

**Layne v Best**

2018 NY Slip Op 33283(U)

December 18, 2018

Supreme Court, New York County

Docket Number: 650250/18

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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MARVA M. LAYNE, individually and  
as a shareholder of NEGRIL VILLAGE, INC., suing in  
the Right of NEGRIL VILLAGE INC., and as an  
individual and CARLTON L. HAYLE, individually and  
as a shareholder of NEGRIL VILLAGE INC., suing in the  
Right of NEGRIL VILLAGE INC. and as an individual,

DECISION  
AND ORDER  
Index No. 650250/18  
Mot. Seq. 001

Plaintiffs,

- against -

PETER BEST, LILY BEST A/K/A LILLIAN TRUONG  
and KANETTA BAPTISTE A/K/A KANETTA JOSEPH,

Defendants.

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FREED, J.:

Plaintiffs consist of Negril Village, Inc. (Negril Village) and its shareholders Marva M. Layne and Carlton L. Hayle. Negril Village operates Negril, a restaurant serving Jamaican cuisine. Plaintiffs allege that Negril’s former business manager, Peter Best, defrauded them. Best and Lily Best a/k/a Lillian Truong, who are husband and wife, move pursuant to CPLR 3211 (a) (1) and (7), and (c) to dismiss the complaint.

The complaint alleges that owners Layne and Hayle have known Best for approximately 20 years, when they hired him to be a busboy at another of their restaurants. Around 2001, Best had risen to the position of general manager of Negril, which allowed Layne to focus on food preparation while Hayle participated in running the business.

Best was in charge of Negril’s financial affairs including, but not limited to, banking, payroll, accounts payable, hiring and firing employees and independent contractors. Best was a

signatory on Negril's bank account and could write checks, withdraw cash, and deposit funds. Best had the responsibility of filing and paying Negril's taxes and was empowered to obtain loans on its behalf. "As a result of a longstanding relationship that had grown to near familial in character, Best was provided with access and control of all the financial affairs of Negril without supervision or proper accountability" (complaint, ¶ 13).

Best hired defendant Kanetta Baptiste a/k/a Kanetta Joseph to act as bookkeeper and accountant for Negril. Baptiste was tasked with collecting all the cash generated by Negril. Best was the prime contact between the accountant and the owners, and was responsible for generating the documents that were provided to the accountant.

Plaintiffs allege that Best damaged them by mishandling Negril's affairs. Best wrongly authorized Negril's funds to be paid to his wife, defendant Truong. Best allegedly borrowed money on behalf of Negril from Truong at a usurious rate of interest. Best also allegedly failed to pay Negril's water bills which resulted in arrears in excess of \$750,000. Plaintiffs claimed that he also failed to pay state taxes, resulting in Negril Village being judicially dissolved as of June 30, 2004. Best then kept the judicial dissolution a secret from the owners. In February 2017, due to the execution of a warrant for unpaid state taxes, Negril was closed. When Negril closed, plaintiffs, for the first time in years, examined the business's books and discovered that not one cent of cash received by Negril for at least the past six years had been deposited into its bank account.

To reopen Negril, plaintiffs had to file for bankruptcy. Plaintiffs allege that, unbeknownst to them, Best tried to obtain in his name a lease for Negril's premises so that he could open his own restaurant there. Plaintiffs claim that Best's conduct caused them to lose

over \$5 million.

Defendants Best and Truong now move to dismiss the complaint. A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted “only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Where a motion is based on CPLR 3211 (a) (7), the court decides only whether the pleading states a cause of action. If from the pleading’s four corners, the court can discern factual allegations which taken together manifest any cause of action cognizable at law a motion for dismissal will be denied (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1<sup>st</sup> Dept 2013]). The court must accept the factual allegations in the complaint as true, give the plaintiff the benefit of every favorable inference, and ask only whether the purported facts fit into any cognizable legal theory (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1<sup>st</sup> Dept 2013]).

Under CPLR 3211 (c), a motion may be treated as one for summary judgment, even though issue has not been joined. To obtain summary judgment, the moving party must demonstrate that the action involves no issues of fact but only issues of law, and that resolution of the issues of law entitle it to judgment in its favor (*Shah v Shah*, 215 AD2d 287, 289 [1<sup>st</sup> Dept 1995]).

In support of their motion, Best and Truong submit copies of email communications, Negril’s bank statements and checks, and a credit card statement belonging to Truong. In his moving affidavit, Best refers to these records to show that he and Truong used their personal credit cards and monies to pay Negril’s expenses, including the rent. However, these records do

not warrant dismissal of the complaint. These records do not show that the complaint should be dismissed. They do not refute any of plaintiffs' factual allegations, prove Best's allegations, or dispose of any issues of fact. The emails only show that the relationship between the plaintiffs and the defendants was poor. As plaintiffs also point out, the financial records are not in admissible form and are for the year 2013, while the claims against Best and Truong date from before and after 2013. Thus, this Court denies that branch of the motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (c).

The first cause of action, sounding in fraud, alleges that, from January 2009 through February 2017, Best frequently represented to plaintiffs that he was ready, willing, and able to manage Negril's financial affairs, that he would act honestly and ethically to the benefit of plaintiffs, and that these statements were false when made and designed to defraud plaintiffs.

To assert a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]).

A fraud claim requires a knowing misrepresentation of fact. An expression of mere puffery or opinion will not support an action for fraud (*Longo v Butler Equities II*, 278 AD2d 97, 97 [1<sup>st</sup> Dept 2000]; *Jacobs v Lewis*, 261 AD2d 127, 127-128 [1<sup>st</sup> Dept 1999]). Best's statements amount to opinion or self-puffery. Unsupported and general statements attesting to one's own competence and honesty are based upon one's opinion. Statements will be deemed non-

actionable where the topic in question can only be a matter of subjective opinion (*see Augsbury v Adams*, 135 AD2d 941, 942 [3d Dept 1987]). Thus, the first cause of action is dismissed.

The second cause of action is for civil conspiracy against the three defendants, who allegedly entered into an agreement “to accomplish the defalcations . . . by the use of fraudulent and unlawful means” (complaint, ¶ 38). Allegedly, Baptiste took funds generated by Negril, and Truong, between 2012 and 2017, and received in excess of \$900,000 of Negril’s funds.

In New York, civil conspiracy to commit a tort is not recognized as an independent cause of action (*Capin & Assoc., Inc. v 599 W. 188<sup>th</sup> St.*, 139 AD3d 634, 635 [1<sup>st</sup> Dept 2016]). Allegations of conspiracy may be pleaded only to connect the actions of separate defendants with an otherwise actionable tort (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986] (*Faulkner v City of Yonkers*, 105 AD3d 899, 900 [2d Dept 2013])). Under New York Law, to establish a claim of civil conspiracy, the plaintiff “must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1<sup>st</sup> Dept 2010]), quoting *World Wrestling Fedn. Entertainment v Bozell*, 142 F Supp 2d 514, 532 [SD NY 2001]).

Plaintiffs sufficiently allege that defendants made an agreement to take Negril’s funds, that several overt acts were made to further this agreement, such as not depositing Negril’s cash receipts, that each defendant participated in the takings, and that plaintiffs were thereby injured. The primary tort is that of conversion, which is adequately pleaded in the complaint. Thus, this Court denies the motion insofar as it seeks dismissal of the second cause of action.

The third cause of action alleges that Best, Truong, and Baptiste converted Negril's funds. "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1<sup>st</sup> Dept 1995]). Plaintiffs allege that defendants wrongly took for their own uses money belonging to Negril. Where a plaintiff alleges that a defendant converted money, the money "must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*id.*; *see also McBride v KPMG Intl.*, 135 AD3d 576, 580 [1<sup>st</sup> Dept 2016]). The funds in Negril's bank account and its receipts are sufficiently identifiable and defendants were obligated to treat them as belonging to Negril. Thus, that branch of the motion seeking dismissal of the third cause of action is denied.

The fourth cause of action is for unjust enrichment against Best, Truong, and Baptiste. To state a claim, the plaintiff must allege that the defendant was enriched at the plaintiff's expense and that it is a violation of equity to allow the defendant to retain the means of its wrongful enrichment (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Plaintiffs allege that Best deprived Negril of money and that he is not entitled to keep those benefits. Generally, while an unjust enrichment claim that simply duplicates or replaces a conventional tort or contract claim will be dismissed (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-91 [2012]), at the pleading stage of the lawsuit, the plaintiff should not be forced to guess which claim, tort or unjust enrichment, will afford it a successful outcome (*St. John's Univ., New York v Bolton*, 757 F Supp 2d 144, 183 [ED NY 2010]). Thus, for now, plaintiffs will be allowed to plead unjust enrichment in addition to the other torts they have sufficiently

alleged.

The fifth cause of action alleges that Best breached his fiduciary duty to Negril. Employees owe their employers a fiduciary duty (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409,429-430 [2001]); *Western Electric Co. v. Brenner*, 41 NY2d 291, 295 [1977]). An employee 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” (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1<sup>st</sup> Dept 2000], quoting *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]). Here, the allegation that Best, while in Negril’s employ in a position of trust, diverted its funds states a cause of action for breach of fiduciary duty.

The sixth cause of action alleges that Truong and Baptiste aided and abetted Best’s breach of fiduciary duty. To establish an aiding and abetting claim, a plaintiff must allege that a fiduciary breached his or her obligations, that the aider and abettor knowingly induced or participated in the breach, and that the plaintiff suffered damage as a result of the breach (*Kaufman v Cohen*, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003]). Knowing participation is present when the abettor provides “substantial assistance” to the fiduciary (*id.* at 126; *King v George Schonberg & Co.*, 233 AD2d 242, 243 [1<sup>st</sup> Dept 1996]). Here, it is alleged that Best gave Negril’s money to Truong, and that he caused Negril to loan money to Truong at usurious rates of interest, and that Truong knowingly accepted the benefits of Best’s wrongful conduct. This Court finds that plaintiffs have sufficiently alleged substantial assistance and, thus, this claim is not subject to dismissal.

The seventh cause of action is based on breach of the duty of good faith and fair dealing



by Best. That cause of action cannot be maintained unless the parties had a contract between them (*Meregildo v Diaz*, 154 AD3d 630, 631 [1<sup>st</sup> Dept 2017]). Also, a claim that Best breached a duty towards plaintiffs is subsumed in the breach of fiduciary duty claim. Therefore, this claim is dismissed.

The eighth cause of action, alleging that Best, Trunong, and Baptiste tortiously interfered with Negril's business relations, has been withdrawn. (Ellis affirmation in opposition to defendants' motion, ¶ 21).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to dismiss by defendants Peter Best and Lily Best a/k/a Lillian Truong is granted to the extent that the first, seventh, and eighth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that, within 20 days of the uploading of this order to NYSCEF, defendant is directed to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

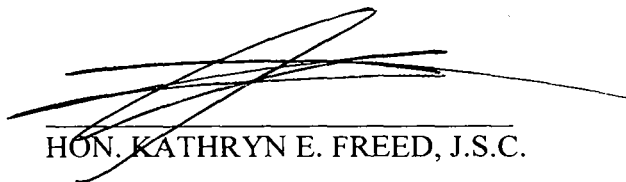
ORDERED that defendants Peter Best and Lily Best a/k/a Lillian Truong shall file an answer to the complaint within 20 days after serving a copy of this order with notice of entry on all parties and the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in this matter on April 30, 2019, at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: December 18, 2018

ENTER:



HON. KATHRYN E. FREED, J.S.C.