

Polished.com Inc. v Naoulo

2023 NY Slip Op 33633(U)

October 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 505712/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

-----X
POLISHED.COM INC., f/k/a GOEDEKERINC.COM,
Plaintiffs,

Index # 505712/2023

- against -

October 10, 2023

MOSHE NAOULO,

Defendant,

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The plaintiff has moved pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the defendant. The defendant has oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint the plaintiff sells home appliances and the defendant was employed there as a salesperson from August 22, 2017 until January 22, 2023. The complaint alleges the defendant purchased products from the plaintiff and sold them to his own clients. The complaint alleges he was warned that such activities were prohibited by the company, however, the defendant ignored those warnings and continued to purchase such goods and sell them to his own customers. The complaint alleges one cause of action for conversion. The defendant has asserted counterclaims alleging breach of contract, defamation, attorney's fees and punitive damages. As noted the plaintiff has now moved seeking to dismiss the counterclaims.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the defendant can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the defendant (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The first two counterclaims allege breaches of contract due to the failure of the plaintiff to pay the defendant commissions earned. The plaintiff seeks to dismiss these counterclaims on the two distinct grounds. First, that there is no evidence that commissions are even owed and second, that there was no express or implied contract between the parties.

Paragraph 24 of the amended answer states that "defendant procured sales while employed with Plaintiff, which required Plaintiff to provide Defendant with commission" (see, Amended Verified Answer, ¶24 [NYSCEF Doc. No. 13]). The mere fact the plaintiff disputes the veracity of the assertion does not render the counterclaim devoid of merit. Indeed, as with any claim asserted in a complaint, they are deemed true. Of course, further discovery will explore the nature and amount of any commissions owed, however, at this juncture the claim has merit.

Furthermore, there are surely questions whether an implied

contract exists between the parties. An implied contract is "just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct" (Jemzura v. Jemzura, 36 NY2d 496, 369 NYS2d 400 [1975]). For an implied contract to be valid it must contain all the elements of a contract including mutual assent, consideration, capacity and legality of subject matter (Maas v. Cornell University, 94 NY2d 87, 699 NYS2d 716 [1999]). There is no dispute the defendant was employed by the plaintiff for over five years. That surely raises questions an implied contract existed. While it is true that an implied in fact contract can be created by conduct between the parties, no such implied contract can exist where an express contract covers the subject matter (O'Grady v. BlueCrest Capital Management LLP, 111 F.Supp2d 494 [S.D.N.Y. 2015]). Therefore, since there cannot be an express and implied contract governing the same conduct and in fact there is no express contract between the parties, the motion seeking to dismiss the first counterclaim is granted. The motion seeking to dismiss the second counterclaim is consequently denied.

Turning to the defamation counterclaim, to establish a cause of action for defamation, the party must allege that there was a "[1] false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged

by, at a minimum, a negligence standard, and [4] it must either cause special harm or constitute defamation per se'" (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). Further, to successfully plead defamation the complaint must provide the time, place and manner of the defamation (Buffolino v. Long Island Savings Bank FSB, 126 AD2d 510, 510 NYS2d 628 [2d Dept., 1987]). Moreover, the defamation cannot be non-actionable opinion (Colantonio v. Mercy Medical Center, 73 AD3d 966, 901 NYS2d 370 [2d Dept., 2010]).

The third counterclaim does not allege any specific statements by the plaintiff at all. The counterclaim merely alleges that the plaintiff and its agents and employees "made false statements, orally and/or in writing, against the character of Defendant and/or Defendant's business" (see, Amended Verified Answer, ¶28 [NYSCEF Doc. No. 13]). The specific defamatory statements are not explicated nor is the manner or method in which those statements were allegedly made. Further, the general gist of the statements, namely that "Defendant procures payments and doesn't ship or send the merchandise being paid for" (see, Amended Verified Answer, ¶32 [NYSCEF Doc. No. 13]) is too vague to satisfy the specific requirements of defamation. Moreover, those statements are nothing more than opinions and are not actionable as defamation. Therefore, the motion seeking to dismiss the defamation counterclaim is granted.

The counterclaim seeking attorney's fees is improper since it is not contractually mandated and cannot be maintained as a separate cause of action (La Porta v. Alcara, Inc., 142 AD3d 851, 38 NYS3d 20 [1st Dept., 2016]). Therefore, the motion seeking to dismiss that counterclaim is granted. Likewise, punitive damages are not recoverable in an ordinary breach of contract case (see, Rocanova v. Equitable Life Assurance Society of U.S., 83 NY2d 604, 612 NYS2d 339 [1994]). There are no allegations the breach of contract alleged is of such a degree as to involve a "fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations'" (id) that such punitive damages may be appropriate. Therefore, the motion seeking to dismiss the counterclaim of punitive damages is granted.

The last counterclaim is tortious interference with prospective contractual relations. To establish this tort the defendant must demonstrate the plaintiff engaged in culpable or wrongful conduct which interfered with a prospective contractual relationship between the defendant and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure (Smith v. Meridian Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]).

The wrongful conduct cannot consist of simple persuasion (Godinger Silver Art Ltd., v. Hirschhorn, 433 F.Supp3d 417 [E.D.N.Y. 2019]). Thus, it must involve conduct that is either an independent crime or tort or done solely out of malice or done with extreme and unfair economic pressure (Carson Optical Inc., v. Prym, 11 F.Supp3d 317 [E.D.N.Y. 2014]).

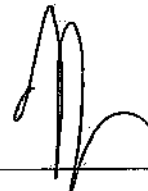
In this case there have been no allegations the plaintiff committed any crimes and there are no allegations of fraud, misrepresentation or economic pressure or other torts. Further, there have been no allegations the defendant acted solely out of malice or utilized extreme and unfair pressures. Merely acting "without justification" or with "wrongful means" (see, Amended Verified Answer, ¶¶54, 55 [NYSCEF Doc. No. 13]) does not establish the tort of tortious interference with prospective contractual relations. The counterclaim does assert the plaintiff acted with "fraud" and "misrepresentation" (id at ¶56) however, that conclusory assertion is insufficient to establish this tort. Therefore, the motion seeking to dismiss the last counterclaim is granted.

Thus, all of the counterclaims are dismissed except the breach of implied contract concerning any unpaid commissions.

So ordered.

ENTER:

DATED: October 10, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC