

Etihad Airways PJSC v Khan

2023 NY Slip Op 34359(U)

December 11, 2023

Supreme Court, New York County

Docket Number: Index No. 157231/2022

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42

Justice

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ETIHAD AIRWAYS PJSC

Plaintiff,

- v -

AMNA ALI KHAN,

Defendant.

-----X

INDEX NO. 157231/2022

MOTION DATE 05/15/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - DEFAULT.

In this action seeking, *inter alia*, the return of monetary compensation paid by the plaintiff airline company, Etihad Airways PJSC (Etihad), to the defendant, Amina Ali Khan (Khan), its former employee, due to her alleged concurrent employment with a competing airline for a period of approximately five months, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. By an order dated February 28, 2023, the court denied the plaintiff’s previous motion for leave to enter a default judgment (MOT SEQ 001) for failure to establish the facts constituting its claim, without prejudice to renewal on proper papers. The plaintiff now moves for a second time for the same relief (MOT SEQ 002). No opposition is submitted. The motion is granted in part.

CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, “proof of the facts constituting the claim.” “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477, 478 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

In support of the motion, the plaintiff submits, *inter alia*, an attorney's affirmation, the unverified complaint, an affidavit of service of the summons and complaint upon the defendant, and an affidavit of Scott Neilson (Neilson), the "Senior HR Business Partner International" of the plaintiff. The plaintiff's submissions establish proper service and the defendant's default. As to liability, since counsel claims no personal knowledge of the underlying facts, the affirmation of the plaintiff's counsel is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012). Moreover, an unverified complaint is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006). However, Neilson's affidavit, is sufficient to establish the *prima facie* validity of the first cause of action asserting a faithless servant claim and the seventh cause of action for conversion of certain company property.

The following facts are drawn from Neilson's affidavit. On November 28, 2016, defendant Khan began employment with Etihad as the Regional Human Resources Manager, Americas (Regional HR Manager), reporting directly to management, including Neilson. As the Regional HR Manager, Khan was responsible for all human resources matters, including, among other things, ensuring timely and accurate payroll and benefits, such as health insurance, dental insurance, and 401(k) contributions. She also administered an employee health and wellness fund in which she was to provide unspecified gift cards and other awards of value (the Wellness Fund Items) to qualifying Etihad employees. Etihad issued Khan a company-owned laptop, two mobile phones, and an official identification card (the Work Equipment). Neilson avers that Khan remains in possession of the Work Equipment and Wellness Fund Items. As of 2022, Khan was paid an annual base salary of \$130,800.00.

Etihad's Code of Conduct, which Khan reviewed during Etihad's annual ethics and compliance course in both 2021 and 2022, states, "[y]ou should not be engaged in outside employment in any business or in a capacity that conflicts with your ability to discharge your duties objectively and in the best interests of Etihad." To pass the ethics and compliance course, Khan had to acknowledge that she would comply with the company's Code of Conduct.

Nonetheless, unbeknownst to Etihad at the time, starting no later than March 1, 2022, Khan began a second full-time human resources role at Emirates Airlines (Emirates), Etihad's leading competitor in the United States and globally. Etihad and Emirates compete in all areas, including in employee recruitment. Also in March 2022, Khan's job performance began to

decline. She failed to pay the premiums for the plaintiff's medical, dental, and vision insurance policies for its employees, causing the policies to terminate and requiring the plaintiff, as a result, to find a new, more expensive medical insurance provider on short notice and to expend considerable effort to reinstate its dental and vision policies. Khan also failed to maintain communications with the administrator of the plaintiff's 401(k) plan, causing the administrator to terminate its services and the plaintiff to be noncompliant with the plan's terms for several months. In addition, Khan failed to terminate insurance coverage for certain former employees and failed to collect contributions for the plaintiff's insurance policies from several employees.

In May 2022, Khan submitted a letter informing Etihad that she would resign from the company effective August 31, 2022. Khan did not disclose that she was already working for Emirates prior to her resignation. As an employee at Etihad, Khan was required to complete by June 2022 an annual conflict of interest declaration, which required employees to disclose any conflicts of interest, including outside employment. She failed to complete the declaration for 2022.

In July 2022, Neilson inquired with his contacts at Emirates, concerned about Khan's deteriorating job performance and rumors of her employment with Emirates. On July 15, 2022, Neilson confirmed through direct discussions with Khan's supervisor at Emirates that she had been working in a human resources role at Emirates since no later than March 1, 2022, responsible for hiring, recruitment, and retention of employees. By letter dated July 18, 2022, Etihad terminated Khan and demanded that she return the Work Equipment and the Wellness Fund Items.

The plaintiff's proof is sufficient to establish its first cause of action, entitled "faithless servant/breach of duty of loyalty." Under the faithless servant doctrine, "[o]ne 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." Feiger v Iral Jewelry, Ltd., 41 NY2d 928, 928 (1977). As an agent, "[a]n employee 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." Bon Temps Agency v Greenfield, 184 AD2d 280, 281 (1st Dept. 1992). For instance, an employee violates the duty of good faith and loyalty when she "omits to disclose any interest which would naturally influence [her] conduct in dealing with the subject of the employment." Lamdin v Broadway Surface Adv. Corp., 272 NY 133, 138 (1936). Here, the defendant took up employment with Emirates, the plaintiff's leading

competitor. Further, the defendant failed to disclose her concurrent employment with Emirates to the plaintiff, despite a requirement that she do so as part of her annual conflict of interest declaration. In addition, Khan performed recruitment services for Emirates, acting directly against Etihad's interests, as Emirates and Etihad hire from the same pool of candidates. Khan's dual employment also resulted in a noticeable deterioration in her work performance at Etihad, causing, among other things, multiple company-wide insurance policies to terminate.

When a defendant is found liable under the faithless servant doctrine, the plaintiff is entitled to disgorgement of any compensation paid to the defendant during the period of disloyalty. See Visual Arts Found., Inc. v Egnasko, 91 AD3d 578 (1st Dept. 2012); Matter of Mahn v Major, Lindsey, & Africa, LLC, 159 AD3d 546, 547 (1st Dept. 2018); Dawes v J. Muller & Co., 176 AD3d 473, 474 (1st Dept. 2019); Mar. Fish Prods., Inc. v World-Wide Fish Prods., Inc., 100 AD2d 81, 91 (1st Dept. 1984). Therefore, the plaintiff is entitled to disgorgement of all compensation it paid to Khan during the period of her concurrent employment with Emirates, from March 1, 2022 through July 18, 2022. Neilson attests that, for calendar year 2022, Khan was paid an annual base salary of \$130,800.00. Calculating the portion of her annual salary that comprises the 139 days of her concurrent employment, the court finds that the plaintiff is entitled to damages in the amount of \$49,811.51, with costs and statutory interest from March 1, 2022. See CPLR 5001.

The plaintiff's motion is denied with respect to the second cause of action for breach of fiduciary duty, which is based on the same underlying conduct as the faithless servant claim and seeks the same damages. As such, the claim is duplicative of the faithless servant claim and is subject to dismissal. See Bluebanana Group v Sargent, 176 AD3d 408, 409 (1st Dept. 2019) (stating that the First Department "applie[s] the same standards for determining a breach of duty of loyalty claim to a breach of fiduciary duty claim against an employee"); InKine Pharm. Co. v Coleman, 305 AD2d 151, 152 (1st Dept. 2003) (holding that duplicative claims that arose from the same facts, and alleged similar damages, as a surviving claim were properly dismissed). The motion is likewise denied with respect to the fifth cause of action for unjust enrichment based on the compensation that Khan allegedly received from Etihad while working concurrently for Emirates, as this claim too is duplicative of the faithless servant claim.

The motion is also denied with respect to the third and fourth causes of action, which are both for "fraud/misrepresentation", because the plaintiff fails to establish the *prima facie* validity of these claims. These claims of fraud are based on two alleged misrepresentations by Khan:

(1) that she would devote her full-time business efforts to her position without engaging in any other outside employment; and (2) that she was taking sick leave to care for an ill parent when, in fact, she was using that time to work for Emirates. As to the first purported misrepresentation, “[i]t is the general rule that fraud cannot be predicated upon statements which are promissory in nature at the time they are made and which relate to future actions or conduct.” P. Chimento Co. v Banco Popular, 208 AD2d 385, 385 (1st Dept. 1994). Consequently, Khan’s alleged promise not to work for an outside employer in the future cannot support a claim of fraud. Id. As to the second purported misrepresentation, the plaintiff submits no proof that Khan actually worked for Emirates on any of the days on which she took sick leave. The plaintiff’s allegation is based only upon information and belief “without the slightest reference to the source of the information or the grounds for the belief,” and is thus insufficient to constitute proper proof of the facts constituting the claim. See Zelnik v Bidermann Indus. U.S.A., 242 AD2d 227, 228 (1st Dept. 1997). For the same reason, the motion is denied as to the sixth cause of action for unjust enrichment based on the compensation that Khan received from Etihad during the sick leaves that she allegedly used to work for Emirates.

With respect to the seventh cause of action, the plaintiff’s submissions establish a *prima facie* claim of conversion as to the alleged Work Equipment, though not as to the Wellness Fund Items. Neilson attests that Etihad issued company-owned Work Equipment to Khan; that on July 28, 2022, Etihad sent a letter to Khan demanding the return of the Work Equipment; that Khan did not respond to said letter; and that, as far as Neilson is aware, Khan remains in possession of the Work Equipment. Neilson’s affidavit is sufficient to establish a *prima facie* claim of conversion with respect to the Work Equipment. See Core Dev. Group LLC v Spaho, 199 AD3d 447, 448 (1st Dept. 2021). However, as to the Wellness Fund Items, the plaintiff’s submissions fail to establish a *prima facie* claim. Neilson states that Khan was responsible for administering a health and wellness fund pursuant to which she would distribute the Wellness Fund Items to qualifying Etihad employees. He does not, however, state whether Khan ever actually purchased the Wellness Fund Items, let alone that she kept them in her personal possession, such as to place them beyond the plaintiff’s lawful control. Therefore, the branch of the plaintiff’s motion for leave to enter a default judgment on its claim of conversion is granted as to the Work Equipment and is denied as to the Wellness Fund Items.

“The usual measure of damages for conversion is the value of the property at the time and place of conversion, plus interest.” Scotti v Barrett, 166 AD3d 698, 699 (2nd Dept. 2018), citing Fantis Foods, Inc. v Std. Importing Co., 49 NY2d 317 (1980). The conversion of the Work

Equipment occurred on July 28, 2022, when the plaintiff demanded the return of these items, but Khan did not comply. See Core Dev. Group LLC v Spaho, supra. As such, the plaintiff is entitled to damages equal to the value of these items as of July 28, 2022, plus interest from the same date. However, the plaintiff has not submitted proof, such as invoices or receipts for the converted Work Equipment, sufficient to permit a calculation of these damages. The plaintiff may, within 60 days, submit supplemental papers to establish its damages on the conversion claim. The conversion claim is waived if not supplemented within 60 days.

Accordingly, upon the foregoing papers, it is


ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is granted as to the first cause of action under the faithless servant doctrine, with damages in the amount of \$49,811.51, plus costs and statutory interest from March 1, 2022, and as to the seventh cause of action for conversion on liability to the extent that the claim relates to the converted Work Equipment, with leave to file supplemental papers on damages, and the motion is otherwise denied; it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Etihad Airways PJSC, and against the defendant, Amna Ali Khan, in the sum of \$49,811.51, plus costs and statutory interest from March 1, 2022, and it is further

ORDERED that the plaintiff may, within sixty (60) days of the date of this Order, submit supplemental papers via email to the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov, to establish its damages on the conversion claim, *i.e.* the value of the converted Work Equipment on July 28, 2022; and such claim is waived if supplemental papers are not timely filed.

This constitutes the Decision and Order of the court.

12/11/2023
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER