Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

DANIA LIBREROS,

Plaintiff,

-against-

ANTHONY GALLO AND VERONICA FLORENTINO,

Defendants.

Index No: 3623/16

Motion Date: 8/22/16

Motion Seq. No.: 1

The following papers numbered 1 to 5 read on this motion by plaintiff Dania Libreros for an order, inter alia, dismissing the defendants' counterclaims

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	
Memoranda of Law	3-5

Upon the foregoing papers it is ordered that: The branch of the motion which is for an order pursuant to CPLR 3211(b) dismissing various affirmative defenses raised by the defendants is granted to the extent that the sixth, eleventh, fourteenth, and twenty-first affirmative defenses are dismissed and is otherwise denied. The branch of the motion which is for an order dismissing the counterclaims pursuant to CPLR 3211(a)(7) is granted to the extent that the fourth counterclaim is dismissed and is otherwise denied. The branch of the motion which is for an order dismissing the counterclaims pursuant to CPLR 3211(a)(5) (statute of limitations) is denied.

I. The Allegations of the Pleadings

A. The Complaint

The complaint essentially alleges the following:

Defendant Anthony Gallo and defendant Veronica Florentino employed plaintiff Dania Libreros as a domestic worker and caretaker of their children from on or about June 4, 2008 to on or about January 26, 2015.

The defendants discriminated against the plaintiff by creating and maintaining a sexually hostile work environment, and they also violated state and federal minimum wage and overtime laws.

B. The Counterclaims

The counterclaims essentially allege that during the course of her employment, the plaintiff stole the defendants' personal property, including jewelry, handbags, and clothing.

II. The Counterclaims

A. CPLR 3211(a)(7)

The first counterclaim, which is for breach of the duty of loyalty, is sufficiently stated. " [A]n employee is to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties' ***." (*W. Elec. Co. v. Brenner*, 41 NY2d 291, 295, quoting *Lamdin v. Broadway Surface Adv. Corp.*, 272 NY 133, 138; *City of Binghamton v. Whalen*, 141 AD3d 145.) The counterclaim may be raised in an action for violation of the state Labor Law or for violation of the federal Fair Labor Standards Act. Where an employee engages in repeated acts of disloyalty, he may forfeit his right to compensation. (*City of Binghamton v. Whalen*, *supra*.) Moreover, the plaintiff's argument that the defendants waived their right to terminate the plaintiff and to assert a claim for breach of loyalty by not acting within a reasonable time after the discovery of the thefts is unavailing here. Waiver is a matter which may be raised as an affirmative defense (*see, Bank of Am., N.A.* v. *414 Midland Ave. Associates, LLC*, 78 AD3d 746), and it does not pertain to the sufficiency of the cause of action.

The second counterclaim, which is for conversion, is adequately stated."Two key elements of conversion are (1) plaintiff's possessory right or interest in the property ***and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights ***," (*Colavito v. New York Organ Donor Network, Inc*., 8 NY3d 43, 50.) The counterclaim is sufficiently specific since the defendants have pleaded the conversion of "designer watches, handbags, jewelry, cufflinks, boots, shoes, and adult, children's, and toddlers clothing." The counterclaim gives the plaintiff adequate notice of the essential facts underlying the claims and the theories of recovery. (*See*, *Joseph T. Ryerson & Son, Inc. v. Piffath*, 132 AD2d 527; *Foley v. D'Agostino*, 21 AD2d 60.) The counterclaim, giving notice of the transactions to be proved and the material elements of the cause of action, is not required to meet any more specific level of particularity in its allegations. (*See*, CPLR 3013, 3016, 3211[a][7]; *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc*. 66 AD3d 122.)

The third counterclaim, which is for breach of fiduciary duty, is sufficiently stated. The elements of a cause of action for breach of fiduciary duty are (1)the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (*See, Daly v. Kochanowicz*, 67 AD3d 78; *Fitzpatrick House III*, *LLC v. Neighborhood Youth & Family Services*, 55 AD3d 664; *Kurtzman v. Bergstol* 40 AD3d 588.) The plaintiff's contention that the relationship between a domestic worker/nanny and an employer does not rise to the level where a fiduciary duty exists is without merit. An employee owes a fiduciary duty to his employer. (*See*, *W. Elec. Co. v. Brenner*, 41 NY2d 291; *City of New York v. Joseph L. Balkan, Inc*., 656 F. Supp. 536 ["New York law establishes that an employee-employer relationship is fiduciary']; 52 NYJur2d, "Employment Relations," §228.) Under New York Law, even low level employees owe a fiduciary duty to their employers. (*Base One Technologies, Inc. v. Ali*, 78 F. Supp. 3d 186; *Fairfield Fin. Mortgage Grp., Inc. v. Luca*, 584 F. Supp. 2d 479.) Moreover, a fiduciary relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions ***." (*EBC I, Inc. v. Goldman, Sachs & Co*., 5 NY3d 11, 19.) In the case at bar, the defendants placed the care of their children with the plaintiff, and any loving parents who place the care of their children with a nanny certainly will do so only if a high level of trust is present. This court disagrees with *Feinberg v. Poznek*, 12 Misc. 3d 1185(A) (Table), 2006 WL 2056489 (Text) where the court unconvincingly found the absence of fiduciary relationship between the plaintiff and a nanny who allegedly took medical and financial records of the plaintiff without permission.

The fourth counterclaim, which is for unjust enrichment, is not adequately stated. " An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v. Verizon N.Y., Inc*., 18 NY3d 777, 790.) In the case at bar, the fourth counterclaim is merely duplicative of the second counterclaim.

B. CPLR 3211(a)(5) – The Statute of Limitations

The defendants agree that the applicable statute of limitations period for the counterclaim based on the breach of fiduciary duty is three years since the counterclaim seeks damages. (*See*, *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132.) "[T]he statute of limitations for a claim alleging a breach of fiduciary duty is tolled until there has been an open repudiation by the fiduciary or the relationship has otherwise been clearly terminated ***." (*In re Dissolution of Therm, Inc.*, 132 AD3d 1137, 1138.) The defendants employed plaintiff Dania Libreros as a domestic worker and caretaker of their children from on or about June 4, 2008 to on or about January 26, 2015. With exceptions not relevant here, the time to begin an action is computed from the time the cause of action accrued to the time the claim is interposed. (CPLR 203[a].) CPLR 203(d) provides in relevant part: "A defense or counterclaim is interposed when a pleading containing it is served." The defendants served their counterclaim on or about June 2, 2016, and, pursuant to the tolling doctrine, they timely asserted their counterclaim for breach of fiduciary duty.

For the same reasons, the defendants timely asserted their claim for breach of the duty of loyalty.

The statute of limitations does not bar the counterclaim for conversion in its entirety for two reasons. First, the statute of limitations period for conversion is three years, and it begins to run from the date of the tort. (*Barrett v. Huff*, 6 AD3d 1164.) Second, "if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint ***." (CPLR 203[d]; *U.S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC,* 22 AD3d 1017; *Coppola v. Coppola*, 260 AD2d 774.)

III. The Affirmative Defenses

CPLR 3211 provides in relevant part: "(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." (*See, Butler v. Catinella*, 58 AD3d 145.) The movants have the burden of demonstrating that the challenged defenses are without merit as a matter of law.(*Butler v. Catinella, supra*.) "Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed ***." (*Federici v. Metropolis Night Club, Inc.*, 48 AD3d 741, 743; *Butler v. Catinella*, *supra*.)

The first affirmative defense is not subject to dismissal pursuant to CPLR 3211(b) since the plaintiff cannot, in effect, test the sufficiency of her own complaint. (*See*, *Butler v. Catinella*, *supra*.)

The plaintiff has withdrawn that part of her motion which seeks an order dismissing the second affirmative defense. (See stipulation dated July 29, 2016.) In any event, the second affirmative defense denies the plaintiff's right to punitive damages on the ground that the defendants never willfully violated the labor laws, and the defense is validly pled since willfulness may be an element warranting punitive damages. (*See*, *Sparks v. Fels*, 137 AD3d 1623.)

The merits of the third affirmative defense, which denies that the plaintiff is entitled to a jury trial on all of her claims, cannot be determined at this point.

The sixth affirmative defense is without merit "since the doctrine of unclean hands is an equitable defense that is unavailable where, as here, the action is exclusively for damages ***." (*Greco v. Christoffersen*, 70 AD3d 769, 771.)

The seventh affirmative defense, which alleges that the "Plaintiff has grossly exaggerated the number of hours worked daily," is not subject to dismissal since the plaintiff did not demonstrate that the defense is without merit as a matter of law. (*See, Butler v. Catinella*, *supra.*)

The eighth affirmative defense, which alleges that the plaintiff was "exempt from overtime under the FSLA and NYLL pursuant to the live-in domestic service worker exemption," is not subject to dismissal since the court cannot determine here the number of hours that the plaintiff worked. (*See*, Labor Law §170.)

The plaintiff has withdrawn that part of her motion which seeks an order dismissing the ninth affirmative defense. In any event, the ninth affirmative defense, which alleges that the plaintiff is not entitled to compensation for periods when she was not on duty, is not subject to dismissal since the plaintiff failed to show that the defense has no merit as a matter of law. (*See, Butler v. Catinella*, *supra*.)

The tenth affirmative defense, which alleges that the plaintiff has failed to "proffer evidence of circumstances giving rise to an inference of discrimination," is not subject to dismissal since the court cannot determine here the validity of the defense as a matter of law. (*See. Butler v. Catinella*, *supra*.)

The eleventh affirmative defense, which alleges that the plaintiff cannot demonstrate pretext, has no merit because the plaintiff has not asserted a claim for retaliation. (*See*,*e.g.*, *Ruderman v. City of N.Y.*, 142 AD3d 863; *Treglia v. Town of Manlius*, 313 F3d 713.)

The twelfth affirmative defense, which alleges a failure to mitigate damages, is not subject to dismissal since "[g]enerally, an individual complaining of discrimination has a duty to mitigate his or her damages by making reasonable efforts to obtain comparable employment ***." (*Goldberg v. N.Y. State Div. of Human Rights*, 85 AD3d 1166, 1167.)

The thirteenth affirmative defense, which asserts that the defendants are entitled to a setoff in mitigation for all amounts that the plaintiff earned or could have earned, is not dismissable. (*See*, *Club Swamp Annex v. White*, 167 AD2d 400.)

The fourteenth affirmative defense, which alleges that the plaintiff suffered no tangible job detriment, is dismissable since this defense relates to vicarious liability not at issue in this case. (*See, Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742.)

The fifteenth affirmative defense, which asserts that the defendants are entitled to an offset for property stolen by the plaintiff, is not dismissable because the plaintiff failed to show that it has no merit as a matter of law. (*See. Butler v. Catinella*, *supra*.)

The plaintiff has withdrawn that part of her motion which seeks an order dismissing the sixteenth affirmative defense. In any event, the sixteenth affirmative defense, which basically asserts that the plaintiff is not entitled to recover punitive damages and penalties, is not dismissable since its merits cannot be determined here as a matter of law. (*See. Butler v. Catinella*, *supra*.)

The plaintiff has withdrawn that part of her motion which seeks an order dismissing the seventeenth affirmative defense which raises the Statute of Limitations.

The eighteenth affirmative defense, which alleges lack of proximate cause, is not dismissable since the merits of this defense cannot be determined here as a matter of law. (*See. Butler v. Catinella*, *supra*.)

The nineteenth affirmative defense, which alleges that the plaintiff's claims are barred by the doctrine of after-acquired evidence, is not dismissable because the affirmative defense may be relevant to damages. (*See, McCarthy v. Pall Corp*., 214 AD2d 705.)

The twenty-first affirmative defense, which asserts to a right to state additional affirmative defenses as they may appear during the course of litigation, is dismissable as an ineffective catchall provision. (*See, Scholastic Inc. v. Pace Plumbing Corp*., 129 AD3d 75.)

Dated: December 13, 2016

J.S.C.