Cooke v Greenhouse Hudson, LLC
2024 NY Slip Op 35575(U)
May 20, 2024
Supreme Court, Columbia County
Docket Number: Index No. E012022018190
Judge: Daniel C. Lynch
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STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

ERIN GOLDMAN COOKE,

Plaintiff,

-against-

GREENHOUSE HUDSON, LLC,
GREEN STREET FLORAL, LLC,
JENNIFER MOJO, individually as
aider and abettor, and DAVID MOJO,
individually as aider and abettor,

Defendants.

DECISION AND ORDER
Index No.: E012022018190
RJI No.:

GREEN STREET FLORAL, LLC

Third-Party Plaintiff,

-against-

ERIN GOLDMAN COOKE,

Counterclaim Defendant,

-and-

G.G. & G. FLOWER CO., LLC and
DARRYN COOKE,

Third-Party Defendants.

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LYNCH, J.:

This litigation arises out of a dispute surrounding the July 2021 purchase of a retail flower shop (hereinafter "the Business") by defendants Jennifer and David Mojo (hereinafter jointly referred to as "the Mojos"), as well as the real property where the Business was located, from plaintiff. Defendant Green Street Floral LLC, of which Jennifer Mojo is the sole member, now operates the Business, and defendant Greenhouse Hudson LLC owns the real property (hereinafter jointly referred to as "the LLC defendants"). An integral part of this purchase was plaintiff's agreement to manage the day-to-day operations of the Business on the Mojos' behalf following the sale, as they lived in Seattle, Washington and would be unable to move to New York full time until June 2022. Accordingly, a post-closing agreement was signed in September 2021 (hereinafter "the Employment Agreement"), providing that plaintiff would work for the Mojos through June 30, 2022, working a minimum of 30 hours per week at $35 per hour as an "at will" employee and providing the "time and attention as [was] required or reasonably requested" to manage the Business (DEX N: 1-4).

In December 2021, plaintiff advised the Mojos that she had underlying health issues – asthma, anemia and a blood disorder – that made her more susceptible to COVID-19, and asked for multiple accommodations, including a socially distanced workstation and the ability to work from home. Plaintiff was given some accommodations, but was not permitted to work fully remotely, as the Mojos believed there were essential parts of her job as store manager that required her physical presence. In December 2021, the Mojos reopened the Business to the public, with certain COVID-19 safety measures, including requiring vaccination for the staff and masks for the patrons. On February 12, 2022, after the Mojos remove some precautionary measures, including a plexiglass divider at the front register, plaintiff informed them that she was terminating her employment with the Business as of February 14, 2022. Following her resignation, plaintiff deleted all emails out of her business email account. On February 13, 2022, David Mojo informed plaintiff not to report to work the next day, and on March 3, 2022, the Mojos, through counsel, demanded that plaintiff give the Mojos all keys to the premises and access to the Square and GoDaddy accounts.

Plaintiff thereafter commenced the instant action, asserting claims of discrimination, failure to accommodate a disability and retaliation under Executive Law Article 15 (hereinafter referred to as "the Human Rights Law" or "the HRL"), as well as claims for breach of contract (DEX A). Defendants answered, and Green Street asserted counterclaims against plaintiff for breach of contract, acting as a faithless servant, conversion and tortious interference with a business relationship (DEX B). Green Street also asserted claims against third-party defendant G.G. & G. Flower Co., LLC (hereinafter "GGG") for breaching the duty of good faith and fair dealing in the sale of the Business and against third-party defendant Darryn Cooke, plaintiff's husband, for breach of contract stemming from his provision of web hosting services to the business (DEX B).

The parties engaged in motion practice throughout discovery, and discovery ultimately concluded. There are two motions currently pending before the Court: (1) defendants' motion for summary judgment dismissing each cause of action in the complaint and granting defendants' counterclaim for breach of contract with respect to liability or, in the alternative, dismissing all claims against defendants David Mojo and Greenhouse Hudson, LLC (Motion 8); and (2) a cross-motion by plaintiff and the third-party defendants for summary judgment (Motion 10). Defendants oppose the cross-motion for summary judgment by plaintiff and the third-party defendants.

"Summary judgment is a drastic remedy" (*Vega v. Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks, brackets and citation omitted]; *accord Grant v Temple*, 216 AD3d 1351, 1352 [3d Dept 2023]), to be granted only when the party moving for summary judgment "make[s] a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *accord Reese v Raymond Corp.*, 202 AD3d 1304, 1306 [3d Dept 2022]). If the movant makes such a showing, "the burden shifts to the nonmovant to raise a triable issue of fact, again through the submission of competent evidence. The evidence must be viewed in the light most favorable to the nonmovant, and that party must be given the benefit of every favorable inference" (*Parris-Kofi v Redneck, Inc.*, 204 AD3d 1180, 1181 [3d Dept 2022]; *see Durr v Capital Dist. Transp. Auth.*, 198 AD3d 1238, 1240 [3d Dept 2021]).

I. Plaintiff's Discrimination Claims

Defendants argue that they are entitled to summary judgment dismissing plaintiff's first and second causes of action. Specifically, defendants argue that plaintiff cannot establish a prima facie case of discrimination, because she (1) did not have a disability within the meaning of Executive Law § 292 (21), as she provided no medical documentation showing that her preexisting health conditions caused her to be more at risk from COVID-19, and (2) defendants provided her with reasonable accommodations. Defendants further argue that even if she could establish a prima facie case of discrimination, her accommodation requests would have imposed an unreasonable burden on the Business. Plaintiff responds that she, not defendants, is entitled to summary judgment, as she established a prima facie case of discrimination because she (1) had a disability under Executive Law § 292 (21), (2) she could have performed her job duties – transferring the business to the Mojos – remotely, (3) she suffered an adverse employment action because of her disability and (4) the adverse employment action occurred under circumstances that give rise to an inference that she was discriminated against because of her disability. Plaintiff also contends that she is entitled to summary judgment on her claim that defendants failed to accommodate her disability, as they failed to engage with plaintiff's reasonable requests for accommodations and her accommodations would not have imposed an undue hardship on defendants.

Under Executive Law § 296 (3), "[i]t shall be an unlawful discriminatory practice for an employer . . . to refuse to provide reasonable accommodations to the known disabilities . . . of an employee . . . in connection with a job or occupation . . . held." A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law § 292 [21] [a]). "[I]f an employee has a physical impairment that prevents the employee from performing the core duties of his or her job even with a reasonable accommodation, the employee does not have a disability covered by the statute, and consequently, the employer is free to take adverse employment action against the employee based on that impairment. On the other hand, if a reasonable accommodation would permit the employee to perform the essential functions of the employee's position, the employee has a 'disability' within the meaning of the statute, and the employer cannot disadvantage the employee based on that disability" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014] [citations omitted]; *see Matter of Town of Hempstead v New York*

State Div. of Human Rights, 215 AD3d 973, 977 [2d Dept 2023]). A reasonable accommodation is an "action[] taken which permit[s] an employee . . . to perform in a reasonable manner the activities involved in the job[;] provided, however, that such actions do not impose an undue hardship on the business . . . from which action is requested" (Executive Law § 292 [21-e]; *see Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1217 [3d Dept 2017]).

"To establish a prima facie case of discrimination based upon the denial of a reasonable accommodation, [a] plaintiff must prove that he or she is a person with a disability, that the employer had notice of the disability, that he or she could perform the essential functions of the job with a reasonable accommodation and that the employer refused that reasonable accommodation" (*Graham v New York State Off. of Mental Health*, 154 AD3d at 1217-1218 [citations omitted]; *accord Nordenstrom v State Univ. of New York. Coll. of Envtl. Science & Forestry*, 184 AD3d 1157, 1158 [4th Dept 2020]). "An employer normally cannot obtain summary judgment on a denial of a reasonable accommodation claim unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation by engaging in a good faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested" (*Graham v New York State Off. of Mental Health*, 154 AD3d at 1218 [internal quotation marks, brackets and citations omitted]; *see Cohen v State of New York*, 129 AD3d 897, 899 [2d Dept 2015]).

The Mojos became interested in the Business in June 2021 and purchased it in September of that year, at which time the store was closed to customers due to the COVID-19 pandemic (DEX C: 101-102). In December 2021, Jennifer Mojo decided to reopen the Business to customers, without discussing the matter with plaintiff (DEX C: 116, 166-167). On December 15, 2021, plaintiff emailed Jennifer Mojo, stating that she had "an underlying health issue that [rendered her] immunocompromised" and requesting the ability to either work from home or in the apartment above the business to prevent her from being exposed to customers and COVID-19 (DEX C: 116-117, 170-173; DEX M). In her deposition, plaintiff testified that she believed these requests were feasible as she offered to perform any on-site work with flowers before the store opened, then perform her other tasks, such as creating products and training Jennifer Mojo, remotely (DEX C: 172). She also asked for stanchions separating the customers from the employees and a plexiglass divider at the checkout (DEX C: 117-118, 166-167). The Mojos denied her request to work completely remotely, because her job as the manager of the Business required in-person work, including customer interactions, though plaintiff was permitted to perform some of her job duties from the apartment above the Business away from customers (DEX D: 138-140, 171). The Mojos did permit plaintiff to move her workstation to the back of the store, and in December 2021, she purchased a plexiglass shield to put at the point of sale, masks, hand sanitizer and an air purifier, and put up more signage requiring masks to be worn inside the Business (DEX D: 152-154, 170; PEX A: 137). The Mojos both testified that they chose to purchase the plexiglass before plaintiff requested it (DEX D: 153; DEX E: 37-38).

Jennifer Mojo testified in her deposition that on February 10, 2022, she decided to remove the plexiglass without consulting plaintiff, as she felt it was ineffective and impeding customer interactions, and plaintiff was not one of the front desk employees (DEX D: 154-156). Furthermore, she felt that because mask mandates had been lifted by New York, it was reasonable (DEX D: 155-156). She claimed that she was unaware it was an accommodation that plaintiff needed (DEX D: 158). According to plaintiff, when she approached David Mojo regarding the removal of the plexiglass on February 12, 2022, he told her it was taken down because she was the only one who wanted it and it was hindering Jennifer Mojo's interactions with customers (DEX

C: 212-213, 220). David Mojo corroborated this at his deposition, stating that Jennifer Mojo decided to remove the plexiglass without speaking to plaintiff, as she believed it had become more of a hindrance than a safeguard, especially for customers and employees who were hard of hearing, and people were leaning around it, making it ineffectual (DEX E: 49-50, 55). The Mojos also removed stanchions that separated the public area of the store from the coolers where the flowers were stored for use by employees, in early February 2022 (DEX C: 216-217). David Mojo told plaintiff that she was not included in the Mojos' decision to remove the plexiglass (DEX C: 221).

During plaintiff's discussion with David Mojo about the removal of the plexiglass, Jennifer Mojo interrupted the conversation and had some form of negative interaction with plaintiff – it is unclear exactly what was said (DEX C: 222; DEX D: 239; DEX E: 46). Ultimately, on February 13, 2022, plaintiff informed the Mojos via email that her last day would be February 14, 2022, as she was no longer comfortable working with Jennifer Mojo or in the store without COVID-19 safety measures, such as the plexiglass shield, "regardless of what NYS mandates" stated regarding safety procedures. She stated that she had informed the Mojos of her medical issues "months" before and requested reasonable accommodations, which were agreed to and then taken away by the Mojos (DEX U: 2-3). David Mojo responded, telling plaintiff not to report to work on February 14, 2022 (DEX U: 2).

The Court holds that defendants are not entitled to summary judgment on plaintiff's discrimination and denial of reasonable accommodation claims. Defendants claim that plaintiff did not have a disability because she provided no medical documentation of her immunocompromised status to the Mojos, but there is no indication that the Mojos requested it, even though she gave notice of her health concerns to Jennifer Mojo on December 15, 2021. Moreover, plaintiff's medical records clearly show that she has asthma that reduces her lung capacity to 68%, as well as anemia (DEX O: 1-15). Furthermore, the evidence submitted by both parties clearly shows that there is an issue of fact as to whether the Mojos engaged "in a good faith interactive process that assessed" plaintiff's potential need for accommodations, and the reasonableness of those accommodations, as they decided to remove the plexiglass and stanchions without discussion with plaintiff, despite putting it in place as a COVID-19 safety precaution (*Graham v New York State Off. of Mental Health*, 154 AD3d at 1218; *see Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d 1159, 1162 [3d Dept 2011]). There is also an issue of fact as to whether the accommodations provided to plaintiff – a workstation in the back of the store, mask requirements, new air filters and the lack of the plexiglass and stanchions – were reasonable, as there is conflicting testimony as to whether plaintiff could have performed her job duties with these accommodations and whether they imposed an undue hardship on the Business (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d at 839-841). As such, defendants are not entitled to summary judgment dismissing plaintiff's first and second causes of action.

Similarly, plaintiff is not entitled to summary judgment on these two causes of action. Plaintiff presented medical records showing that that she had asthma and anemia in late 2021, but as to her contention that she had the blood condition von Willebrand Disease (hereinafter "VWD"), these records stated that her symptoms were often "misclassified as von Willebrand disorder" (DEX O: 5). Moreover, plaintiff presented no medical evidence beyond her own internet research that these health conditions made her particularly vulnerable to COVID-19, and so there is an issue of fact as to whether she had a physical impairment that prevented her from performing her duties as manager of the Business without reasonable accommodations. Therefore, issues of fact remain, preventing the grant of summary judgment to plaintiff on these claims.

II. <u>Plaintiff's Retaliation Claims</u>

Defendants argue that they are entitled to summary judgment dismissing plaintiff's retaliation claim, as her request for reasonable accommodations was not a protected activity for the purposes of a retaliation claim. Plaintiff responds that she is entitled to summary judgment on this retaliation claim, as she alleged that she was fired in retaliation for protesting the discrimination she faced from the denial of her request for accommodations, and she proved the elements for a retaliation cause of action by undisputed evidence.

"It [is] an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under [the HRL]" (Executive Law 296 [7]). To make a prima facia claim of retaliation under the HRL, "plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *accord Graham v New York State Off. of Mental Health*, 154 AD3d at 1220-1221). If plaintiff makes this prima facie showing, the burden shifts to defendants "to present legitimate, independent, and nondiscriminatory reasons to support their actions" (*Suriel v Dominican Republic Educ. & Mentoring Project, Inc.*, 85 AD3d 1464, 1467 [3d Dept 2011] [internal quotation marks and citations omitted]; *see Miller v City of Ithaca*, 179 AD3d 1235, 1237 [3d Dept 2020]).

As a preliminary matter, defendants argue that they are entitled to summary judgment because requesting accommodations is not a protected activity under the HRL (*see Witchard v Montefiore Med. Ctr.*, 103 AD3d 596, 596 [1st Dept 2013], *lv denied* 22 NY3d 854 [2013]). However, *Witchard* bases its holding only on cases dealing with motions to dismiss, not motions for summary judgment (*see* 103 AD3d at 596), and this holding has not been strictly followed by the Third Department of the Appellate Division in an analysis of a summary judgment motion (*see Graham v New York State Off. of Mental Health*, 154 AD3d at 1221). Furthermore, requesting accommodations is treated as a protected activity under both the New York City Human Rights Law and the Second Circuit's interpretation of the Americans with Disabilities Act (*see* N.Y.C. Admin. Code § 8-107 [7] [v]; *Weixel v Bd. of Educ. of City of New York*, 287 F3d 138, 149 [2d Cir 2002]). Finally, the Court of Appeals has said that engaging in a protected activity involves "opposing or complaining about unlawful discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 313), and plaintiff's objections to the Mojos reopening the Business to customers without providing her reasonable accommodations, and then their unilateral revocation of some of the accommodations provided, clearly fall under that definition, especially in light of Executive Law § 300's directive that the HRL "be construed liberally for the accomplishment of the remedial purposes thereof."

Neither party is entitled to summary judgment on plaintiff's retaliation claim. The evidence presented creates a question of fact as to whether the Mojos deliberately made working conditions so intolerable that plaintiff was forced into involuntary resignation after she requested accommodations for her medical conditions. The Mojos agreed to provide her with certain accommodations, though there is disagreement as to whether they purchased the plexiglass of their own volition or in response to plaintiff's request, but then took those away unilaterally, despite repeated communications from plaintiff indicating their importance to her. As such, defendants are not entitled to summary judgment on the retaliation claim (*see Matter of ABD Engrs. LLP v New York State Div. of Human Rights*, 225 Add 982, 983 [3d Dept 2024]; *Long v Aerotek, Inc.*, 202 AD3d 1216, 1222 [3d Dept 2022]). Similarly, there are issues of fact as to whether plaintiff's termination was for a legitimate, non-discriminatory reason, as the Mojos claimed at their depositions that she quit of her own accord after Jennifer Mojo took issue with plaintiff speaking to David Mojo about the removal of the plexiglass. As such, neither party is entitled to summary judgment on the retaliation issue.

III. Plaintiff's Breach of Contract Claims

Defendants contend that they are entitled to summary judgment dismissing plaintiff's breach of contract claim, because (1) her employment was not constructively terminated, as there is no evidence showing that her employment was so difficult or unpleasant that a reasonable individual in her position would have felt compelled to resign, and (2) there was no provision in the Employment Agreement that she be scheduled for at least 30 hours a week. Plaintiff argues that she should be granted summary judgment on this claim, as defendants constructively discharged her by removing the COVID-19 precautionary procedures, making the work atmosphere so intolerable that she was forced to quit.

"[T]o establish a cause of action for breach of contract, a party must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 186 AD3d 1720, 1722 [3d Dept 2020] [internal quotation marks and citation omitted]; *accord Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.*, 221 AD3d 1324, 1326 [3d Dept 2023]).

Defendants are entitled to summary judgment dismissing the portion of plaintiff's breach of contract claim that argues that defendants breached the Employment Agreement by failing to give her the proper notice of termination, as the Employment Agreement states that plaintiff could be terminated "at any time, with or without . . . notice" (DEX N: 4). Defendants are also entitled to summary judgment dismissing that portion of this cause of action that claims defendants breached the Employment Agreement by terminating some COVID-19 safety precautions, as there is no provision in that agreement which requires any COVID-19 safety provisions to be in place. Despite plaintiff's claim that there was an understanding between the parties that plaintiff would be able to continue managing the Business as she saw fit, including maintaining a "no customer" policy, the contract states that it is the entire agreement between the parties, and so no understanding not set forth within the contract is enforceable (*see Park Ave. Assoc. in Radiology, P.C. v Nicholson*, 200 AD3d 1436, 1438-1439 [3d Dept 2021], *affd* 38 NY3d 1127 [2022]). Finally, defendants are also entitled to summary judgment against plaintiff's claim for breach of contract due to constructive discharge, as the contract states that plaintiff is an at-will employee, and this precludes plaintiff's claim of constructive discharge insofar as it is based in breach of contract (*see Webb v Greater N.Y. Auto. Dealers Assn., Inc.*, 144 AD3d 1136 [2d Dept 2016]; *Braddock v Braddock*, 60 AD3d 84, 96 [1st Dept 2009]).

However, neither party is entitled to summary judgment on plaintiff's claim that defendants breached the employment contract with plaintiff by failing to schedule her for a minimum of 30 hours per week between December 27, 2021 and February 13, 2022 (DEX A: 16). Plaintiff's timesheet clearly shows that she worked less than 30 hours for the weeks of December 27, 2021 through January 31, 2022 (DEX G; DEX H). Nevertheless, plaintiff failed to present evidence showing that this lack of work was because defendants refused to schedule her for more hours, and so an issue of fact remains on this issue.

IV. Claims Against Defendants Greenhouse Hudson, LLC and David Mojo

Defendants also argue that in the event they are not granted summary judgment against plaintiff in all respects, all claims against David Mojo and Greenhouse Hudson should be dismissed, because Green Street, not Greenhouse Hudson, employed plaintiff, and David Mojo is not a member of Green Street and had no job responsibilities regarding the Business. Plaintiff responds that the Employment Agreement was signed by Greenhouse Hudson, not Green Street, and so Greenhouse Hudson was plaintiff's employer and is therefore a proper party. Plaintiff adds that David Mojo terminated plaintiff's employment, and so is also a proper party. In determining whether an individual is an employer and a proper party in an action under the HRL, there are "four relevant factors: (1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct" (*Griffin v Sirva, Inc.*, 29 NY3d 174, 188 [2017] [internal quotation marks and citations omitted]

The Employment Agreement lists Greenhouse Hudson, not Green Street, as plaintiff's employer (DEX N: 1), even though it is undisputed that Greenhouse Hudson owns the real property where the business is located, while Green Street owns the Business. Both the Mojos are both members of the former, while only Jennifer Mojo is a member of the latter (DEX D: 15-18). The claims against Greenhouse Hudson should be dismissed, as plaintiff was not employed by Greenhouse Hudson within the meaning of the HRL, despite Greenhouse Hudson being the signatory to the Employment Agreement – she was paid by Green Street, and Greenhouse Hudson was not involved in any of the employment actions taken against plaintiff (*see Schwarz v Consolidated Edison, Inc.*, 147 AD3d 447, 449 [1st Dept 2017]).

However, the Court finds that the claims against David Mojo should not be dismissed. There is an issue of fact as to whether he had the power of dismissal and control over plaintiff's conduct – he sent the email instructing plaintiff not to come in on February 14, 2022, and even if this was directed by Jennifer Mojo as he asserted, he was still authorized to send it from his own email address. Moreover, plaintiff spoke to him regarding the removal of the plexiglass and stanchions, and he was involved in multiple meetings with plaintiff and Jennifer Mojo regarding the running of the Business and the accommodations provided to plaintiff. As such, there is an issue of fact as to whether he can be held liable as an employer of plaintiff under the HRL, and so the claims against him cannot be dismissed (*see Griffin v Sirva, Inc.*, 29 NY3d at 186; *Palmer v Cook*, 64 Misc 3d 1222[A], *7 [Sup Ct, Queens County 2019]).

V. Green Street's Breach of Contract Counterclaim

Green Street argues that it is entitled to summary judgment on its breach of contract counterclaim, as plaintiff resigned from her employment in February 2022, prior to the termination of her term of employment as set forth in the Employment Agreement, causing damages to Green Street, as Jennifer Mojo had to manage the Business. Plaintiff responds that because the Employment Agreement was signed by Greenhouse Hudson, Green Street has no right to enforce the Employment Agreement, but instead employed plaintiff at-will. Plaintiff further argues that Green Street and the Mojos engaged in unlawful conduct by failing to offer plaintiff reasonable accommodations, and so they cannot benefit from the fact that this conduct caused plaintiff's departure. Finally, plaintiff asserts that Green Street failed to establish that plaintiff's resignation caused Green Street any damages.

As set forth above, "to establish a cause of action for breach of contract, a party must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 186 AD3d 1720, 1722 [3d Dept 2020] [internal quotation marks and citation omitted]; *accord Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.*, 221 AD3d 1324, 1326 [3d Dept 2023]). Here, the Employment Agreement was between Greenhouse Hudson and plaintiff, not Green Street and plaintiff. As such, the only contract Green Street has established the existence of is the weekly contract indicated by plaintiff's paystubs, which contained no term of employment. Therefore, plaintiff is entitled to summary judgment dismissing Green Street's breach of contract counterclaim.

VI. Green Street's Faithless Servant Counterclaim

Plaintiff argues that Green Street's faithless servant counterclaim should be dismissed, as defendants presented no evidence that plaintiff usurped an opportunity from the Business or actively stole from it. Green Street responds that there are questions of material fact as to whether plaintiff wrongfully diverted customers away from the Business prior to her termination. 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 [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]; *accord City of Binghamton v Whalen*, 141 AD3d 145, 147 [3d Dept 2016]).

Plaintiff is not entitled to summary judgment on this counterclaim. Green Street points to plaintiff's February 5, 2022 text messages with Tom Bucholsky, the owner of Bates & Anderson Funeral Services (hereinafter "Bates & Anderson"), in which Bucholsky complained of a delay in the delivery of flowers and plaintiff informed him that she had told Jennifer Mojo when flowers needed to be delivered by but that Jennifer Mojo chose not to listen (DEX J). Plaintiff also told Bucholsky that Jennifer Mojo is "a pathological liar" and that plaintiff would likely be leaving soon due to her behavior. She and Bucholsky also discussed the difficulty the Mojos would have delivering flowers late after plaintiff left. These texts are sufficient to raise a question of fact as to whether plaintiff breached the fiduciary duty she owed Green Street, as they show that plaintiff disparaged the Mojos to a customer while she was still employed, permitting Jennifer Mojo to make a mistake in running the Business and joking about the consequences of that failure with a customer, which is inconsistent with plaintiff's duties as an employee (*see generally City of*

Binghamton v Whalen, 141 AD3d at 147; *Matter of Blumenthal [Kingsford]*, 32 AD3d 767, 768 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]).

VII. <u>Green Street's Tortious Interference Counterclaim</u>

Plaintiff argues that Green Street's claim for tortious interference should be dismissed, as there is no evidence that she interfered with the Business's relationship with Bates & Anderson Funeral Services and Bates & Anderson continues to order flowers from the Business. Green Street responds that there is a question of fact as to whether plaintiff did interfere with this relationship, as she disparaged Jennifer Mojo to Bates & Anderson and another customer of the Business.

To set forth a claim for tortious interference with a business relationship, Green Street "must prove 1) that it had a business relationship with a third party; 2) that [plaintiff] knew of that relationship and intentionally interfered with it; 3) that [plaintiff] acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that [plaintiff]'s interference caused injury to the relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed* 14 NY3d 736 [2010]; *accord Jackie's Enters., Inc. v Belleville*, 165 AD3d 1567, 1571 [3d Dept 2018]).

Plaintiff is entitled to summary judgment dismissing this claim. Bucholsky's affidavit stated that he continued to refer clients to the Business until March 22, after plaintiff's termination, and that he only stopped because one of his clients received "an inferior flower arrangement," not because of anything plaintiff said to him (Bucholsky Affidavit: 2). The texts between plaintiff and Bucholsky do show that plaintiff disparaged the Mojos, stating that "[t]hey are clueless and don[']t listen to professional advice," which Bucholsky called a "[r]ecipe for failure" (DEX J: 4). However, Bucholsky's uncontested affidavit states that he continued to refer clients to the Business until March 22, 2022, after these communications with plaintiff and after her employment with the

Business had ended, and so it is clear that plaintiff's communications with Bucholsky did not cause the termination of the relationship between Bates & Anderson and the Business.

VIII. Green Street's Conversion Counterclaim

Plaintiff moves for the dismissal of Green Street's counterclaim for conversion arising from her failure to relinquish custody and control over the Business's Square and GoDaddy accounts, arguing that she did not have control over these accounts. Green Street responds that there is an issue of material fact regarding this issue, as Jennifer Mojo stated that plaintiff withheld access to these accounts for 15 months after the sale of the Business.

A conversion occurs if "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 42, 49-50 [2006] [citations omitted]; *accord Ciprich v Atwood*, 163 AD3d 1332, 1334 [3d Dept 2018]). This requires that "a defendant intrude[] or exercise[] control over property to the extent that a plaintiff is entirely denied of possession" (*Jackie's Enters., Inc. v Belleville*, 165 AD3d at 1573 [citations omitted]; *see Sporn v MCA Records*, 58 NY2d 482, 488 [1983]).

Plaintiff is entitled to summary judgment dismissing Green Street's counterclaim for conversion as to the allegations that plaintiff committed conversion regarding the Business's Square account, as Jennifer Mojo testified that she has access to it (PEX H: 49), meaning that the Mojos were not entirely denied possession of the account (*see Jackie's Enters., Inc. v Belleville*, 165 AD3d at 1573). As to the remainder of the conversion claims – those regarding the emails in plaintiff's erin@roseryflowers.com email account and the GoDaddy account – neither party is entitled to summary judgment. It is unclear whether Jennifer Mojo had access to copies of the business-related emails that were deleted, creating a triable issue of fact as to whether plaintiff entirely denied the Mojos possession of those emails, and plaintiff failed to make a prima facie showing that access to the GoDaddy account was turned over to the Mojos. As such, those two issues remain.

IX. Green Street's Third-Party Claim Against GGG

Third-party defendant GGG contends that Green Street's claim for breach of the duty of good faith and fair dealing against it, the entity which owned the Business prior to Green Street, should be dismissed, because Green Street did not enter into any contract with GGG and GGG never engaged in any action that caused damages to Green Street. Green Street responds that there is an issue of fact, as after closing, plaintiff engaged in malicious acts that damaged Green Street by diminishing the Business's goodwill, depriving Green Street of the benefit of its bargain.

GGG is entitled to summary judgment dismissing Green Street's claim for breach of the duty of good faith and fair dealing. Insofar as the asset purchase agreement for the Business was between GGG, Jennifer Mojo and David Mojo, Green Street was not a party to the asset purchase agreement. As such, Green Street had no contract with GGG, and so cannot enforce the duty of good faith and fair dealing against GGG (*see Levine v Yokell*, 258 AD2d 296, 296-297 [1st Dept 1999]; *Reels v Dynamics in Play, LLC*, 78 Misc 3d 1217[A], *9 [Sup Ct, Kings County 2023]).

X. Green Street's Third-Party Claim Against Darryn Cooke

Finally, third-party defendant Darryn Cooke argues that Green Street's claim for breach of contract against him should be dismissed, because he never signed a written contract with Green Street, the value of his work was deducted from the purchase price of the Business and Green Street cannot prove he failed to perform any work he was obligated to perform. Green Street responds that Cooke is not entitled to summary judgment, as he entered into an informal agreement with Green Street, provided services to Green Street and was compensated for those services through an offset in the purchase price of the Business.

"[W]ith respect to implied-in-fact contracts, based on the facts and circumstances surrounding the dispute as manifested in the acts and conduct of the parties, there must be an indication of a meeting of minds of the parties constituting an agreement. As a general rule, the performance and acceptance of services can give rise to the inference of an implied contract to pay for the reasonable value of such services" (*Berlinger v Lisi*, 288 AD2d 523, 524-525 [3d Dept 2001] [internal quotation marks, brackets, ellipsis and citation omitted]; *see Capital Med. Sys. v Fuji Med. Sys., U.S.A.*, 239 AD2d 743, 745 [3d Dept 1997].

An email between Darryn Cooke and David Mojo shows that he offered his services to the Mojos to provide them IT support, including web hosting (PEX L), and an invoice he submitted to the Business in October 2021 indicates that he billed $1,550 for web hosting and other IT services for the one-year period covering October 1, 2021 to September 30, 2022. In his deposition, he explained that the money owed to him under this agreement was paid by the Mojos to GGG, as an offset of money GGG owed the Mojos after the sale of the Business, and that he considered the balance paid (PEX J: 88-89). In January 2022, Ms. Mojo informed Cooke's that she would be using a different web hosting provider, and so would no longer need Cooke's services (PEX J: 89-90; PEX M).

Darryn Cooke is not entitled to summary judgment dismissing this claim. The facts clearly demonstrate that he and the Mojos had an agreement to perform services, and he received consideration for this agreement in the form of the offset given to GGG by the Mojos, evidenced by the fact that he considered the balance paid. As such, he failed to make a prima facie showing that there was no contract between himself and the Business, and so his motion for summary judgment must be denied.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted as to plaintiff's breach of contract claims alleging that she was not given proper notice of termination, that defendants failed to take proper COVID-19 safety precautions and that she was constructively discharged; and it is further

ORDERED that all claims against Greenhouse Hudson should be dismissed; and it is further

ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that plaintiff is entitled to summary judgment dismissing Green Street's breach of contract claim; and it is further

ORDERED that plaintiff is entitled to summary judgment dismissing Green Street's counterclaim for tortious interference with a business relationship; and it is further

ORDERED that plaintiff is entitled to summary judgment dismissing Green Street's counterclaim for conversion regarding the Business's Square account, but not as to the emails deleted by plaintiff or the Business's GoDaddy account; and it is further

ORDERED that GGG is entitled to summary judgment dismissing Green Street's claim for breach of the duty of good faith and fair dealing; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is otherwise denied; and it is further

ORDERED that Darryn Cooke's cross-motion for summary judgment against Green Street is denied.

This memorandum constitutes the Decision and Order of the Court. The signing of this Decision and Order shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: May 20, 2024
Albany, New York

HON. DANIEL C. LYNCH, J.S.C.

Papers considered:

1. Notice of Motion, dated March 1, 2024, together with the Statement of Material Facts, Affirmation in Support of George Alissandratos, Esq., Exhibits A – V and the Memorandum of Law in Support;
2. Notice of Cross-Motion, dated March 14, 2024, together with the Response to Statement of Material Facts, Counter-Statement of Material Facts, Affirmation of Carlo A.C. de Oliveira, Esq., with Exhibits A – U;
3. Affirmation of Plaintiff in Support of Cross-Motion, with Exhibits A – E;
4. Affidavit of Tom Bucholsky;
5. Memorandum of Law in Opposition to Motion and in Support of Cross-Motion of Carlo A.C. de Oliveira, Esq.;
6. Affidavit of Defendant Jennifer Mojo in Opposition to Cross-Motion; and
7. Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion of George Alissandratos, Esq., dated March 21, 2024.

To:

Carlo A.C. de Oliveira, Esq.
Cooper, Erving & Savage, LLP
Attorneys for Plaintiff and