Ching Nor Yee v Xiudong Chen
2024 NY Slip Op 35224(U)
May 24, 2024
Supreme Court, Queens County
Docket Number: Index No. 704057/23
Judge: Carmen R. Velasquez

 INDEX NO. 704057/2023
NYSCEF DOC. NO. 259 RECEIVED NYSCEF: 05/28/2024

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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CHING NOR YEE, ET AL., Index No. 704057/23

Plaintiffs, Motion Date: November 20, 2023

-against-

M# 3

XIUDONG CHEN, ET AL.,

Defendants.

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The following papers numbered EF 52-54, 70-82 read on this motion by the plaintiffs for an order dismissing the second, third, fourth and sixth counterclaims set forth in the Answer pursuant to CPLR 3211(a)(7); and cross motion by defendants for leave to amend the Answer.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	EF 52-54
Notice of Cross Motion - Affirmation - Exhibits.	EF 73-82
Affirmation in Opposition - Exhibits	EF 70-71

Upon the foregoing papers, it is ordered that this motion by the plaintiffs for an order dismissing the second, third, fourth and sixth counterclaims set forth in the Answer and cross motion by defendants for leave to amend the Answer are decided as follows:

Plaintiffs and defendant Xiudong Chen ("Chen") formed a business, Glamour Debut LLC, and executed an Operating Agreement on March 23, 2022. The purpose of the business was to sell skin care and nutrition products based on individual needs and preferences. Under the agreement, defendant Chen was the managing member of the business. Plaintiff Ching Nor Yee avers that she was the Chief Financial Officer of the business, with the right to, *inter alia*, review Glamour's financial records. Plaintiff Yee also states that she drafted checks for company expenses, with the approval of defendant Chen.

Plaintiffs claim in their complaint that defendant Chen has misappropriated, converted and wasted the funds of the company for the benefit of herself and her husband, defendant Gary W. Myers. In addition, plaintiff Yee avers that defendant Chen has excluded plaintiffs from the operation and management of the business despite promises that they would be active participants. According to plaintiff, Chen created a new bank account in the name of Glamour, NY, a subsidiary of Glamour, that was created in violation of the Operating Agreement. Defendants interposed an Answer with six counterclaims.

This court, in an order dated September 26, 2023, granted plaintiff's motion for a preliminary injunction and enjoined the defendant from, *inter alia*, misappropriating, converting or using any funds that are the property of Glamour Debut LLC for personal use and interfering with plaintiff's management of Glamour and/or the normal business operations of Glamour. Plaintiff now seeks to dismiss the second, third, fourth and sixth counterclaims pursuant to CPLR 3211(a)(7). Defendants cross move to amend the Answer.

On a motion pursuant to CPLR 3211(a)(7) to dismiss a pleading for failure to state a cause of action, the court must accept the facts alleged in the complaint 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" (*Pacific W., Inc. v E & A Restoration, Inc.*, 178 AD3d 834, 835 [2d Dept 2019]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d at 1181, quoting *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005].)

In the matter at hand, the second counterclaim alleges tortious interference with prospective contractual relations. According to the second counterclaim, plaintiff has falsely stated to manufacturers that defendant Chen is operating the LLC in a dishonest manner and has urged the LLC's manufacturers to cease all present and future business relationship with defendant Chen and the LLC. In addition, the second counterclaim asserts that plaintiffs have withheld the required documents for the LLC to set up a satellite office in China, which was one of the purposes of the LLC.

To establish a claim of tortious interference with prospective contractual relations, a plaintiff must demonstrate that the defendant's interference with its prospective contractual 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]; *Caprer v Nussbaum*, 36 AD3d 176, 204 [2d Dept 2006].) Here, the second counterclaim fails to identify any third parties with which defendant has a prospective contractual relation with. It merely alleges unspecified "manufacturers." Thus, this counterclaim fails to set forth a viable cause of action for tortious interference with prospective contractual relations. (*Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 714 [2d Dept 2019].)

The third counterclaim alleges unjust enrichment.

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972].) A plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. (*Berkovoits v Berkovits*, 190 AD3d 911, 917 [2d Dept 2021]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 889 [2d Dept 2014].) A claim for unjust enrichment is not available where it simply duplicates or replaces a conventional contract or tort claim. (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]; *Guzman v Ramos*, 191 AD3d 644, 652 [2d Dept 2021]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005].)

Here, the unjust enrichment counterclaim is duplicative of the first counterclaim for conversion. The third counterclaim alleges that "[p]laintiffs have been unjustly enriched by selling $300,000 worth of the LLC's merchandise as a result of Plaintiffs' refusal to return profits to the LLC." The first counterclaim similarly alleges that plaintiffs appeared at the LLC offices and "removed $300,000 worth of LLC's inventory, resold, and pocketed the profits."

The fourth counterclaim alleges defamation inasmuch as it alleges that plaintiffs have falsely stated that defendant Chen "was stealing money from the company."

The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. (*Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1034 [2d Dept 2020]; *Arvanitakis v Lester*, 145 AD3d

650, 651 [2d Dept 2016].) The complaint must set forth the particular words allegedly constituting defamation. (CPLR 3016[a].)

In the matter at bar, the complaint fails to allege the specific persons to whom the statement was made, the date and time it was made, and the manner in which it was made. (*Sternberg v Wiederman*, 225 AD3d 820, 821 [2d Dept 2024]; *Arsenault v Forquer*, 197 AD2d 554, 556 [2d Dept 1993]; *Buffolino v Long Is. Sav. Bank*, 126 AD2d 508, 510 [2d Dept 1987].) As such, it fails to state a cause of action.

The sixth counterclaim seeks an injunction. This counterclaim asserts that plaintiffs stole inventory from the office and sold the goods and pocketed the profits. As a result, defendants seek to enjoin the plaintiffs from accessing the company office and management. However, this counterclaim is moot in view of this court's September 26, 2023 order, which granted plaintiff a preliminary injunction enjoining the defendants from, *inter alia*, interfering with plaintiff's management of the business. In any event, this cause of action fails to plead all the requisite elements of an injunction. (*see Jones v State Farm Fire & Cas. Co.*, 189 AD3d 1565, 1566 [2d Dept 2020].)

With respect to the cross motion to amend the answer, defendants fail to provide any specific support for the requested relief. Indeed, although the defendants submit a proposed amended Answer, they do not set forth in the moving affirmation the specific amendments they are seeking nor do they explain the basis for any amendments or why they are now seeking such relief. (*see* CPLR 3025[b]; *Duffy v Bass & D'Allesandro*, 245 AD2d 333, [2d Dept 1997].)

Accordingly, this motion by the plaintiffs is granted, and the second, third, fourth and sixth counterclaims set forth in the Answer are dismissed.

The other counterclaims shall remain.

The cross motion by defendants to amend the Answer is denied.

Dated: May 24, 2024

CARMEN R. VELASQUEZ, J.S.C.

FILED
5/28/2024 TA
COUNTY CLERK
QUEENS COUNTY