SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Impossible Entertainment

INDEX NO. 650942/2011E

MOTION DATE 8.31.11

- v -

MOTION SEQ. NO. 001

Matthew Wulf et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3211(a)(7) to dismiss defendant's first counterclaim alleging "misclassification as independent contractor" is denied; and it is further

ORDERED that defendant's cross-motion to dismiss plaintiff's tortious interference with prospective advantage claim is granted, and the tortious interference with prospective advantage claim is severed and dismissed; and it is further

ORDERED that counsel for parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Part 35 60 Centre Street, Room 438 on Tuesday, November 22, 2011 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10.12.11

J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

IMPOSSIBLE ENTERTAINMENT, INC., Index No. 650942/2011

Plaintiff,

-against-

MATTHEW WULF individually and
d/b/a WULF CASTING,

Defendant.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Impossible Entertainment, Inc. ("plaintiff") commenced this action against defendant Matthew Wulf ("defendant") alleging breach of fiduciary duty and duty of loyalty, unfair competition, misappropriation of trade secrets, and tortious interference with prospective advantage.

Plaintiff now moves pursuant to CPLR 3211(a)(7) to dismiss defendant's first counterclaim alleging "misclassification as independent contractor."[1]

In response, defendant cross moves to dismiss plaintiff's tortious interference with prospective advantage claim.[2]

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[1] Plaintiff also sought to dismiss defendant's second counterclaim (intentional interference with contract) and third counterclaim (intentional interference with prospective business advantage). However, after service of plaintiff's motion, defendant served an Amended Answer, which, according to plaintiff "substantially remedied the pleading defects outlined in [plaintiff's] motion, with the exception of the first counterclaim." Thus, in Reply plaintiff withdrew "its motion to dismiss with respect to all points EXCEPT the first counterclaim . . . ."

[2] Defendant also cross moved to dismiss the Complaint for lack of personal jurisdiction due to improper service, but after the Court scheduled a traverse hearing, by letter dated August 23, 2011, defendant withdrew his objection to service and withdrew this branch of his cross-motion.

Factual Background[3]

Plaintiff began doing business in 1996 as a Casting Director, which involves interviewing, auditioning, and placing models and actors for stage, screen, print, and electronic media. Part of plaintiff's business is to maintain relationships with actors and models, and those seeking to hire them. Ten years later, in 2006, plaintiff hired defendant as an assistant casting agent. At the time of his hire, defendant had no relationships with any actors, models, or with any person or entities seeking to hire actors and models, and knew nothing about the casting business.

During a casting session on June 3, 2010, defendant was constantly flirting with a young model, who was attempting to "make a connection." When plaintiff's Chief Executive Officer Craig Lechner ("Lechner") directed defendant to focus on his duties, the parties had a verbal altercation, which was later resolved.

Later that same day June 3, 2010, while still working for plaintiff, defendant set up his own website and began doing business from plaintiff's office as Wulf Casting. Defendant began soliciting and doing business with plaintiff's clients and contacts, and using plaintiff's samples, tear sheets, and other materials, passing them off as his own, all for his own benefit. For the next three days, while still employed by plaintiff, defendant pillaged plaintiff's office, computer system, and files, stealing and copying various confidential and proprietary information and property belonging to plaintiff. Defendant then resigned on June 6, 2010.

On June 7, 2010, defendant sent emails to all of plaintiff's clients and contacts, advising them that he had started his own business. The trade and patronage of such contacts have been

[3] The Factual Background is taken from plaintiff's motion and Complaint.

secured by plaintiff over years of business effort and advertising, and the expenditure of substantial time and money, constituting a part of the goodwill of plaintiff's business which enterprise and foresight have built up. These contacts are not publicly known, are not readily ascertainable from independent sources, and could not have been obtained by defendant through means other than the ransacking of plaintiff's computer system and files while defendant was still plaintiff's employee on plaintiff's time. Since that time, defendant has continued to use plaintiff's contacts, work product, samples, tear sheets, promotional materials, and other property, passing it off as his own.

In its Answer, defendant asserts in his first counterclaim entitled "misclassification as independent contractor" that throughout his employment with plaintiff, plaintiff characterized defendant as an independent contractor on its books and records, even though defendant was a common law employee of plaintiff. Plaintiff allegedly mischaracterized defendant "with the wrongful intent to evade payment of employment taxes, social security and Federal Insurance Contributions Act ("FICA") tax, and other expenses incurred by companies in connection with their maintenance of employees under New York State and Federal law, as well as payment of benefits," and as a result, defendant suffered damages.

In support of its motion to dismiss, plaintiff contends that the first counterclaim fails to state a claim. First, it is legal, and common place, to employ persons as independent contractors for the sole purpose of avoiding costs such as medical insurance and employment taxes, attendant to W-2 employees. Second, defendant has no standing and has not sustained damages to support such a claim. Only the City and State of NewYork and the federal government, and not defendant, have standing to allege damages from any failure of plaintiff to pay taxes and FICA.

As to damages, whether the FICA was deducted every two weeks from defendant's paycheck as a W-2 employee, or paid later by defendant as an independent contractor is inconsequential as he was still paid the same amount and suffered no damages.

In opposition, defendant asserts that by purposefully misclassifying defendant as an independent contractor rather an employee, plaintiff wrongfully caused defendant economic harm in connection with taxes and loss of benefits, correspondingly enriching itself in the process. There is no issue regarding whether an employment relationship existed. Plaintiff purposefully misclassified defendant with the wrongful intent to evade payment of employment taxes, and employee benefits. As a result of being misclassified, defendant (i) was required to pay taxes that were the employer's share and should have been paid by plaintiff and (ii) did not receive benefits. Plaintiff was unjustly enriched by not paying these taxes that, as employer, were its share, and not providing benefits.

Misclassification of workers is illegal. The New York Department of Labor (a member of the State's "Joint Enforcement Task Force on Employee Misclassification") states at its website that some employers treat people as independent contractors when they are employees to avoid compliance with unemployment insurance, Workers' Compensation, Social Security, tax withholding, temporary disability, and minimum wage and overtime laws that protect workers, depriving workers of the protections they deserve. And, plaintiff's misclassification has directly harmed defendant. The classification of workers as either employees or independent contractors determines both the nature and quantity of taxes imposed on employers and workers. If an employer-employee relationship exists, the employer is subject to social security taxes under FICA and unemployment taxes under the Federal Unemployment Tax Act ("FUTA") (26 U.S.C.

§ 3301). If there is no employer-employee relationship, the employer is not subject to FICA and FUTA, and the worker pays self-employment taxes under the Self-Employment Contributions Act ("SECA").

Regardless of whether this claim is properly labeled unjust enrichment or "misclassification of employment status," defendant has stated a claim.

Even if defendant suffered no tax detriment as a result of the misclassification, the Amended Answer pleads an additional and independent class of damages, that plaintiff's misclassification wrongfully precluded defendant from participating in benefits.

Defendant's unjust enrichment claim would still survive this motion to dismiss based on plaintiff's wrongful retention of benefits. And, defendant is entitled to discovery in aid of this claim.

In the event the Court grants any part of plaintiff's motion, defendant respectfully requests leave to replead.

In support of defendant's cross-motion to dismiss plaintiff's tortious interference with prospective advantage claim,[4] defendant argues that the Complaint fails to identify any particular business relationship between plaintiff and a third-party and fails to allege that defendant interfered with any such business relationship. Plaintiff also fails to allege any injury to plaintiff's relationship with any third party. Moreover, this claim must be dismissed because it "fail[s] to include the necessary allegation that defendant's conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic

[4] Defendant also cross moved to dismiss plaintiff's third cause of action alleging a violation of the Donnelly Act. However, in reply, plaintiff withdrew the third cause of action, rendering this branch of defendant's cross-motion moot.

considerations." The only reasonable inference from the allegations, if true, is that defendant was motivated to further his own business interests. Finally, plaintiff fails to plead facts that, if true, could give rise to inferences satisfying any of these elements.

In reply, plaintiff contends that while defendant's Amended Answer renames his "misclassification as independent contractor" counterclaim as one for "unjust enrichment," the underlying allegations are identical and do not state a valid claim. While it may be improper for an employer to call someone an independent contractor, but treat them like W-2 employee, it is proper to call someone an independent contractor so long as they are actually treated as an independent contractor. Defendant does not allege in his counterclaims any of the circumstances which would characterize defendant as an employee. There are no allegations in either the original Answer or the Amended Answer that the *indicia* of an independent contractor did not apply to defendant. Further, plaintiff failed to plead facts which demonstrate that he suffered any overall loss to sustain an unjust enrichment claim. None of the elements of an "unjust enrichment" claim have been met.

Further, plaintiff argues that its complaint alleges a valid claim for tortious interference with prospective advantage. The complaint includes facts in paragraph 14, regarding the existence of business relationships with third parties; in paragraph 18, of defendant's interference with that relationship; in paragraph 16, of the wrongful means utilized by defendant; and in paragraphs 19 and 20 concerning the injury to plaintiff. Accepting the alleged facts as true, and taking the allegations in the complaint as a whole, plaintiff has stated a valid claim for tortious interference with prospective advantage.

Discussion

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Defendant's Unjust Enrichment Claim

As defendant's Amended Answer supercedes the original Answer (*Keary v Great Atlantic & Pacific Tea Co., Inc.*, 96 AD2d 499, 465 NYS2d 518 [1st Dept 1983]), the Court will address whether defendant stated a claim for unjust enrichment based on plaintiff's misclassification of defendant as an independent contractor.

In order to state 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, 919 NYS2d 465 [2011]).

In its Amended Answer, defendants' first counterclaim alleges the identical allegations as previously asserted, except that he adds that plaintiff was enriched "by not paying certain taxes and benefits that it should have in light of Defendant's status as a common law employee"; that plaintiff's enrichment was at defendant's expense since defendant "(i) was wrongfully required to pay certain taxes that were plaintiff's share (as employer) and (ii) did not receive any benefits." And, defendant claims that it "is against equity and good conscience to allow Plaintiff to retain the benefit of its wrongful conduct."

Contrary to plaintiff's contention, defendant states a claim for damages allegedly resulting from plaintiff's misclassification of defendant as an independent contractor. In *Weiner v Cataldo*, Waters & Griffith Architects, P.C., 200 AD2d 942, 943 [3d Dept 1994]), the Appellate Division, Third Department upheld the Supreme Court's denial of summary judgment on a claim for FICA taxes that plaintiff alleges he was required to pay as a result of defendant's failure to do so. The Court reasoned that "Regardless of the agreement between plaintiff and defendant, if sufficient indicia of control existed . . . plaintiff was an 'employee' for Federal tax withholding purposes . . . and defendant was liable for the employer's share of FICA taxes."

According to defendant's submissions, the Social Security Administration provides a chart reflecting the monetary difference between classifying a worker as an independent contractor and an employee. An employee's 2011 Social Security tax and Medicare tax are paid by the employee at a rate of 4.2% and 1.45%, respectively and the employer pays 6.2% and 1.45%, respectively. However, an independent contractor (i.e., self-employed) pays 10.4% and

2.9% respectively. Thus, according to defendant, the alleged misclassification of defendant as an independent contractor rather than an employee resulted in defendant paying an additional 7.65% in Social Security and Medicare tax since, rather than paying 5.65% in FICA tax (4.2% Social Security plus 1.45% Medicare), defendant was required to pay 13.3% in SECA tax (10.4% Social Security plus 2.9% Medicare). Such misclassification permitted plaintiff to retain the 7.65% that it should have paid in FICA (6.2% Social Security plus 1.45% Medicare). Thus, assuming as true, as this Court must, that defendant was in fact an employee of the plaintiff, plaintiff was unjustly enriched in an amount equal to 7.65% of defendant's net earnings for each year of his employment.

As such, plaintiff's argument that employers are free to classify workers "as independent contractors for the sole purpose of avoiding costs for medical insurance, employment taxes, etc.," fails to overcome defendant's allegations that he was an employee of plaintiff, but improperly misclassified as an independent contractor to the benefit of plaintiff and to his detriment.

Therefore, dismissal of the first counterclaim for unjust enrichment is unwarranted.

Plaintiff's Fifth Cause of Action for Tortious Interference with Prospective Advantage

"To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby" (*Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 776 NYS2d 279 [1st Dept 2004] *citing Alexander & Alexander of New York v Fritzen*, 68 NY2d 968, 969, 510 NYS2d 546 [1986]; *Shared Communications Services of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 803 NYS2d 512

[1st Dept 2005] (dismissing a claim for tortious interference with prospective business relations which failed to allege that defendant's conduct was "motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations"); *Pandian v New York Health and Hospitals Corp.*, 54 AD3d 590, 863 NYS2d 668 [1st Dept 2008] (stating that the claim for interference with prospective economic advantage failed to allege a motive of malice or the infliction of injury by unlawful means other than self-interest or other economic considerations)).

As pointed out by plaintiff, plaintiff alleged in paragraph 14 of the Complaint the existence of business relationships with third parties, by stating that defendant "began soliciting and doing business with IEI's clients and contacts . . . ." Plaintiff alleged in paragraph 18 of the Complaint that defendant interfered with that relationship in that "on June 7, 2010, Wulf sent emails to all of IEI's clients and contacts advising them that Wulf had started his own business. These clients and contacts included Art Buyers, Magazine Editors, Directors, Photographers, Producers, and others who have employed IEI's casting services in the past." Plaintiff further alleged in paragraph 16 the wrongful means utilized by defendant, stating that "all the while during those three days, while Wulf remained an employee of IEI, while Wulf did business as Wulf Casting from IEI's office unbeknownst to IEI, and on plaintiff's time, Wulf secretly pillaged IEI's office, computer system, and files, stealing various confidential and proprietary information and property belonging to IEI." And, plaintiff alleged sufficient facts in paragraphs 19 and 20 of the complaint of the injury sustained, by alleging that "The trade and patronage of such contacts have been secured by IEI over years of business effort and advertising, and the expenditure of substantial time and money, constituting a part of the good-will of IEI's business

which enterprise and foresight have built up. It took Craig Lechner and IEI more than 15 years to accumulate these contacts, which are not publicly known, are not readily ascertainable from independent sources, and could not have been obtained by Wulf through means other than the ransacking of IEI's computer system and files while Wulf was still an IEI employee on IEI's time. . . . Since that time, Wulf has continued to use IEI's contacts, work product, samples, tear sheets, promotional materials, and other property, passing it off as his own" resulting in $2.5 million in damages.

However, there are no allegations giving rise to an inference that defendant's actions were undertaken for the *sole* purpose of harming plaintiff or that defendant exercised such interference *by perpetrating independent torts, distinct of alleged wrongful competition* (*Shmueli v Corcoran Group*, 9 Misc 3d 589, 802 NYS2d 871 [Supreme Court, New York County 2005]) or that defendant's acts were accompanied by the use of wrongful means (Algomod Technologies Corp. v. Price, 65 A.D.3d 974, 886 N.Y.S.2d 120 [1st Dept 2009]). "Wrongful means," has been defined "as representing 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract'" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621, 641 NYS2d 581 [1996]). The Complaint fails to allege any facts giving rise to the inference that defendant undertook any of the methods described above.

Therefore, dismissal of plaintiff's tortious interference with prospective advantage claim is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3211(a)(7) to dismiss defendant's first counterclaim alleging "misclassification as independent contractor" is denied; and it is further

ORDERED that defendant's cross-motion to dismiss plaintiff's tortious interference with prospective advantage claim is granted, and the tortious interference with prospective advantage claim is severed and dismissed; and it is further

ORDERED that counsel for parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Part 35 60 Centre Street, Room 438 on Tuesday, November 22, 2011 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 6, 2011

Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL EDMEAD