SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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ASHLEIGH NANKIVELL,

Plaintiff,

Index No.: 153503/13

- against -

ARDIS HEALTH, LLC, CURB YOUR CRAVINGS, LLC, USA HERBALS, LLC, JORDAN FINGER, AND KARL ALOMAR,

Defendants.

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DEBRA A. JAMES, J.:

Motion sequence numbers 001 and 002 are herein consolidated for disposition.

In this action for employment discrimination, defendants Ardis Health, LLC (Ardis), Curb Your Cravings, LLC (CYC), USA Herbals, LLC (USA Herbals), Jordan Finger and Karl Alomar move, pursuant to CPLR 3211 (a) (1), (2), (5) and (7), for an order dismissing the complaint brought by plaintiff, Ashleigh Nankivell (motion sequence number 001).

Plaintiff moves, pursuant to CPLR 3025 (b), for leave to amend her complaint (motion sequence number 002).

As set forth below, the motion to dismiss shall be granted in part and denied in part, and the motion to amend the complaint is also shall be granted in part and denied in part.

Plaintiff was hired by CYC in October 2008 to work as a video producer. Between October 2008 and December 2008, her salary was paid by both CYC and USA Herbals in equal parts. Thereafter, in January 2009, plaintiff became a full-time employee with USA Herbals and her salary was paid exclusively by it. At USA Herbals, plaintiff's title was video and social media producer, and she was responsible for video production and web design, as well as posting content to established websites and blogs. During her tenure of employment, she worked under the direction of individual defendant Finger, who upon information and belief is the principal and owner of the defendant companies.

Plaintiff claims that at the outset of and throughout her employment she was continually subjected to sexually harassing behavior by Finger, creating a hostile work environment.

According to plaintiff, at the time of her hire, she signed for a CYC employee handbook, which contained an anti-harassment policy. However, she alleges that that "policy failed to include a method by which [she] could complain about the sexually hostile work environment created by Finger," as the policy instructed employees to report the behavior of a supervisor to the president of the company. In this instance, the alleged harasser was the president of the company. She never received an employee

handbook when she became a USA Herbals employee. Plaintiff believed in light of her circumstances, any complaint she made "would have been futile."

Plaintiff alleges that her work required her to work up to 80 hours per week. After office hours, plaintiff would work from home on her personal laptop computer, for which she had paid approximately $3,200. She claims that, given the work that she had to perform on the laptop, it "crashed" and was destroyed in the Spring of 2010. It was only then that she was given a used company laptop. In addition, she claims that she owned a video camera and digital camera (for which she paid approximately $1,200 and $400 respectively), both of which she was required to use in her job, and when both of these no longer worked, Finger purchased replacements, which he required plaintiff to use. Plaintiff claims she was never paid for her personal equipment which broke as a result of her required use in performing her job.

Plaintiff alleges that in June 2010, she began developing a concept and website entitled "Whatsinurs.com," which she developed on her own time, and was never performed as an employee of any entity. Plaintiff shared the concept with Finger, who thought it might be profitable. She then met with Karl Alomar,

who engaged in projects with Finger as a contractor through Alomar's company. On June 21, 2010, plaintiff, Finger and Alomar entered into an oral agreement to use Whatsinurs[1] to build an Internet business (collectively the Founders). Plaintiff, Alomar and Finger agreed that plaintiff would work on the business as an original founder and equity owner, and that her compensation would derive from her status as creator, founder and owner, not as an employee.

Thereafter, the Founders agreed to incorporate the business into a limited liability company, Lukiani LLC doing business as Whatsinurs.com in the State of Delaware. Plaintiff received no additional compensation while working in her off hours to create the business, understanding that she would share in the profits of the business with Finger and Alomar, as promised by both men.

Plaintiff claims that the responsibilities among the Founders were divided such that plaintiff was responsible for all website, product planning, design, as well as social media, marketing campaigns and community management; Finger was responsible for fundraising from investors, arranging the incorporation into an LLC, reserving the domain name

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[1] The business was to provide a portal for communication between shoppers of health and beauty products.

"Whatsinurs.com", drafting the partnership equity agreement (Founders Agreement), and filing trademark and copyright applications for the business; Alomar was responsible for the architecture, implementation and maintenance of the Whatsinurs operating systems and technology pertaining to the business's website.

In October 2010, Finger informed plaintiff of the filing of a certificate of incorporation in Delaware for the business; however, plaintiff alleges that that was a false representation, as there has never been a certificate of incorporation filed in any state in the U.S. From September 2010 through May 2011, plaintiff repeatedly reminded Finger of his responsibility to draft a written agreement for the Founders to sign reflecting that they were equal equity owners in the business. In December 2010, Finger proposed that plaintiff receive a 10% share as opposed to a third equal share. On December 4, 2010, plaintiff refused and informed Finger by email that the belated counteroffer was not acceptable.

Plaintiff continued to work on her own time in the business, and Finger encouraged her to finish the project. Thereafter, on June 13, 2011, Finger presented plaintiff with a "Founders Agreement" which among other things provided a division of equity

ownership in Lukiani d/b/a Whatsinurs.com with the following allocations: 10% to plaintiff; 33.3% to Alomar and 51.7% to Finger. It also named only Finger and Alomar as the business's Board of Directors.

Plaintiff asserts that Finger misappropriated the startup assets of the business, including registering the domain name in the name of one of his companies, Movie Star Look, and filing for the Whatsinurs trademark and copyright as property of Ardis Health.

On June 17, 2011, Finger asked plaintiff if she signed the agreement, to which she advised she was having an attorney review it. Plaintiff recorded the conversation wherein Finger allegedly praised her for her hard work and extensive uncompensated overtime hours, encouraging her to take lunch breaks and arrive at work between 10:30 and 11:00 a.m. due to her late night hours.

In the Spring of 2011, plaintiff sought other employment opportunities. Shortly after the Founders Agreement was presented to plaintiff in June 2011, Finger learned that she was seeking other employment. On June 23, 2011, Finger terminated plaintiff for cause citing excessive unexcused absences, consistent lateness and unexplained disappearances from the office. While Finger claimed that plaintiff was terminated due

to her failure to show up to work on that day, she claims she took off to go to a medical appointment, which was approved by Finger.

Defendant companies moved for a preliminary injunction against plaintiff in the federal district court for the Southern District of New York, Index No. 11-CV-5013 (Ardis Health, LLC et al v Nankivell), wherein they claimed that plaintiff was not entitled to an equity interest in Whatsinurs.com because she worked on that project as an assignment in the course of her employment with defendant Ardis; and as such, she was required to return defendants' login information for various websites, return their laptop and content on it, and refrain from using their proprietary information. The Honorable Naomi Buckwald ordered that plaintiff was to return such information to defendants, but did not grant the injunction with regard to retrieving the laptop or prohibiting plaintiff from displaying the design on her own website.

Thereafter, plaintiff counterclaimed against the company defendants and filed a third-party complaint against Finger alleging sexual harassment, retaliation, destruction of personal property, conversion, negligence and breach of contract, among others. The company defendants and Finger moved to dismiss the

counterclaims and third-party complaint. The court found that it had subject matter jurisdiction over plaintiff's counterclaims for breach of fiduciary duty, fraud in the inducement, conversion, unjust enrichment, and quantum meruit, but that it did not have supplemental jurisdiction over the destruction of personal property or state and city sex discrimination claims, as they did not relate to the underlying claims.

The Southern District court found that plaintiff did not meet her burden on the breach of fiduciary duty, fraudulent inducement, and conversion claims. In addition, the court held that the unjust enrichment and quantum meruit claims "apply to the Whatsinurs website, which undisputedly falls within the subject matter of the Copyright Act" and are, therefore, preempted (Weber v Geffen Records, Inc., 63 F Supp 2d 458, 462 [SD NY 1999]). The court, in light of the above, dismissed the counterclaims and third-party complaint.

On March 6, 2013, the parties stipulated to dismissal of the action without prejudice.

This action ensued.

Pursuant to CPLR 3211 (a) (1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon

documentary evidence." The court may grant dismissal when the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 571 [2005] [citation omitted]). Under CPLR 3211 (a) (2), a court may dismiss an action where there is no "jurisdiction of the subject matter of the cause of action."

In addition, pursuant to CPLR 3211 (a) (5), a party may move to dismiss and the court may grant a dismissal on the grounds that payment has been made or that the underlying claims are time-barred, among others. On a motion to dismiss pursuant to CPLR 3211 (a) (7), plaintiff's allegations must be accepted as true, and courts must afford plaintiff "the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]; see also Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

At the outset, defendants argue that the causes of action for breach of contract (fifth), conversion of the website and

domain name (sixth), destruction of property (seventh) and negligence (eighth) should be dismissed because they were determined on the merits in the federal action and are barred under the doctrine of res judicata.

The doctrine of res judicata "bars 'all other claims arising out of the same transaction or series of transactions . . . even if based upon different theories or if seeking a different remedy'" (Jumax Assoc. v 350 Cabrini Owners Corp., 110 AD3d 622, 623 [1st Dept 2013], quoting O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981]). The res judicata "doctrine dictates, 'as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action'" (Syncora Guar. Inc. v J.P. Morgan Sec. LLC, 110 AD3d 87, 92-93 [1st Dept 2013], quoting UBS Sec. LLC v Highland Capital Mgt., L.P., 86 AD3d 469, 473-474 [1st Dept 2011]; see also Matter of People v Applied Card Sys., Inc., 11 NY3d 105, 122 [2008]). Further, res judicata may not be avoided by simply asserting a new legal theory (Se Dae *Yang* v Korea First Bank, 247 AD2d 237, 237-238 [1st Dept 1998]). Conversely, "[w]here a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply"

(Djoganopoulos v Polkes, 67 AD3d 726, 727 [2d Dept 2009]). Under the Federal Rules of Civil Procedure, rule 41 (b), contrary to our state courts, "a dismissal is on the merits unless the contrary expressly appears" (Giacomazzo v Moreno, 94 AD2d 369, 371 [1st Dept 1983]; see also Komlosi v City of New York, 3 AD3d 343 [1st Dept 2004]).

Here, defendants argue the that the breach of contract claim alleged herein is essentially duplicative of the breach of fiduciary duty and fraudulent inducement claims filed in the federal action, as plaintiff relies on both the Founders Agreement and termination email to support both claims. Specifically, plaintiff claimed that Finger owed her a fiduciary duty by virtue of a partnership between them. There was no dispute that the parties did not execute a written partnership agreement. Plaintiff alleged that the Founders Agreement confirmed her status as a founding partner and that a termination email acknowledged her participation in the business is independent of her status as an employee. Judge Buckwald held, however, that neither document supported her claim as neither reflected a loss-sharing agreement sufficient to establish a partnership in fact. Accordingly, the court shall dismiss the breach of fiduciary claims.

With respect to the fraudulent inducement claim, plaintiff alleged that Finger induced plaintiff to enter into an agreement while not intending to perform. The Southern District, however, determined that both claims failed as plaintiff failed to establish the requisite relationship to sustain them. The court did not determine whether these alleged agreements were in fact breached. That notwithstanding, the breach of contract claim "could have been litigated in [the federal] action, which asserted claims against the same defendants arising out of the same events" (Kruglyak v New York Univ., 110 AD3d 645, 645 [1st Dept 2013], citing O'Brien v City of Syracuse, 54 NY2d at 357).

Accordingly, the cause of action for breach of contract shall be dismissed with prejudice.

Plaintiff's cause of action for conversion in this action is brought under essentially the same allegations as that in the federal action. There, the court found that plaintiff "fail[ed] to state a claim for conversion" and dismissed the four counterclaims she raised against the movants. As this matter has already been dismissed on the merits, the cause of action for conversion shall likewise be dismissed with prejudice.

Next, plaintiff again raises causes of action for quantum meruit and unjust enrichment, which were also causes of action in

the federal action. In the federal action, the court found that since those claims related to the website, they fell within the parameters of the Copyright Act, which are generally preempted by that statute. The court dismissed those counterclaims on those grounds. Here, a review of plaintiff's allegations in the federal action versus the complaint in this action, as well as the proposed amended complaint, reflect that the claims arise out of the same transaction or series of transactions, and therefore are barred under the doctrine of res judicata (Dickerson v United Way of N.Y. City, 113 AD3d 452, 453 [1st Dept 2014]) .

Accordingly, plaintiff's claims for quantum meruit and unjust enrichment shall be dismissed with prejudice.

In the federal action, Judge Buckwald held that neither the counterclaims for destruction of property nor sex discrimination fell within the ambit of facts that were relevant or related to the companies' copyright and trademark claims. Therefore, res judicata does not apply to these causes of action and the court will address the alternative arguments with respect to the motion to dismiss these claims.

In the proposed amended complaint (motion sequence number 002), plaintiff combines those allegations concerning her destruction of property claim with those related to her

negligence cause of action. The court will consider the motion to dismiss the negligence cause of action based on an alleged destruction of personal property. Defendants' argument that these claims are barred by the statute of limitations under CPLR 214 (three years for negligence), fails as a matter of law. CPLR 205 provides that a party may commence a new action within six months of the federal action, provided that the federal action was timely commenced and not determined on the merits. The parties stipulated to dismissal of the federal action on March 6, 2013, and plaintiff filed the complaint on April 17, 2013, clearly within the six-month period. The court, therefore, finds this cause of action timely.

In order to state a claim for negligence, the plaintiff must allege the existence of a duty, a violation of that duty, causation and damages (Greenberg, Trager & Herbst, LLP v HSBC Bank USA, 17 NY3d 565, 576 [2011], citing Akins v Glens Falls City School Dist., 53 NY2d 325, 333 [1981]). Plaintiff alleges that as an employee of one or more of the corporate defendants, she was owed a duty of care with respect to her personal property; that defendant's violated that duty by requiring her to use her personal property in her employment; and that the equipment, a laptop computer, video camera and digital camera,

were destroyed either by overuse or some other means as a result, resulting in a $5,200 loss. Defendants argue that plaintiff fails to establish which specific defendant owed her a duty, and that requiring her to use her own equipment was not unreasonable, nor is there any allegation as to how defendants were negligent.

The court finds that plaintiff has not sufficiently pled a claim of negligence. While plaintiff would have had a workers compensation claim if she had asserted that she experienced overuse of her hands in the course of her employment (see Matter of Curtis v Xerox, 66 AD3d 1106 [3d Dept 2009]), there is no cognizable claim of an employee against an employer for overuse of personal property that an employer requires as a term of employment and the matter of such requirement would relate to plaintiff's remuneration under the terms of employment. See Matter of Amoroso, 22 AD3d 940 (3rd Dept 2005).

Next, as plaintiff, in the proposed amended complaint (motion sequence number 002), has withdrawn the causes of action for sex discrimination and retaliation under the NYSHRL and the cause of action for retaliation under the NYCHRL, the court need not address these branches of the motion to dismiss.

The court now turns to defendants' motion to dismiss plaintiff's cause of action for sex discrimination under the

NYCHRL. In 2005, the NYCHRL was revised via the Local Civil Rights Restoration Act of 2005 (LCRRA), which as a result, is construed more liberally than its state or federal counterparts (Zakrzewska v New School, 14 NY3d 469 [2010]; Brightman v Prison Health Servs., Inc., 62 AD3d 472 [1st Dept 2009]), and is to "be construed 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible'" (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 34 [1st Dept 2011]).

> In order to state a claim for a hostile work environment the complaint must assert: (1) that the plaintiff is a member of a protected class; (2) that the conduct or words upon which the claim of harassment is predicated were unwelcome; (3) that the conduct or words were prompted simply because the plaintiff was in the protected class; (4) that the conduct or words created a hostile work environment which affected a term, condition or privilege of his employment; and (5) that the defendant is liable for such conduct

(Kazimierski v New York Univ., 11 Misc 3d 1087[A], *3, 2006 NY Slip Op 50729 [Sup Ct, NY County 2006] [citation omitted]). Prior to the enactment of the LCRRA, claims brought under NYCHRL were required to allege conduct severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive, and it must allege that the victim subjectively perceived the environment to be hostile (id., citing Harris v Forklift Sys., Inc., 510 US 17, 21-22 [1993]). However

subsequent to the enactment of the LCRRA, "for purposes of hostile workplace environment claims brought under the [NYCHRL], 'questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability'" (Hernandez v Kaisman, 103 AD3d 106, 113-114 [1st Dept 2012], quoting Williams, 61 AD3d at 76). "On the other hand, however, Williams recognized that the [NYCHRL] is not a 'general civility code,' such that an employer can be held liable for 'petty slights and trivial inconveniences'" (*id.* at 114, quoting Williams, 61 AD3d at 79-80).

Here, plaintiff alleges in the complaint that, as a woman, she is a member of a protected class; the conduct of Finger was unwelcome and offensive; that it was directed at her because she was a woman; and the words created a hostile environment for which defendants should be liable. Defendants do not appear to dispute this but rather argue that plaintiff's allegations fail to meet the severe and pervasive threshold as the instances occurred on but a few occasions. However, as noted above, that is not the standard under the NYCHRL. Conducting employment luncheons and holiday parties at strip clubs, showing video clips of topless women or pictures of scantily dressed women to their

employees, commenting on their physical attributes, or advertising sexual conquests or desires to employees, on a regular basis as is alleged herein is not conduct which can be said to be "petty slights or trivial inconveniences."

As such, the motion to dismiss the cause of action for sex discrimination and harassment under the NYCHRL is denied (*see e.g.* Davis v Phoenix Ancient Art, S.A., 39 Misc 3d 1214[A], 2013 NY Slip Op 50613[U] [Sup Ct, NY County 2013]).

A motion to amend may be made and granted at any time (CPLR 3025 [b]; Jacobowitz v Leak, 19 AD3d 453 [2d Dept 2005]), "absent prejudice or surprise resulting directly from the delay" (McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]; Liebowitz v Mt. Sinai Hosp., 296 AD2d 340, 342 [1st Dept 2002]; Tishman Constr. Corp. of N.Y. v City of New York, 280 AD2d 374, 377 [1st Dept 2001]), so long as the "proffered amendment is not palpably insufficient or clearly devoid of merit" (Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012] [internal quotation marks and citation omitted]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." (Sample v Levada, 8 AD3d 465, 467-468 [2d Dept 2004]).

"Accordingly, leave to amend a complaint to add an additional theory of liability is generally granted when the defendants were placed on notice of such theory by the allegations in the initial complaint, such that the defendants cannot establish that they will be prejudiced by the amended complaint" (Jacobson v McNeil Consumer & Specialty Pharms., 68 AD3d 652, 653 [1st Dept 2009]). "[P]rejudice occurs when the party opposing [the] amendment 'has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (Jacobson, 68 AD3d at 654-655, quoting Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]).

Plaintiff seeks through the proposed amended complaint to clarify her existing causes of action and withdraw her New York State Human Rights Law (NYSHRL) claim for hostile work environment (first cause of action), her NYSHRL retaliation claim (second cause of action), her New York City Human Rights Law (NYCHRL) retaliation claims (fourth cause of action) and her conversion claim insofar as it related to the Whatsinurs website (sixth cause of action), and seeks to add causes of action for promissory estoppel, breach of covenant of good faith and fair dealing and trespass to chattels. Plaintiff claims that

defendants will in no way be prejudiced by permitting the amendment of the complaint at this stage of the proceeding. These claims are based on facts and circumstances which could have caused "neither surprise nor cognizable prejudice to defendant[s]" (see Ward v Eastchester Health Care Ctr., LLC, 34 AD3d 247, 248 [1st Dept 2006], citing *Zaid Theatre Corp. v Sona Realty Corp.*, 18 AD3d 352, 354-355 [1st Dept 2005]).

Defendants do not contend that they would be prejudiced, but rather simply suggest that plaintiff fails to meet her affirmative duty to show that the proffered amendment is not palpably insufficient or clearly devoid of merit. The court agrees with respect to those causes of action which it has found are barred under the doctrine of res judicata, i.e., the breach of contract, conversion, unjust enrichment and quantum enrichment claims, and the factual claims that fail to state a claim of negligence. As to the remainder of the proposed amended complaint, defendants "fail[] to 'overcome a presumption of validity in plaintiff's favor'" (JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc., 107 AD3d 643, 644 [1st Dept 2013], quoting Peach Parking Corp. v 346 W. 40th St., LLC, 42 AD3d 82, 86 [1st Dept 2007]).

Therefore, the court will permit plaintiff to serve and file

an amended complaint consistent with this decision.

Accordingly, it is

ORDERED that the motion by defendants Ardis Health, LLC, Curb Your Cravings, LLC, USA Herbals, LLC, Jordan Finger and Karl Alomar to dismiss is granted to the extent that the causes of action for breach of contract, conversion, unjust enrichment, quantum meruit are dismissed with prejudice and the claim of negligence dismissed as insufficiently pled, and is otherwise denied (motion sequence 001); and it is further

ORDERED that the motion by plaintiff Ashleigh Nankivell to amend the complaint (motion sequence 002); and it is further

ORDERED that the plaintiff shall serve and file an amended complaint consistent with this decision, within thirty (30) days of entry of this Order; and it is further

ORDERED that the parties shall appear for a compliance conference in IAS Part 59, 71 Thomas Street, Room 103, New York, New York on December 9, 2014, 10 AM.

Dated: October 3, 2014

ENTER:

J.S.C.

DEBRA A. JAMES