

Advanced Intl., Inc. v Wenli Liu

2013 NY Slip Op 33223(U)

December 17, 2013

Supreme Court, New York County

Docket Number: 103345/2008

Judge: Joan A. Madden

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SCANNED ON 12/20/2013

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

PRESENT: Hon. Joan A. Madden
Justice

PART 11

Index Number : 103345/2008
ADVANCE INTERNATIONAL
vs.
LIU, WENLI
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/20/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the attached memorandum Decision and order.*

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

FILED
DEC 20 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 17, 2013

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 11

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ADVANCE INTERNATIONAL, INC.,

Index No.: 103345/2008

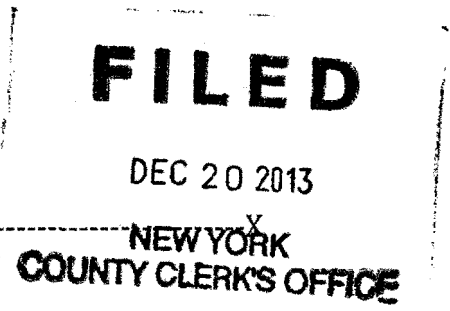
Plaintiff,

-against-

WENLI LIU,

Defendant.

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JOAN A. MADDEN, J.:



In this action arising out of an alleged kickback scheme, defendant Wenli Liu ("Liu") moves for summary judgment dismissing the complaint on the grounds that there are no viable claims against Liu or, in the alternative, on forum non conveniens grounds. Plaintiff Advance International, Inc., ("Advance") opposes the motion.

BACKGROUND

Advance is a New York corporation engaged in the business of designing and manufacturing tinsel garland. In 1995, Advance opened an office in Shangahi, China for sourcing and inspection purposes. Liu, who is a citizen of China, worked at Advance's office in Shangahi, until she was terminated in 2003. Liu's responsibilities were initially limited to locating potential new suppliers and inspectors for goods purchased by Advance before they were shipped. According to Advance, Liu was later responsible for placing Advance's purchase orders with its Chinese vendors as well as negotiating the price with those vendors. Over her tenure, Liu allegedly placed purchase orders on Advance's behalf in excess of \$24 million. At the same time, Advance maintains that Liu's annual salary never exceeded \$4,800.

Advance commenced the instant action on March 4, 2008. The complaint contains causes of action for breach of fiduciary duty, unjust enrichment, and money had and received.¹ These claims stem from Advance's allegations that, as a condition of her placing purchase orders with the vendors, Liu required vendors to give her "kickbacks." It is alleged that Liu would agree to pay the vendor more for the products than the vendor was requesting to cover the "kickbacks." Specifically, it is alleged that Liu had an arrangement with Shanghai Orient Lights ("SOL"), which would place purchase orders for polyvinyl chloride, know as PVC, the main component in the tinsel garland Advance produces. It is alleged that Liu would place the PVC purchase order on Advance's behalf with SOL with a purchase price at least 5% more than SOL paid to the PVC supplier, Cangana LiXin Vacuum Coating Factory ("LiXin"), and then share the overcharges with SOL's manager, Wendi Zhang ("Zhang"). Advance claims that the PVC overcharges with SOL alone exceeded \$1.2 million.

As to the first claim, it is alleged that as an employee of Advance, Liu was under a fiduciary obligation to act honestly and exclusively for Advance, and to act in the upmost good faith, and that her alleged "kickback" scheme breached that fiduciary duty and resulted in \$1.2 million. As to the second claim, it is alleged that by virtue of her wrongful acts, Liu was unjustly enriched at the expense of Advance,

¹After Advance commenced this action, it moved for an order of attachment restraining Lui's New York bank account at Chase Manhattan Bank ("Chase"), pursuant to CPLR 6201(1) based on Liu's status as a non-domiciliary of New York. By decision and order dated October 2, 2008, the court granted the motion to the extent of restraining up to \$600,000, in the account. By order dated April 26, 2010, Liu was restrained from removing \$178.23 from a checking account at Chase; \$51,512.54 from a Savings Account at Chase; and \$97,000 in a mutual fund at Chase, conditioned on plaintiff depositing \$14,000 in the escrow account of plaintiff's counsel.

in the amount of \$1.2 million. As to the final claim, for money had and received, it is alleged that during her employment, Liu received illegal payments from Advance's vendors and SOL in an amount in excess of \$1.2 million. The complaint also seeks punitive damages.

Liu answered the complaint and discovery proceeded. At her deposition, Liu testified that when she first worked for Advance, her duties were limited to locating vendors and inspecting goods but that she was later permitted to initially negotiate prices with vendors subject to Advance's approval (Liu Dep. at 94). She further testified that by 1998, her title was "Chief Representative Officer," and she supervised staff but did not have responsibility for the purchasing products or setting prices. Staff in Advance's offices in the Bronx, where she would fax the information and the contracts to be signed, would determine prices (Id., at 168). According to Liu, SOL did not provide PVC to Advance before 2003 (Id., at 173, 180), and that usually Advance's Executive President and owner, Herbert Feinberg, worked with SOL's manager, Zhang, in purchasing and negotiating on behalf of Advance (Id., at 179-180).

Liu testified that she opened a bank account at Chase Manhattan Bank ("Chase") while she was employed at Advance and that her initial deposit was approximately \$100,000. (Liu Dep. at 94). She testified that she received the money from Advance to reimburse her for moneys she had loaned to Advance. (Id. at 99), and that she had about \$50,000 in the account at the time of her deposition. Liu further testified that she opened an investment fund at Old Mutual Bermuda with approximately \$120,000 after being terminated from Advance (Id. at 111). According to Lui, when she began working for Advance her salary was \$150 per month, plus a bonus. While she could not estimate her salary during 1995 through

1997 (Id. at 31-33), she testified that she earned an annual salary, including a bonus, of \$60,000 in 1998, \$65,000 in 1999 and 2000; \$90,000 in 2001 and \$95,630 in 2002 (Id. at 34-40). After she was fired from Advance she started her own business making Christmas decorations (Id. at 40).

Liu stated that the only income she had while employed at Advance, aside from her Advance salary, was a government mortgage rebate in the amount of \$3,600 (Id. at 58-59, 91-94), she did not receive any money from her parents (Id. at 22) and did not recall if she earned any money from the stock market at that time. (Id. at 58-59) Liu testified that her husband, who she married in 2003, owns the apartment they currently occupy. (Id. at 8, 78). Liu also testified that she purchased an apartment in either 1996 or 1997, which she later sold (Id. at 78-79). She testified that she purchased the apartment with savings from her job at Advance and a previous job and money she had invested in the stock market (Id. at 79-81). She further testified that she subsequently sold that apartment and purchased a new apartment from the sale that for she estimated \$1.4 million in American dollars (Id. at 88-89).

Feinberg testified that Liu was eventually promoted to "chief representative of Advance's Shanghai offices" (Feinberg Dep. at 14). Feinberg further testified that Liu was not hired directly by Advance, but by a company called Shanghai Intellectual. (Id. at 28). He explained "you can't hire Chinese nationals directly. You have to go through a government sponsor office." Id. Feinberg further testified "I'm not sure how it worked, but I do know we didn't hire the people directly." Id. at 29.

According to Feinberg, Liu negotiated with SOL regarding the cost of the materials that SOL was selling to Advance (Id. at 44). Feinberg testified that before

he terminated Liu, he began hearing rumors that Liu was demanding kickbacks from vendors as a condition of placing orders on behalf of Advance (Id., at 16, 45-47). Although he initially disregarded the rumors, Feinberg states he became suspicious after learning Liu purchased an apartment in China for \$350,000 when she never made more than \$4,800 while working at Advance (Id., at 33-34). However, he admitted that Advance kept no records indicating Liu's salary (Id., at 76). Feinberg stated that Liu's testimony that Liu advanced \$100,000 to his multimillion dollar company was "ludicrous" (Id., at 48).

When asked if he knew how much Liu received in kickbacks and who Liu received kickbacks from, Feinberg responded "no," and that "I have no proof that there were any kickbacks." (Id. 48-49). Feinberg testified that when he stopped buying from SOL and began buying directly from the LiXin, there was a substantial change in price "because we were buying direct and not from [SOL]" (Id., at 73).

Liu moves for summary judgment dismissing the complaint against her. With respect to the breach of fiduciary duty claim, Liu argue that she owed no fiduciary duty to Advance since as Feinberg admitted she was not an employee of Advance. Liu further argues that Advance provides no evidence to substantiate Feinberg's assertion that Liu received kickbacks from vendors or that such kickbacks damaged Advance, and notes that Feinberg admitted during his deposition that he had no information about the amount of the alleged kickbacks or from whom the kickbacks were received.

In opposition, Advance argues that Liu was employed by it through its representative office in Shanghai and points to Liu's deposition testimony in which she states, "I work for Advance International." (Liu Dep. at 17). Advance also argues that although Liu worked through an intermediary, this fact is not determinative as

to whether she owed a fiduciary duty to Advance as fiduciary duties extend to agency relationships, and the record shows that Liu was acting as an agent for Advance when performing her duties. Advance also argues that the record is sufficient to raise triable issues of fact as to whether Liu took the alleged kickbacks and breached her fiduciary duties, and raises triable issues of fact as to whether she can held liable for on its claims of unjust enrichment and money had and received.

In support of its position, Advance relies on invoice records from 2001, 2002, and 2003 which allegedly reflect Advance's monthly PVC film purchases from SOL during Liu's employment and compares these invoices to those from 2004, to that SOL significantly overcharged Advance for PVC film during Liu's employment. Advance also relies on statements in Feinberg's affidavit submitted in support of its application for an attachment. According to Feinberg, he was told by Liu and Zhang of SOL, that as an accommodation to Advance, SOL would make the PVC purchases from the supplier LiXin and would charge Advance the same price it paid without a markup (March 4, 2008 Feinberg Aff., ¶ 15). He further states that after Advance terminated Liu, and Advance purchased PVC film directly from its supplier LiXin, the price of the film dropped 5% which shows that Advance had been overcharged by \$1.2 million (Id at ¶ 16).

Advance also argues that since Advance never paid Liu a salary of more than \$4,800 per year, evidence of multiple bank accounts and her apartment purchases raises triable issues of fact as to whether Liu received kickbacks from Advance's vendors. Advance also relies on evidence that Liu provided Zhang, SOL's manager, with one of Advance's credits to buy an automobile tax free, to argue that she breached her fiduciary duties by receiving kickbacks from SOL.

In addition, Advance relies on the affidavit of Xu Sheng Bin (“Bin”), the manager of LiXin since 1998. Bin states that LiXin began selling PVC film directly to Advance in 2004, and charged it the same price as it charged SOL for the PVC film it purchased on behalf of Advance. (Bin Aff. at ¶ 1). Bin states that he has no records to support his statement as they were destroyed in a typhoon in 2006 (*Id.*, ¶ 5).

Advance also submits a letter from Zhang in which he admits that SOL, charged Advance an additional \$15,000 to ensure high quality production and for his services and as an agent for export of the materials. Notably, Zhang does not state that Liu was paid any part of the \$15,000.

In her sworn interrogatory response, Liu denies that she purchased or negotiated the purchase of materials from SOL on behalf of Advance between 1998 and 2003. She also states with respect to the car incentive given to Zhang, that when she informed Feinberg the credit would expire at the end of the year, 2003, he consented to her giving the incentive car quota to SOL.

DISCUSSION

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Wingard v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Unsubstantiated assertions and speculations are insufficient to raise triable issues of fact. *Id.*, at 325.

To prevail on a claim of breach of fiduciary duty, the plaintiff must establish (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. Rut v. Young Adult Inst., Inc., 74 AD3d 776, 777 (2d Dept 2010). An employee under certain circumstances may owe a fiduciary duty to her employer to the extent that the employee is "prohibited from acting in any manner inconsistent with [her] agency and trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of [her] duties." CBS Corp. v. Dumsday, 268 AD2d 350, 353 (1st Dept 2000). The record here shows that Liu was paid by a company called Shanghai Intellectual as required by Chinese law. However, Liu's status as an employee is not dispositive since a fiduciary relationship can exist "when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 (2005)(internal quotations omitted).

Here, assuming *arguendo* that the record raises a factual question as to whether Liu owed Advance a fiduciary duty, Advance has failed produce proof to rebut Liu's prima facie showing, with any evidence that Liu breached her fiduciary duty by accepting kickbacks from vendors, including by overcharging Advance for PVC's obtained from SOL. At best, Advance's contentions are based on conjecture and speculation.

Next, the documentary evidence and Feinberg's affidavit submitted in opposition to the motion are insufficient to raise at triable issues of fact in this regard. An examination of the invoices submitted by Advance regarding the prices charged to Advance for PVC before and after Liu was terminated are not self-explanatory. For example, it is unclear from comparing the invoices whether the

products involved were the same and/or if there was another basis for the different prices charged. Thus, even if the court were to accept Feinberg's unsubstantiated conclusion that the invoices establish that the prices charged to Advance decreased after Liu was terminated, such conclusion is insufficient to connect the lower prices to any misconduct on the part of Liu. For the same reason, the statement in the affidavit from the supplier of PVC that he charged the same price to SOL as it did to Advance, is insufficient to raise a factual question as to whether Liu breached her fiduciary duty, including through a kickback scheme.

Furthermore, contrary to Advance's position, evidence that Liu gave Advance's credit to SOL's manager to buy an automobile tax free is insufficient to provide a basis for finding that the credit was given in exchange for kickbacks.² There is also no evidence in the record connecting money in Liu's bank accounts, and that used for the purchase of her apartments to money obtained through the alleged kickback scheme. In the absence of any evidence linking Feinberg's suspicions related to Liu's financial situation to any breach of fiduciary duty, including a kickback scheme, summary judgment must be granted dismissing the breach of fiduciary duty claim. See e.g., Benzaken v. Verizons Communications, Inc., 21 AD3d 864 (2d Dept 2005)(affirming grant of summary judgment to telephone company where plaintiff failed to provide any evidence beyond pure speculation, that company's employees stole jewelry based on their access to the area where various other persons had better or equal access as well).

²The letter from SOL's manager in which he states that he charged Advance an additional \$15,000 cannot be considered, as it is not sworn, and thus is inadmissible hearsay. Ulster County v. CSI, Inc., 95 AD3d 1634 (3d Dept 2012). In any event, the statement in the letter provides no link between Liu and the additional money charged.

For similar reasons, Advance cannot prevail on its claims for unjust enrichment and for money had and received. To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v. McAneney, 31 AD3d 54, 59 (2d Dept 2006). Central to a claim for unjust enrichment is an allegation that "benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiff." Weiner v. Lazard Freres & Co., Inc., 241 AD2d 114, 119 (1st Dept 1998), quoting, Tarrytown House Condominiums v. Hainje, 161 AD2d 310, 313 (1st Dept 1990).

A cause of action for money had and received is based on "an obligation which the law creates in the absence of an agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another." Parsa v. State of New York, 64 NY2d 143, 148 (1984) (citations omitted).

Here, as Advance has failed to produce sufficient evidence to raise a triable issue of fact as to whether Liu was unjustly enriched at Advance's expense or that she received money belonging to Advance, summary judgment must be granted in her favor. Under these circumstances, the court need not address Liu's argument that the complaint must be dismissed under the doctrine of forum non conveniens.

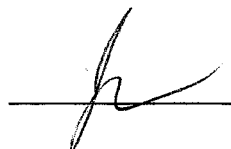
CONCLUSION

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Wenli Liu is granted, and the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that all restraints on her bank accounts as per the court's April 26, 2010 order are hereby vacated.

Dated: December 17, 2013



J.S.C.

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DEC 20 2013
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