

White & Case LLP v Kim
2022 NY Slip Op 33631(U)
October 20, 2022
Supreme Court, New York County
Docket Number: Index No. 652445/2022
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 14

Justice

-----X

WHITE & CASE LLP

Plaintiff,

- v -

HANNAH KIM,

Defendant.

-----X

INDEX NO. 652445/2022

MOTION DATE 10/17/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21

were read on this motion to/for DISMISS.

Defendant’s motion to dismiss is granted in part and denied in part.

Background

Plaintiff contends that defendant worked for it as a legal assistant for nearly 7 years, from 2013 to 2020. It asserts that during her employment, she submitted a suspicious number of reimbursement requests (over 1,000). Plaintiff explains that it reimburses attorneys and support staff who work past “normal” business hours for certain expenses subject to the firm’s policies. An employee is entitled to seek reimbursement for food or transportation related to overtime work but must identify the client matter for which they are working that evening. Plaintiff alleges that although these reimbursement requests are reviewed prior to the employee receiving a reimbursement, it “naturally expects that legal assistants (and all employees) will act lawfully” and not falsify requests (NYSCEF Doc. No. 1, ¶ 18).

Plaintiff alleges that in August 2019, the firm conducted an audit into defendant’s reimbursement and overtime requests. It explains that she left the firm (in February 2020),

before the investigation was completed. Plaintiff acknowledges that there is a separate action between the parties (one where defendant sued plaintiff and alleges that she suffered discrimination while working for plaintiff)¹ and during discovery in that case plaintiff purportedly discovered instances of defendant altering receipts. It claims she did this to make certain expenses appear eligible for reimbursement that ordinarily would not be eligible. Plaintiff asserts that defendant concealed her receipts and so plaintiff did not discover the fraud before defendant resigned.

Plaintiff maintains that defendant altered documents to ensure that plaintiff reimbursed her for personal expenses, such as clothes shopping, and increased the dollar value of food or transportation costs on these receipts. Plaintiff cites a purported example where defendant falsified a credit card statement to ensure that a personal purchase at a clothing store was reflected as reimbursable charge for an Uber ride. In other words, the approximately \$90 clothing purchase was made to look like defendant took a \$90 Uber ride.

Defendant suggests a wildly different version of events and moves to dismiss the complaint. She contends that plaintiff failed to identify how many of the reimbursement requests took place since 2017 or how many were false. Defendant points out that plaintiff's policy did not allow credit card statements to be submitted as receipts for any requests seeking more than \$25 and so plaintiff's reliance on a credit card statement is puzzling. She also observes that only 3 reimbursements are cited in the complaint and all are from the same Amex credit card statement dated November 8, 2017. Defendant maintains that plaintiff admits it has six other

¹ That matter, under Index Number 154446/2020, is currently pending before another judge in this county. Plaintiff requested that this matter be transferred to the commercial division but that request was denied by the administrative judge (NYSCEF Doc. No. 22). The judge assigned to that matter also refused to accept the instant case as a related matter.

Amex statements relating to 23 other reimbursement requests and yet none of these statements support the fraud allegations.

Defendant complains that the amounts that were allegedly changed to appear as if they were for other purchases were for tens of dollars (for instance, the clothes purchase vs the Uber charge was only a \$38.35 difference). Defendant insists that the claim about the food reimbursements is misleading because those expenses are capped at \$30. She makes a broader argument that she was working crazy hours during this time period (more than half her pay was from overtime work) and questions what motivation she would have to engage in a fraud for a few dollars. Defendant made nearly \$230,000 in 2017.

She first claims that plaintiff lacks standing because the complaint failed to show that it suffered any injury in fact. Defendant claims that any harm is speculative as plaintiff admits it has to uncover the extent of the fraud and might need to disclose its findings to clients (and possibly reimburse the clients).

Defendant next claims that there are no allegations to support the claims from 2018, 2019 or 2020. She points out that there are no specific instances of fraud from 2018 or 2019 in the complaint and the 2020 allegation is utterly disproved with documentary evidence. The one instance of purported fraud in 2020 occurred on January 8. This reimbursement concerned whether a meal reimbursement met the policy guidelines; defendant claims the policy was that a legal assistant could seek reimbursement if he or she worked past 7 p.m. and had worked at least 8 hours that day. She points to a deposition transcript from the other matter in which an employee of plaintiff allegedly admitted that a legal assistant could order a meal at 6 p.m. and still seek reimbursement if he or she met the other requirements. In other words, the meal itself did not have to be purchased after 7 p.m.

Defendant claims that the four undated allegations of wrongdoing contained in the complaint cannot constitute a viable claim for fraud because they do not contain the requisite specificity. She maintains that the breach of fiduciary duty and breach of loyalty (faithless employee) claims must be dismissed as duplicative of the fraud claims. Defendant further argues that these claims are, in event, time barred.

In opposition, plaintiff asserts it has standing because it suffered pecuniary harm and the allegations in the complaint must be taken as true. It observes that it will suffer monetary damages because it will have to reimburse its clients (to the extent the charges were billed to client matters) out of plaintiff's pocket. Plaintiff insists it established all the elements of fraud and the extent of the fraud can be explored in discovery. It points out that it has only seven credit card statements in its possession and so it need not be barred from pursuing its claims at this point of the case.

Plaintiff also claims it pled valid causes of action for breach of fiduciary duty and the faithless servant doctrine. It also argues that it has a cognizable claim for conversion. With respect to statute of limitations argument, plaintiff contends that because all of the claims are based on fraud, a six-year limitations period applies. Plaintiff emphasizes that its claims are not duplicative because they seek different relief for each cause of action. And it asserts it can plead claims in the alternative at this early stage of the case.

In reply, defendant insists that plaintiff failed to allege enough facts to assert a disputed issue and therefore lacks standing to bring the case. She emphasizes that plaintiff failed to satisfy the elements of a fraud claim and did not meet the heightened pleading standard. Defendant similarly argues that the remaining claims should be dismissed as well.

Discussion

“On a motion to dismiss, the pleading is to be afforded a liberal construction. We 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. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]).

Standing

“A court can act only when the rights of the party requesting relief are affected and therefore a controversy is not justiciable unless the party requesting relief has an interest sufficient to constitute standing to maintain the action. Each petitioner must therefore show the existence of an injury in fact in order to demonstrate that he or she has an actual legal stake in the matter being adjudicated” (*Matter of Acevedo v New York State Dept. of Motor Vehicles*, 29 NY3d 202, 218, 54 NYS3d 614 [2017] [internal quotations and citations omitted]).

Here, the Court finds that plaintiff clearly has standing to bring this matter. It alleges that its former employee altered reimbursements to increase the amount she received from plaintiff. In other words, plaintiff alleges that defendant concocted a scheme to induce plaintiff to give her more money than what she was entitled to receive, and plaintiff paid pursuant to that scheme. That confers standing.

That some of these reimbursements were billed to clients (although some may have been charged to pro bono matters) does not require dismissal of plaintiff’s claims on this ground at

this stage of the case. Plaintiff seeks compensatory damages, punitive damages and disgorgement of compensation paid to defendant as well as legal fees. Taking the allegations as true, as the Court must on a motion to dismiss, plaintiff has standing to bring this case. Eventually, however, plaintiff will have to prove its damages.

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Plaintiff stated a valid cause of action for fraud. It claimed that defendant routinely submitted false reimbursement requests with the intent to receive more money than she was entitled to recover. That is a classic example of a claim for fraud.

Breach of Fiduciary Duty

“The elements of a breach of fiduciary duty cause of action are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct, which elements must be pleaded with the particularity required by CPLR 3016(b)” (*Stinner v Epstein*, 162 AD3d 819, 820 [2d Dept 2018]). The Court severs and dismisses this cause of action because plaintiff did not establish the existence of a fiduciary duty owed to plaintiff by defendant. The mere fact that defendant worked for plaintiff does not create a fiduciary relationship (*Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615, 947 NYS2d 457 [1st Dept 2012]).

The complaint alleges that defendant “was highly compensated, entrusted with sensitive confidential information, and was bound to exercise the utmost good faith and loyalty in the performance of her duties” (NYSCEF Doc. No 1, ¶ 59). But plaintiff does not insist that defendant used her access to that “sensitive confidential information” for her own gain. Plaintiff does not, for instance, allege that defendant used confidential client information for unlawful financial gain. Rather, defendant’s access to confidential information is irrelevant to the claim here, which is that defendant used plaintiff’s reimbursement system to get more than she deserved.

Faithless Servant Doctrine

“New York's strict application of the faithless servant doctrine mandates the forfeiture of all compensation where one who owes a duty of fidelity to a principal is faithless in the performance of his services” (*Art Capital Group, LLC v Rose*, 149 AD3d 447, 449, 52 NYS3d 85 [1st Dept 2017] [internal quotations and citation omitted]).

The Court also severs and dismisses this cause of action. “The faithless servant doctrine provides that an agent is obligated “to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. To show a violation of the faithless servant doctrine, an employer must show (1) that the employee's disloyal activity was related to the performance of his duties and (2) that the disloyalty permeated the employee's service in its most material and substantial part “(*Sanders v Madison Sq. Garden, L.P.*, 2007 WL 1933933 [SD NY 2007]).”

The purportedly disloyal activity here did not, according to the allegations in the complaint, permeate defendant's employment. Defendant was a legal assistant who assisted with legal work for a law firm (plaintiff). Plaintiff does not deny that defendant worked substantial hours or that, in certain years, more than half her salary came from performing overtime work. That defendant may have (assuming the complaint is true) made misrepresentations in order to receive larger reimbursements has nothing to do with the main tasks she was entrusted to perform. At best, it was an optional and ancillary component of her job duties (of course there was no obligation for defendant to submit any requests for reimbursements at all). Under these circumstances, the Court finds that this doctrine is simply inapplicable, particularly because the relief plaintiff seeks (and the remedy this cause of action implicates) is the return of defendant's earned compensation. And there is no allegation defendant lied about doing the actual work for which she billed and so this remedy is inapplicable.

Plus, similar to the breach of fiduciary duty cause of action, the allegations for this cause of action assert that "doctoring financial documents and then knowingly requesting financial reimbursements based on falsified records violated the enormous trust White & Case placed in her to handle incredibly sensitive and confidential client documents and information" (NYSCEF Doc. No. 1, ¶ 69). However, there is no allegation that defendant ever misused the sensitive or confidential client documents or information. If these allegations are true, then it would certainly cause an employer to lose trust in an employee. But the fact that defendant had access to sensitive information as part of her job has little to do with whether she forged reimbursement requests.

Conversion

“Conversion occurs 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” (*Family Health Mgt., LLC v Rohan Developments, LLC*, 207 AD3d 136, 139, 171 NYS3d 44 [1st Dept 2022] [internal quotations and citation omitted]).

The issue for this cause of action is whether plaintiff identified a particular and definite sum of money required to sustain this cause of action. “It is well settled that an action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question. Although the action must be for recovery of a particular and definite sum of money, the specific bills need not be identified” (*id.* [internal quotations and citations omitted]).

The Court finds that plaintiff has stated a cause of action for conversion. It identified a specific set of funds: the money it reimbursed to defendant under false pretenses. On a motion to dismiss, plaintiff need not identify every single reimbursement it wants to recover. “Although Plaintiffs' conversion claim must ultimately be reduced to a definite and specific sum of money, that can be accomplished through discovery” (*Grgurev v Licul*, 229 F Supp 3d 267, 288 [SD NY 2017] [denying the branch of a motion to dismiss a conversion claim where defendants allegedly took control over and misused a particular ‘pot’ of money]). There is no requirement that plaintiff name an exact dollar amount at this stage of the case.

The fact that this cause of action is based upon fraud renders this claim as timely (*Star Auto Sales of Queens, LLC v Filardo*, 203 AD3d 865, 165 NYS3d 100 [2d Dept 2022] [noting that a six-year limitations period or two years from the time the fraud was discovered, or could have been discovered with reasonable diligence, applies to a conversion claim based on fraud]).

Summary

The Court recognizes that defendant raises numerous arguments about why she believes the instant action should be dismissed. But many of those claims are premature and would require a finding on the merits. For instance, defendant points to testimony from her supervisor in the other litigation which she claims shows that a particular reimbursement in 2020 was permissible under plaintiff's policy. Defendant claims that reimbursement for food was permissible where a legal assistant worked past 7 p.m. and worked at least 8 hours that day and did not require the actual ordering of the food to be placed after 7 p.m. That is an argument for why that particular reimbursement should not be part of the lawsuit. It does not justify dismissing the entire complaint.

And the Court observes that the timeline of events surely frustrated defendant. She commenced a discrimination action against plaintiff and then plaintiff tried to assert counterclaims against her. That effort failed and so plaintiff brought this case. In defendant's view, this entire case is retaliatory because plaintiff can only point to a few dollars, at most, that defendant might not have been entitled to receive. And she astutely points out that plaintiff's reliance on credit card statements to support the alleged fraud in the reimbursements appears to conflict with plaintiff's own policies for reimbursements larger than \$25 (apparently, receipts or other documentation were required for higher value reimbursements).

In other words, while defendant understandably feels like this is a lawsuit about a de minimis amount of money, especially in comparison to her salary, the Court finds it would be premature to dismiss the entire case at this stage. Plaintiff identified a few concrete examples of the fraudulent scheme sufficient to meet the heightened pleading standard under the CPLR and is entitled to engage in discovery to see the extent of the alleged fraud. It may be that defendant is

correct that the alleged amount defendant receive is so minimal that this case should be sent to small claims court or defendant might be able to show that plaintiff did not suffer any harm but this Court cannot make that determination yet. At this stage of the case, plaintiff has sufficiently alleged that defendant padded her expenses and plaintiff is entitled to discover the extent of the damages.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss is granted only to the extent that the second cause of action for breach of fiduciary duty and the third cause of action based on the faithless servant doctrine are severed and dismissed, and denied with respect to the remaining branches of the motion and defendant is directed to answer pursuant to the CPLR.

Conference: December 12, 2022 at 12 p.m. By December 5, 2022, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no discovery agreement could be reached. The Court will then assess whether an in-person conference is necessary. The failure to upload anything by December 5, 2022 will result in an adjournment of the conference.

10/20/2022
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"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE