided to “protect the remaining funds in the business account” and use them to pay business debts, including payroll. She then created a new corporation only to utilize the funds to pay the debts of HS. She denies having improperly indorsed checks or having taken clients from plaintiff.

By Decision and Order dated August 27, 2019, the motion was denied as premature, and the parties were thereafter directed to proceed to discovery. Paper discovery was exchanged, and each party was deposed. Plaintiff filed a Note of Issue with Jury Demand on May 10, 2021.

Motion for Summary Judgment

By Notice of Motion filed August 30, 2021², plaintiff again seeks summary judgment and dismissal of defendant’s counterclaim for dissolution. Plaintiff asserts that defendant admits that she formed KH on September 24, 2018. On September 28, 2018 defendant withdrew \$10,550.84 without authorization, and in October 2018, defendant placed an order to forward HS mail to her new address. She reiterates her prior claim, appending checks showing checks allegedly improperly indorsed by defendant. Further, she reasserts that defendant stole HS clients by opening KH and competing with her. Plaintiff asserts that she “minimally contributed \$26,112.67” of her own funds to HS and personally paid HS business expenses of \$20,192.30. She appends a spreadsheet, which she asserts demonstrates that she is owed “at least \$30,209.97” but proceeds to instruct the Court to disregard “source entries” as they are misformatted. Plaintiff asserts that she be entitled to damages for breach of the shareholder agreement and conversion, and an inquest to determine her damages for breach of fiduciary duty and usurpation of corporate opportunity.

²While this filing date is well beyond the 60 days permitted by the Part Rules, the Court specifically gave plaintiff until September 3, 2021 to file the motion. As such, it is timely.

Plaintiff's attorney appends a Memorandum of Law, in which he outlines the principles of breach of fiduciary duty, conversion and diversion of corporate opportunity; but does not incorporate any facts associating these principles with plaintiff's matter.

Opposition

In opposition, defendant asserts there are triable issues of fact regarding the claims for breach of contract, breach of fiduciary duty and conversion. Although the parties have engaged in discovery and depositions, the documents provided do not clarify or account for "many thousands of dollars" expended by plaintiff for her personal use and instead demonstrate nothing but plaintiff's "deplorable bookkeeping". The bank statements appended to plaintiff's papers are not HS bank statements, as asserted, but personal accounts belonging to plaintiff. They do not show any loans from plaintiff.

Defendant's demand for an accounting was met with a five-page handwritten and self-serving document that proves nothing. Instead, the bank and credit card statements appended to defendant's papers show that plaintiff used the HS account funds for many personal transactions.

Discussion

For the reasons which follow, plaintiff's motion for summary judgment is denied.

The Uniform Rules for Trial Courts (22 NYCRR) 202.8-b(c) provides that: "every brief, memorandum, affirmation and affidavit shall include on a page attached to the end of the applicable document, a certification by counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit." Here, neither party has appended any such certification to any affidavit, affirmation or memorandum of law.

Further section 202.8-g of the Uniform Rules provides: (a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice

of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Uniform Rule 202.8-g took effect on February 1, 2021, nearly seven months before plaintiff brought this motion. Subsection (b) of the Rule requires the party opposing such a motion to file a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and “if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue of fact.” Here, neither the movant nor the opponent included a statement of material facts as required pursuant to 22 NYCRR 202.8-g.

This Court finds that the parties failures to comply with the provisions of Uniform Rules 202.8-b and 202.8-g constitute “a substantive defect in a motion for summary judgment,” rendering it procedurally defective (*Amos Financial LLC v. Crapanzano*, 73 Misc.3d 448 [Sup Ct Rockland Cty 2021]). As such, the motion is denied.

ORDERED that plaintiffs’ motion for summary judgment is denied.

This matter shall be scheduled for virtual conference on February 24, 2022 at 2:45 p.m. A link will be provided prior to the conference date.

This decision shall constitute the order of the Court.

Dated: December 22, 2021
Goshen, New York

ENTER


HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*