

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 10-08-2013
Submit Date: 10-08-2013
Motion No.: 004 MOTD

[] Final
[x] Non Final

_____ X
**LONG ISLAND NETWORK OF
COMMUNITY SERVICES, INC.,**

Plaintiff,

- against -

DEBORAH KINZER,

Defendant.
_____ X

Attorney for Plaintiff
William K. Polignani, Esq.
PO Box 420
925 West Park Avenue
Long Beach, New York 11561

Attorney for the Defendant
Debra L. Wabnik, Esq.
Stagg, Terenizi Confusione & Wabnik LLP
401 Franklin Avenue, Suite 300
Garden City, New York 11530

In this action to recover damages and for injunctive relief for, among other things, fraudulent inducement, breach of contract, breach of fiduciary duty, conversion, and unjust enrichment, the plaintiff, Long Island Network of Community Services, Inc. ("LINCS") moves for summary judgment.

ORDERED that the motion is granted in part and denied in part, as set forth herein.

Factual and Procedural Background

The defendant Deborah Kinzer (“Kinzer”) is the former chief financial officer of LINCS. Kinzer and LINCS entered into a Separation Agreement dated September 6, 2011, which provides, in relevant part:

1. **Last Day of Employment.** Kinzer’s employment with [LINCS] terminated effective June 30, 2011. . . [LINCS] shall have no further obligations to Kinzer with respect to her employment except as set forth in this agreement.

2. **Consideration.** Kinzer hereby elects and authorizes LINCS to surrender and terminate LINCS’s Key Life Insurance Policy number 90223001 on Kinzer from John Hancock (the “Key Life Policy”) . . . In consideration of the mutual promises and benefits of this Agreement, LINCS will provide Kinzer with the surrender value of the Key Life Policy as determined by John Hancock (the “Insurance Payment”), with a deduction for all legal fees incurred in preparation of this Agreement.

* * *

3. **General Release of Claims.** In consideration for the Insurance Payment and other good and valuable consideration, Kinzer . . . knowingly and voluntarily releases and forever discharges [LINCS] . . . of and from any and all claims . . . Kinzer has, had or may have . . .

* * *

4. **Acknowledgments and Affirmations.**

* * *

- b. The Insurance Payment and benefits described herein shall be in lieu of any and all other amounts to which Kinzer might be, is now or may become entitled from [LINCS] . . .

5. Confidentiality Disclosure.

* * *

- c. Kinzer shall cooperate fully with [LINCS] with respect to any audit or investigation related to any actions taken during Kinzer's employment with [LINCS]. Further, Kinzer will cooperate fully with [LINCS] in its defense of or other participation in any administrative, judicial or other proceeding arising from any charge, complaint or other action that has been or may be filed.

LINCS commenced this action in June 2012.

In October 2012 Kinzer pleaded guilty to one count of grand larceny in the third degree. Kinzer's plea included her admission that she stole money from LINCS while in the employ of LINCS between March 4, 2008, and April 11, 2011. After Kinzer pleaded guilty but before she was sentenced, LINCS discovered the theft of an additional \$21,685 in 2006. Upon sentencing, Kinzer paid restitution of \$54,797.78 for the thefts between 2008 and 2011. Kinzer offered to pay the remaining \$21,685 to LINCS, but it refused to accept that amount.

The Amended Complaint dated May 20, 2013, contains seven causes of action. The first cause of action alleges that Kinzer fraudulently induced LINCS to enter into the Separation Agreement by failing to disclose that she had stolen money from LINCS thereby falsely representing that she was acting in good faith. The second cause of action alleges that Kinzer breached the Separation Agreement by refusing to cooperate with LINCS' investigations and audits after her employment terminated. The third cause of action is for breach of fiduciary duty. The fourth cause of action is for conversion. The fifth cause of action seeks an injunction

enjoining Kinzer from distributing, devaluing, or dissipating any monies she received as a result of her theft and any monies remaining from the Insurance Payment made pursuant to the Separation Agreement. The sixth cause of action is for unjust enrichment. The seventh cause of action alleges that Kinzer, as a faithless servant, must forfeit all compensation earned during the period of her disloyalty.

In her Answer to Amended Complaint, Kinzer asserts and invokes her privilege against self-incrimination in response to the material allegations.

By order dated April 16, 2013, this Court (Pines, J.), among other things, denied LINCS' motion for a preliminary injunction but granted LINCS' motion to amend the complaint.

LINCS now moves for summary judgment. Kinzer opposes the motion.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone*

v. Bender, 74 AD3d 1111, 1113 [2nd Dept 2010]).

“To maintain a cause of action for fraudulent inducement of contract, a plaintiff must show ‘a material representation, known to be false, made with intention of inducing reliance, upon which [it] actually relie[d], consequently sustaining a detriment’” (*Frank Crystal & Co., Inc. v. Dillmann*, 84 AD3d 704 [1st Dept 2011] quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept. 2005]).

“The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant’s failure to perform, (4) resulting damage” (2 NY PJI2d 4:1, at 676 [2013]).

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct (*Kurtzman v. Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation (*Yu Han Young v. Chiu*, 49 AD3d 535, 536 [2d Dept 2008]).

“To establish a cause of action in conversion ‘the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised unauthorized dominion over the thing in question . . . to the exclusion of the

plaintiff's rights'" (*Castaldi v. 39 Winfield Assocs.*, 30 AD3d 458 [2d Dept. 2006]).

To prove a claim for unjust enrichment, "[a] plaintiff must show 'that (1) the other party was enriched, (2) at that party'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'"'" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011]).

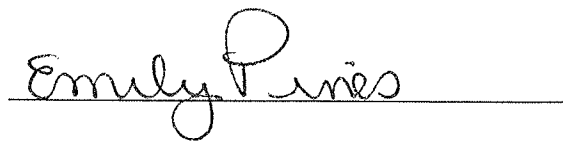
Here, Kinzer's plea of guilty to grand larceny in the third degree establishes LINCS' entitlement to judgment as a matter of law on its breach of fiduciary duty cause of action (*see William Floyd Union Free School Dist. v Wright*, 61 AD3d 856, 859 [2d Dept 2009]), as well as its causes of action for conversion and unjust enrichment. Due to Kinzer's repeated acts of disloyalty, under the faithless servant doctrine complete and permanent forfeiture of compensation is warranted (*Id.*). Accordingly, LINCS is granted summary judgment on its third, fourth, sixth and seventh causes of action in the amount of \$231,979.02, as set forth in the affidavit of John Haigney, Vice Chair of LINCS, submitted in support of the motion. Contrary to Kinzer's contention, the Separation Agreement clearly states that the surrender value of the Key Life policy was paid to Kinzer pursuant to the terms of that agreement. Moreover, LINCS' claim for \$21,685.67 that Kinzer allegedly stole in 2006 is not time-barred as "[t]he discovery accrual rule also applies to fraud-based breach of fiduciary duty claims" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003]). LINCS did not discover Kinzer's conduct until after her employment terminated in 2011 and it commenced this action in 2012. Thus, the claim is timely.

However, LINCS has not made a prima facie showing of entitlement to judgment as a matter of law on its first cause of action for fraudulent inducement as it has not submitted any admissible evidence of false statements made by Kinzer made with the intention of inducing reliance by LINCS on such statement in entering into the Separation Agreement. The 2008 and 2009 Annual Filing for Charitable Organizations signed by Kinzer as CFO were clearly not made for the purpose of inducing LINCS to enter into the Separation Agreement in 2011. Similarly, LINCS has not made a prima facie showing of entitlement to judgment as a matter of law on its second cause of action for breach of the Separation Agreement as it has only provided conclusory allegations that Kinzer failed to cooperate with LINCS' investigations and audits after her employment was terminated. Accordingly, summary judgment as to the first and second causes of action is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: December 3, 2013

Riverhead, New York



EMILY PINES

J. S. C.

[] Final
[x] Non Final