

**New York Auto Concierge Inc. v Valenzuela**

2023 NY Slip Op 34380(U)

December 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 533111/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December 2023.

HONORABLE FRANCOIS A. RIVERA

-----X  
NEW YORK AUTO CONCIERGE INC. &  
Tow NY Autobody Corp

Plaintiffs

-against-

MICHAELANGELO VALENZUELA  
JAYLANIE CAMERON SIMPSON  
ANNETTE JOHNSON ROPER

Defendants

**DECISION & ORDER**  
Index No. 533111/2021

-----X  
Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion, filed on May 13, 2023, under motion sequence number three, by defendant Michael Valenzuela (hereinafter Valenzuela) for an order pursuant to CPLR §§ 3211(a)(2), (4), (7) and CPLR 3016(b) dismissing the complaint of plaintiffs New York Auto Concierge Inc. and Tow NY Autobody Corp.

- Notice of Motion
- Affirmation in Support
- Affidavit in Support
  - Exhibits A-B
- Affirmation in Opposition
- Affirmation in Reply

**BACKGROUND**

On December 28, 2021, plaintiffs New York Auto Concierge Inc. and Tow NY Autobody Corp. (hereinafter collectively as plaintiffs) commenced the instant action by filing a summons and verified complaint with the Kings County Clerk’s Office (KCCO).

On July 7, 2022, Valenzuela interposed and filed a verified answer with the KCCO. No other defendant has appeared or interposed an answer to the verified complaint.

The verified complaint alleges seventeen allegations of fact in support of four causes of action. The first cause of action is for breach of fiduciary duty. The second cause of action alleges that the defendant was a faithless servant. The third cause of actions alleges that the defendant interfered with prospective advantage. The fourth cause of action is for injunctive relief.

The verified complaint alleges the following salient facts against the movant. In or about the 2020, the plaintiffs hired Valenzuela. Valenzuela utilized his unfettered access to the plaintiffs' proprietary information, including customer information, for his own benefit and to the detriment of the plaintiffs. Valenzuela began stealing documents to actively solicit the plaintiffs' customers and employees and to steer the plaintiffs' clients away. When Valenzuela and other defendants left to start their own company, they breached their fiduciary duties to the plaintiffs.

The defendants were disloyal pursuant to the faithless servant doctrine by wrongfully receiving and misappropriating their salaries from the plaintiffs' while conspiring to steal the plaintiffs' clients as such the plaintiffs are entitled to all the monies taken during the conspiracy. All defendants knew the clients they conspired to bring to their new company were previously the plaintiffs' clients and would continue to be the plaintiffs' clients if the defendants had not steered them away. The plaintiffs seek an

equitable judgment against all defendants for an injunction to stop contacting the plaintiffs' client.

### LAW AND APPLICATION

In support of the motion, Valenzuela submitted his own affidavit and an affirmation of his counsel. The affirmation of Valenzuela's counsel demonstrated no personal knowledge of any of the transactions or occurrence alleged in the verified complaint or in Valenzuela's affidavit. An attorney's affirmation that is not based upon personal knowledge is of no probative value (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]; *Hackett-Napier v All Health Operations, LLC*, 73 Misc. 3d 1228 [A] [Sup Ct, Kings County 2021]). In opposition to Valenzuela's motion to dismiss, the plaintiffs submitted an affidavit of Eric Brown, their President, who annexed Valenzuela's employment application and payroll records.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026). We accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal (*Rabos v. R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012]).

CPLR 3211(a)(2) authorizes the Court to dismiss a cause of action where the Court has no jurisdiction of the subject matter of the cause of action. The affirmation of Valenzuela's counsel incorrectly contends that a cause of action subject to dismissal pursuant to CPLR 3211(a)(7) deprives the Court of subject matter jurisdiction. The

Supreme Court is a Court of general jurisdiction and has subject matter jurisdiction over the torts pled in this action.

Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*Hempstead Hous. Auth. v Middle Cnty. Res. Mgmt., Inc.*, 216 AD3d 621, 622 [2d Dept 2023]). Valenzuela contends that there is a separate pending related action with the plaintiff regarding the same causes of action in the instant action. The other action entitled *New York Auto Concierge Inc. et. al. v Lisa Rosa et. al.*, filed under Index Number 532355/2021. While the plaintiff in both actions is the same, no defendant in the other action is a named defendant in the instant action. Therefore, there is no substantial identity of the parties.

In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Bono v Stim & Warmuth, P.C.*, 215 AD3d 911, 911 [2d Dept 2023], quoting *Langley v Melville Fire Dist.*, 213 AD3d 748, 750 [2d Dept 2023]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, the criterion is whether the proponent of the pleading has a cause of action, not whether the proponent has stated one, and, unless it has been shown that a material fact as

claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate (*Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715–716 [2d Dept 2022], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The first cause of action is for breach of fiduciary duty. An employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties (*30 FPS Prods., Inc. v Livolsi*, 68 A3d 1101, 1102 [2d Dept 2009], quoting *Wallack Frgt. Lines v Next Day Express*, 273 AD2d 462, 463 [2d Dept 2000]). An employee may breach his or her fiduciary duty to the employer, by improperly using the employer's time and resources to form a new business and promote themselves while still working for the employer (*Ashland Mgt. Inc. v. Altair Invs., NA, LLC*, 14 NY3d 774, 776 [2010]).

The second alleges that the defendant was a faithless servant. The faithless servant doctrine holds that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally disentitled to recover his or her compensation, whether commissions or salary (*Feiger v Iral Jewelry*, 41 NY2d 928, 928 [1977]). It makes no difference that the services were beneficial to the principal, or that the principal suffered no provable damage because of the breach of fidelity by the agent (*Panos v Mid Hudson Med. Grp., P.C.*, 204 AD3d 1016, 1018 [2d Dept 2022]).

The third cause of actions alleges that the defendant interfered with prospective advantage. To establish a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by wrongful means or that the defendant

acted for the sole purpose of harming the plaintiff (*Tsatskin v Kordonsky*, 189 AD3d 1296, 1298 [2d Dept 2020]). The fourth cause of action seeks injunctive relief. While it is an equitable remedy and not a standalone cause of action, the remedy is not subject to dismissal as a pleading deficiency.

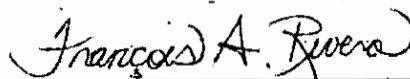
Every cause of action follows the same allegations, namely, that the defendants while employed by the plaintiffs utilized their position at the company to steer clients to their companies and utilized the plaintiffs' name and likeness to make customers believe that it was acceptable. Accepting the allegations by the plaintiffs in the verified complaint as true and giving the plaintiffs the benefit of every favorable inference, the Court finds that all the causes of action in the verified complaint plead cognizable claims. CPLR 3016 (b) provides that where a cause of action or defense is based upon fraud the circumstances constituting the wrong shall be stated in detail. The instant action does not contain any claims of fraud. Accordingly, Valenzuela's motion is denied.

### CONCLUSION

The motion by defendant Michael Valenzuela for an order pursuant to CPLR §§ 3211(a)(2), (4), (7) and CPLR 3016(b) dismissing the complaint of plaintiff New York Auto Concierge Inc. and Tow NY Autobody Corp. is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.