Elite Technical Serv., Inc. v Meyers
2013 NY Slip Op 32187(U)
August 26, 2013
Sup Ct, Suffolk County
Docket Number: 60851-13
Judge: Thomas F. Whelan

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SHORT FORM ORDER

INDEX No. 60851-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/23/13
ADJ. DATES 7/26/13
Mot. Seq. # 001 - MotD
Inquest date: 10/11/13

ELITE TECHNICAL SERVICES, INC., Plaintiff, -against- TODD W. MEYERS, Defendant.	CAMPOLO, MIDDLETON ET AL Attys. For Plaintiff 3340 Veterans Memorial Hwy. Bohemia, NY 11716 TODD W. MEYERS Defendant Pro Se 112 Suffolk Ct. Longwood, FL 32779

Upon the following papers numbered 1 to 3 read on this motion for a default judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for the entry of a default judgment against the defendant, is considered under CPLR 3215 and is granted only to the extent set forth below; and it is further

ORDERED that an inquest shall be held on **October 11, 2013**, at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex of the courthouse at One Court Street, Riverhead, New York 11901, on those portions of the plaintiff's Third cause of action wherein it seeks the recovery of wages and other payroll expenses identified in ¶ 43 of the complaint which the plaintiff paid to Shannon Praylow.

This action arises out of alleged wrongs committed by the defendant while in the employ of the plaintiff who is engaged in the business of providing technical services to federal and commercial based clients specializing in information technology and engineering disciplines. The defendant was hired by the plaintiff in 2009 and he served in capacities such as Vice President of Brand Management Business Development and Vice President of Federal Programs. The defendant independently managed and oversaw projects, staffed contractors and led client services. In addition, the defendant managed billing, invoicing, collections and drafted and reviewed proposals. His employment with the plaintiff which began in March of 2009 was the subject of a written employment contract.

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In 2012, the defendant was assigned the task of directing, managing and overseeing a subcontract he negotiated on behalf of the plaintiff with respect to a document tactics, and techniques project. The plaintiff claims that the defendant misrepresented the role of the plaintiff under the terms of the subcontract by describing it to the plaintiff's principals as being that of the "prime" contractor for the project. The plaintiff further claims that the defendant completely botched the job by hiring personnel who were without the necessary security clearances which caused the client to delay the entire project. The client allegedly insisted upon the execution of a new subcontract at a reduced price due, among other things, to the elimination of three of the four contractors who worked on the original subcontract on behalf of the plaintiff. The new subcontract was thereafter assigned by the original client to another who, like the original client, refused to pay Elite for the work performed under the original subcontract by the personnel staffed by the defendant. Thereafter, the defendant hired one, Shannon Praylow, who executed a consulting contract with the plaintiff. Thereunder, Praylow was to perform work for the plaintiff under the new subcontract beginning on November 12, 2012.

The plaintiff claims that the defendant failed to secure the client's approval of the hiring of Praylow and that the defendant misrepresented to the plaintiff that it would receive payment from the client of amounts it paid to Praylow. The plaintiff further claims that Praylow performed no contract work but was nevertheless paid by the plaintiff due to false invoices produced at the defendant's direction, all of which was concealed from the plaintiff's principals. In March of 2013, the plaintiff terminated the defendant from his employ and it terminated Praylow as well.

In the complaint served, the plaintiff seeks recovery of the damages which the plaintiff allegedly incurred by reason of the defendant's misconduct. The following four causes of action are set forth in the complaint: 1) recovery of damages incurred by reason of the defendant's active concealment and fraudulent misrepresentations regarding his conduct which led to the cancellation of the original subcontract and the non-payment by the client of the wages/salary paid to three of the four workers originally hired by the defendant together with damages in excess of $500,000.00 for lost profits and business opportunities and damages to the plaintiff's reputation; 2) damages by reason of the defendant's fraudulent conduct with respect to the retention of the consultant Praylow and her work on the project, for which the plaintiff paid Praylow some $36,877.00 in salary and/or wages and damages in excess of $500,000.00 for lost profits and business opportunities and damages to the plaintiff's reputation; 3) damages for the defendant's breaches of fiduciary duties owing to the plaintiff; and 4) damages for the defendant's breach of those portions of the defendant's employment agreement wherein he promised during his employment and for one year thereafter, "not to solicit, interfere with or endeavor to entice away from Elite or any of its affiliates or customers or any person, firm, company, partnership, corporation, or entity in the habit of dealing with Elite or any of its affiliates". For the reasons stated, the motion is denied, except to the limited extent set forth below.

To succeed on a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (*see* ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012]; ***Kolonkowski v Daily News, L.P.***, 94 AD3d 704, 941 NYS2d 663 [2d Dept. 2012]; ***Atlantic Cas. Ins. Co. v RJNJ Serv., Inc.***, 89 AD3d 649, 932 NYS2d 109 [2d Dept 2011]). While the "proof" required on an application for a default judgment is not as exacting as that required for a successful summary judgment motion, some first hand confirmation of the facts constituting the plaintiff's claims against the defaulting defendant is required

to be set forth in an affidavit by the plaintiff (or other person) possessed of personal knowledge of said facts or in a verified pleading (*see* ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 760 NYS2d 727 [2003]; ***LIUS Group Intern. Endwell, LLC v. HFS Intern., Inc***., 92 AD3d 918, 939 NYS2d 525 [2d Dept 2012]; ***Cohen v Schupler*** 51 AD3d 706, 856 NYS2d 870 [2d Dept 2008]).

CPLR 3215(f) mandates that an application to the court for a default judgment be supported by an affidavit of facts or a complaint verified by a party with personal knowledge of material facts which constitute viable claims against the defaulting defendant (*see* ***Malone v Sycamore Realty Corp.***, 31 AD3d 721, 818 NYS2d 463 [2d Dept 2006]; ***Taebong Choi v JKS Dry Cleaning Equip. Corp***., 15 AD3d 566, 789 NYS2d 688 [2d Dept 2005]; ***Fappianno v City of New York***, 5 AD3d 627, 774 NYS2d 773 [2d Dept 2004]). Appellate case authorities have repeatedly instructed that the facts advanced in any such affidavit or verified complaint must sufficiently state the elements of cognizable claims for relief against the defaulting defendant to support the granting of a default judgment (*see* ***Church of S. India Malayalam Congregation of Greater New York v Bryant Installations, Inc***., 85 AD3d 706, 925 NYS2d 131 [2d Dept 2011]; ***McGee v Dunn***, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; ***CPS Group, Inc. v Gastro Enter. Corp***., 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; ***Resnick v Lebovitz***, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]). Where cognizable claims are not discernible from the allegations in the complaint, leave to enter a default judgment is properly denied (*see* ***Mauro v Atlas Park, LLC***, 99 AD3d 872, 951 NYS2d 915 [2d Dept. 2012]; ***Cohen v Schupler***, 51 AD3d 706, 856 NYS2d 870 [2d Dept. 2008]; ***Beaton v Transit Fac. Corp***., 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]).

Here, the moving established service of the summons and complaint upon the defendant in Florida and his default in answering. His default in answering is thus fixed and determined. However, the moving papers failed to establish that all of the claims advanced is the complaint are cognizable as required by CPLR 3215(f).

In general, allegations upon which a breach of contract claim is premised will not support recovery in tort under theories of fraud, negligence, conversion and the like unless it appears that there has been a breach of a duty independent of those imposed upon the defendant under the terms of his contract (*see* ***Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; ***OP Solutions, Inc. v Crowell & Moring, LLP,*** 72 AD3d 622, 622, 900 NYS2d 48 [2010]; ***Yenrab, Inc. v 794 Linden Realty, LLC***, 68 AD3d 755, 892 NYS2d 105 [2d Dept, 2009]; ***Wiernik v Kurth***, 59 AD3d 535, 873 NYS2d 673 [2d Dept 2009]). Consequently, '"where a party is merely seeking to enforce its bargain, a tort claim will not lie'" (***Landon v Kroll Lab. Specialists, Inc***., 91 AD3d 79, 934 NYS2d 183 [2d Dept 2011]; *quoting*, ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 316, 639 NYS2d 283 [1995]). Where, however, duties owing from the defendant to the plaintiff that are separate and distinct from those owing under the contract are breached, such breaches may be actionable independent of the breach of contract claim, but only where the measure of damages sought are likewise separate and distinct (*see* ***Sommer v Federal Signal Corp***., 79 NY2d 540, 583 NYS2d 957 [1992]; ***North Shore Bottling Co. v Schmidt & Sons***, 22 NY2d 171, 179, 292 NYS2d 86 [1968]). Although a contractual party may be liable in tort where its defective performance of contractual services results in injury to the person or property of the other party, claims alleging only economic loss, the usual means of redress is an action for breach of contract, will not give rise to a tort action for the recovery of economic losses (*see* ***Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, *supra*; ***Chiarello v Rio,*** 101 AD3d 793, 957 NYS2d 133 [2d Dept 2012]; ***Heffez v L & G Gen.***

Constr., Inc., 56 AD3d 526, 867 NYS2d 198 [2d Dept. 2008]; ***Lee v Matarrese***, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005]).

That employees owe fiduciary duties, including duties of loyalty and good faith, to their employer in the performance of their duties is well established (*see* ***Lamdin v Broadway Surface Adv. Corp.***, 272 NY 133, 5 NE2d 66 [1936]; ***Qosina Corp. v C & N Packaging, Inc.***, 96 AD3d 1032, 948 NYS2d 308 [2d Dept 2012]; ***30 FPS Prod., Inc. v Livolsi***, 68 AD3d 1101, 891 NYS2d 162 [2d Dept 2009]; ***American Map Corp. v Stone***, 264 AD2d 492, 492–493, 694 NYS2d 704 [2d Dept 1999]). Actionable breaches of such duties usually result in a personal gain to the employee and losses to the employer and are generally premised upon conduct by which profits, business opportunities, confidential or inproprietary information, the raiding of employees and other assets of the employer are lost or diverted (*see* ***Western Elec. Co. v Brenner***, 41 NY2d 291, 392 NYS2d 409 [1977]; ***Qosina Corp. v C & N Packaging, Inc.***, 96 AD3d 1032, *supra*; ***American Map Corp. v Stone***, 264 AD2d 492, *supra*; ***Gomez v Bicknell***, 302 AD2d 107, 756 NYS2d 209 [2d Dept. 2002]; ***W. Bruno Co. v Friedberg***, 21 AD2d 336, 250 NYS2d 187 [1st Dept 1964]). However, it is equally well established that an employee's failure to perform his or her employment duties does not give rise to claims of fraud or breaches of fiduciary duties (*see* ***Cerciello v Admiral Ins. Brokerage Corp.***, 90 AD3d 967, 936 NYS2d 224 [2d Dept 2011]). While claims for negligent performance of contractual duties will generally support the recovery of contract damages (*see* ***Western Elec. Co. v Brenner***, 41 NY2d 291, *supra*; ***Wiernik v Kurth***, 59 AD3d 535, *supra*), employers are generally precluded from recovering from employees back wages or equivalent monies paid during a period of completed employment (*see* ***Cerciello v Admiral Ins. Brokerage Corp.***, 90 AD3d 96, *supra*; ***G.K. Alan Assoc., Inc. v Lazzari.***, 44 AD3d 95, 840 NYS2d 378 [2d Dept 2007]; *cf.*, ***Bon Temps Agency Ltd. v Greenfield***, 184 AD2d 280, 584 NYS2d 824 [1st Dept 1992]).

Here, the allegations of wrongdoing lodged against the defendant charge him with n negligent performance of the defendant's contractual duties or a failure to perform such duties while on the job and with in-house transgressions and omissions while conversing, communicating and otherwise interfacing with the principals of the plaintiff or its employees. There are no allegations regarding conduct on the part of the defendant whereby he acted upon information learned from the clients to his benefit and to the detriment of the plaintiff. Nor are there allegation that the defendant concealed, stole, collected or impaired corporate assets, profits or opportunities, used confidential information or trade secrets to start up or aid a competitor, or that he diverted business profits and/or opportunities or interfered with any business or business relations of the plaintiff. Also absent are allegations that the defendant solicited customers or competed with the plaintiff in violation of his covenant not to do so or that he violated his covenant not to interfere with or endeavor to entice away from Elite or any of its affiliates or customers or any person, firm, company, partnership, corporation, or entity in the habit of dealing with Elite or any of its affiliates during his employment with the plaintiff or for one year thereafter. Not discernible from these and the other allegations of the complaint is the plaintiff's possession of cognizable claims for recovery of damages under its Fourth cause of action, wherein violations of the covenant portions of the defendants' employment contract are advanced (*see* ***Indotronix Intern. Corp. v Ayyala***, 67 AD3d 643, 888 NYS2d 170 [2d Dept 2009]). An award of a default judgment on the Fourth cause of action is thus precluded.

The plaintiff's moving papers also failed to demonstrate cognizable claims sounding in fraud as alleged in the First and Second causes of action set forth in the complaint. The allegations advanced in the complaint lack the specificity required of such claims under CPLR 3016 and they are devoid of

facts asserting, other than in conclusory fashion, that the plaintiff reasonably relied upon any misrepresentations or other falsehoods uttered by the defendant or upon unknown, non-discoverable material omissions on his part, all of which are necessary to state a viable claim for recovery of fraud (*see* ***Cerciello v Admiral Ins. Brokerage Corp***., 90 AD3d 967, *supra*; ***Scott v Fields***, 92 AD3d 666, 938 NYS2d 575 [2d Dept 2012]). A default judgment in favor of the plaintiff on the First and Second causes of action is thus denied.

The Third and remaining cause of action is one sounding in breach of the defendant's fiduciary duties during the course of his work on the subject project. The court finds that only the portions that pertain to the defendant's falsification and manufacture of documents, including time cards and invoices relative to Shannon Praylow, which caused Elite to pay Praylow for work allegedly not performed by her are cognizable as breaches of the fiduciary duties including the duty of good faith and loyalty owing from the defendant to the plaintiff (*see* ¶¶ 42; 43 and 73 of the complaint). The other allegations advanced in the complaint constitute allegations of negligent performance of the defendant's employment duties and/or his non-performance of such duties which do not give rise to actionable claims for breach of fiduciary duties by an employee (*see* ***Cerciello v Admiral Ins. Brokerage Corp***., 90 AD3d 967, *supra*). The plaintiff is thus entitled to a default judgment only on so much of its Third cause of action wherein it seeks damages in the amount of $36,877.00 plus those additional amounts listed in ¶ 43 of the complaint, all of which represent amounts paid by the plaintiff to Praylow due to conduct actionable as breaches of the defendant's fiduciary duties. Entry of a judgment on this claim is, however, precluded since the amount due is not a sum certain and is determinable only after proof of these damages are put before the court at an inquest which shall be held as scheduled below.

In view of the foregoing, the instant motion for a default judgment is denied with respect to the plaintiff's First and Second causes of action and those portions of the Third cause of action which relate to claims other than plaintiff's payment of wages and other payroll items to the consultant, Praylow. The motion is granted with respect to those portions of the plaintiff's Third cause of action wherein the defendant is charged with liability to the plaintiff for the wages and other payroll expenses identified in ¶ 43 of the complaint which the plaintiff paid to Praylow.

The claim under the Third cause of action, upon which a default has been awarded, is hereby severed from all others. An inquest on the amount of damages recoverable from the defendant on this claim shall be held on **October 11, 2013**, at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex of the courthouse at One Court Street, Riverhead, New York 11901.

DATED: 8/26/13

THOMAS F. WHELAN, J.S.C.