

- (ii) pursuant to CPLR 3211(a)(7), dismissing the Fourth Cause of Action on the additional ground that it fails to state a claim on which relief could be granted; and
- (iii) pursuant to CPLR 3211(a)(7), dismissing the Second Cause of Action as against me for failure to state a claim upon which relief could be granted.

2. Authority for this relief is set forth in the accompanying Memorandum of Law. This Affidavit is devoted specifically to the motion's first branch, for summary judgment. Copies of all pleadings filed to date are annexed as follows, in compliance with CPLR 3212:

<u>Exhibit</u>	<u>Pleading</u>	<u>Docket No.</u>
A	Third-Party Complaint	3
B	Answer of Third-Party Defendant James Schiano	6
C	Complaint in main action	1
D	Answer in main action	2

Background:

3. This motion is based entirely on facts alleged in the Third-Party Complaint. Systems Vend operates a vending machine business (Third-Party Complaint, ¶ 6) and is owned by Peter Harsanyi, a defendant in the main action (*Id.* at ¶ 5). I was hired as its bookkeeper in 2010 (*Id.* at ¶ 21). In that capacity, I reported to Mr. Harsanyi, Office Manager James Schiano (the plaintiff and third-party defendant), and the company's accountant (*Id.* at ¶ 15).

4. According to Systems Vend, the Third-Party Action derives from certain allegedly fraudulent activity attributed to Mr. Schiano in connection with the counting and reconciliation of dollar bills from the company's vending machines (Third-Party Complaint, ¶¶ 25-36). The First, Third and Fifth Causes of Action, for fraud, breach of fiduciary duty and "unfaithful servant," respectively, are directed against him based on that purported conduct.

5. For purposes of this motion I am not disputing the allegations against Mr. Schiano, though I do not believe them to be true. Obviously, I deny having in any way “aided and abetted” that alleged misconduct (the Second Cause of Action); the inadequacy of that claim as a matter of pleading is addressed in Point III of the Memorandum of Law.¹ Likewise, I am advised that the claim of fiduciary duty against me (Fourth Cause of Action) is also deficient as a matter of pleading, as explained in Point II of the Memorandum of Law.

Grounds for summary judgment on fiduciary duty claim:

6. This Affidavit is intended to establish that based Systems Vend’s own allegations, without resort to any extrinsic evidence, its claim for breach of fiduciary duty must fail because:

- (i) as the company’s bookkeeper, I was not a fiduciary (Memo of Law, pp. 3-5);
- (ii) the allegations identify no “special circumstances” that might have elevated my relationship with the company to fiduciary status (Memo of Law, pg. 6); and
- (iii) the duty of “loyalty” that I am specifically accused of breaching does not apply to the conduct attributed to either Mr. Schiano or me (Memo of Law, pp. 6-7).

7. Systems Vend is correct that my role with the company was that of bookkeeper, for which I was hired (Third-Party Complaint, ¶ 21). It is also correct that in that capacity I worked subordinate to the owner (Mr. Harsanyi), the Office Manager (Mr. Schiano), and the company’s accountant – to all of whom I “answered” directly (*Id.* at ¶ 15).

8. Consistent with that role, my job description as stated by Systems Vend (“paying bills, helping with bids, maintaining accounting programs”) (*Id.* at ¶ 23) was administrative, not managerial. I am advised that these non-managerial functions, and my subordinate role within

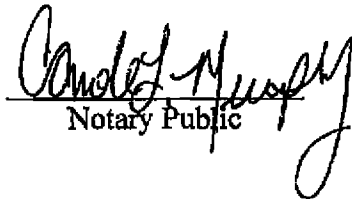
¹ I understand that those allegations are presumed true on this motion, even though I deny them. Regardless, however, I am advised that the Second Cause of Action does not state a viable claim for aiding and abetting fraud under the controlling authorities (Memo of Law, pp. 11-14).

the corporate hierarchy, could not have imposed upon me the “higher level of trust” required to establish fiduciary obligations (Memo of Law, pp. 3-5). I am further advised that without this predicate element of a claim for breach of fiduciary duty, and absent any “special circumstances” (*Id.* at pg. 6), the Fourth Cause of Action must fail as a matter of law.

WHEREFORE, deponent respectfully requests that this Court issue an Order dismissing the Fourth Cause of Action as against her as a matter of law pursuant to CPLR 3212(b); and dismissing the Fourth and Second Causes of Action pursuant to CPLR 3211(a)(7) for failure to state claims upon which relief may be granted; together with such other and further relief as the Court may deem just and proper.


 JOSEPHINE J. CASTRO

Sworn to before me this
 23rd day of June, 2022


 Notary Public

CAROLE L. MURPHY
 NOTARY PUBLIC, STATE OF NEW YORK
 NO. 01MU6052374
 QUALIFIED IN NASSAU COUNTY
 COMMISSION EXPIRES DEC. 11, 2022