

Nichtberger v Paramount Painting Group, LLC

2023 NY Slip Op 30200(U)

January 19, 2023

Supreme Court, New York County

Docket Number: Index No. 651030/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE **PART** **60M**

Justice

-----X

MITCHELL NICHTBERGER,

Plaintiff,

- v -

PARAMOUNT PAINTING GROUP, LLC, L&L PAINTING
COMPANY, INC., MICHAEL LEVINE, ROSS LEVINE,
MARNI LEVINE SIVIN, HOWARD ROTHENBERG

Defendant.

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INDEX NO. 651030/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

On May 14, 2021, plaintiff Mitchell Nichtberger pled guilty to one Count of Grand Larceny in the Second Degree, Penal Law §155.40(1), a class C felony (see Plea Agreement, NYSEF doc 115). In the Statement of Facts following the plea agreement, Nichtberger admitted “that between February 13, 2012 and March 19, 2019 he was employed by Paramount Painting Group, LLC, and that he *systematically* stole \$1,436,072.56 from defendant Paramount Painting Group, LLC by diverting checks made payable to Paramount Painting Group, LLC into a separate checking account he controlled.” (id. Emphasis added). Not content with merely making Paramount the victim of a felony, Nichtberger has now sued Paramount and its principals for compensation he alleges Paramount has not paid him.

The court grants that part of defendants’ motion to dismiss plaintiff Nitchberger’s claims for compensation in the form of salary, bonus and/or profit sharing. As this court has already ruled in a prior lawsuit entitled *Paramount Painting Group, LLC v Mitchell Nichtberger et al*,

Index no 651698/2019, Nichtberger is not entitled to recover compensation because of the faithless servant doctrine [see NYSEF Doc. 18, Transcript in prior lawsuit, pgs 8-9]; *see also*, *Panos v Mid Hudson Medical Group*, 204 AD3d 1016, 1019 [2d Dep't 2022]; *In re Blumenthal*, 32 AD2d 767, 768 [1st Dep't 2006]).

To the extent the prior decision is not *res judicata*, or to the extent that Nichtberger argues that the part of his compensation not attributable to his misdeeds is recoverable, the claims would be time barred. Nichtberger has not opposed defendants' argument that any claim arising before March 2016 is time barred and Nitchberger has admitted in his plea agreement that he "systematically" stole from his employer from 2012 to 2019. Therefore, even if there was some portion of compensation that pre-dates Nichtberger's systematic felonious conduct, recovery would be time barred at this point.

In any event, "ongoing and pervasive" misconduct of a "wayward and unruly agent" like that of an employee who embezzles money from his employer," forfeits all compensation after the first faithless act (*Cheryl & Co v Krueger*, 536 FSupp3d 182213 [SD Ohio 2021])[citations omitted][making the distinction between an employee who made two inappropriate communications verses one who embezzled]; *see also Blumenthal*, 32 AD3d 767 ["in light of respondent's repeated disloyalty throughout his tenure, there is no merit to his assertion that there should have been an apportionment of his salary"). Given Nichtberger's admission to systematically diverting Paramount's checks to himself over many years, he has forfeited all compensation.

Moreover, Nichtberger's claims to \$50,000 a year based on a verbal agreement violates the statute of frauds and the merger clause in paragraph 14 of plaintiff's employment agreement requiring that all modifications be in writing (see NYSEF doc 2 at ¶ 14). Finally, the court

dismisses the fraud claim on the additional ground that it duplicates the claim for breach of contract in that the two causes of action seek the same exact damages.

However, the court declines to dismiss the claims for replevin and conversion at this time. Regardless of whether the faithless servant doctrine applies with equal force to property purchased with the compensation, there are questions of fact as to whether or not Plaintiff actually did use money stolen from Defendants or his (now forfeited) compensation to purchase the artwork etc., that plaintiff kept in his office. Plaintiff alleges in the complaint that "In the years subsequent to the formation of PPG, and between the years of 2010 to March 18, 2019, Plaintiff had purchased and acquired numerous pieces of artwork, memorabilia and various other items, many which have a unique and personal value to Plaintiff" (Complaint, NYSCEF Doc. No. 1, para. 68).

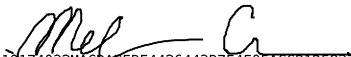
Defendants argue that plaintiff could only have used the embezzled funds to purchase the chattels, because plaintiff was otherwise broke. Although it may be likely that plaintiff purchased the items with purloined funds, this is a motion to dismiss and the pleadings can be read to state otherwise. While defendants may have an equitable lien on the chattels, defendants' right to them requires further development of the record.

Accordingly, it is

ORDERED THAT defendants' motion to dismiss is granted as to the first and second causes of action and is otherwise denied; and it is further

ORDERED THAT defendants shall continue to preserve the chattels at issue pending determination of the claims between the parties; and it is further

ORDERED THAT defendants shall have 30 days from the efiled date of this decision and order to file an answer.


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1/19/2023
DATE

MELISSA A. CRANE, 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 checked="" type="checkbox"/>	GRANTED IN PART	<input 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