

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,

Justice

TRIAL PART: 21

JAMES SCHIANO,

Plaintiff,

Index No.: 603964/2022

Motion Seq. No.: 001

Motion Submitted: 12/16/2022

-against-

DECISION AND ORDER ON MOTION

PETER HARSANYI, individually as fiduciary of SYSTEMS VEND MANAGEMENT CORP., VENDING SERVICE.COM, INC., CWS VENDING, INC

Defendants.

SYSTEMS VEND MANAGEMENT CORP.

Third-Party Plaintiff,

- against -

JAMES SCHIANO and JOSEPHINE J. CASTRO,

Third-Party Defendants.

The following papers were read on this motion:

- Notice of Motion for Summary Judgment and Supporting Papers [Seq. 001].....X
Affirmation in Opposition to Motion and Supporting Papers [Seq. 001].....X
Reply Affirmation [Seq. 001] .....X

Upon the foregoing e-filed papers, the motion filed by the Third-Party Defendant, Josephine J. Castro ["Castro"], for an Order pursuant to CPLR § 3212(b) granting her summary judgment and dismissing the fourth cause of action by Third-Party Plaintiff Systems Vend Management Corp. ["Systems Vend"] as against her, on the ground that as a matter of law, the Third-Party Plaintiff cannot prove a fiduciary duty on her part in her capacity as Systems Vend's bookkeeper; and pursuant to CPLR 3211(a)(7), on the additional ground that the fourth cause of action fails to state a claim on which relief could be granted; and pursuant

to CPLR 3211(a)(7), dismissing the second cause of action as against Ms. Castro for the failure to state a claim, is determined as hereinafter follows:

The plaintiff, James Schiano [“plaintiff” or “Schiano”], commenced the instant action by filing a Summons and Verified Complaint on March 29, 2022 (the “Complaint”). The crux of the plaintiff’s claims against the defendants, Peter Harsanyi, individually as fiduciary of Systems Vend Management Corp. [“Harsanyi”], Vending Service.com, Inc. [“Vending Service.com”], and CWS Vending, Inc. [“CWS”] [collectively, “defendants”], is that the plaintiff contends he was involved in a *de facto* business partnership with the defendants, in which he invested and otherwise directly/indirectly contributed funds totaling more than \$800,000.00, beginning around 2010 and ending around March of 2021, when the plaintiff was shut out of the business premises. He maintains that the instant action was brought at both law and equity for the plaintiff to enforce his rights to enjoy the benefits of his substantial investments in the parties’ business relationship.

Defendant/Third Party Plaintiff Systems Vend commenced a third-party action on May 16, 2022 by filing a Third-Party Summons and Complaint (the “Third-Party Complaint”) against Third-Party Defendants James Schiano and Josephine J. Castro. According to the Third-Party Complaint, Systems Vend is a corporation and is solely owned by defendant Harsanyi. Systems Vend operates a vending machine business, in which it delivers vending machines to individuals, entities, or locations, to sell snacks and drinks to the public or third-party individuals. Systems Vend alleges that Mr. Schiano was first hired by Systems Vend as a part-time employee in 2010, but then he was ultimately promoted to be Systems Vend’s full-time office manager. It is further alleged, *inter alia*, that in 2012, Systems Vend hired Ms. Castro as a bookkeeper upon Mr. Schiano’s recommendation and advice.

The Third-Party Complaint alleges that Schiano devised a fraudulent scheme to allow him to steal money and claim equity ownership of Systems Vend, and that this scheme greatly relied on third-party

defendant Schiano. It is alleged that Castro never questioned Schiano and allowed him to remove cash from Systems Vend's office without first receiving a report for the money tallied by Schiano, that Castro knowingly used Schiano's false reports and deceptively mischaracterized Schiano's transactions as loans or capital contributions made to Systems Vend, and that she purposefully withheld her internal records from Harsani and Systems Vend's accountant, allowing Schiano's fraudulent scheme to continue for years.

Plaintiff/Third-Party Defendant Schiano served a Verified Answer to the Third-Party Complaint ["Schiano's Third-Party Answer"] on June 23, 2022. Ms. Castro appears to have filed this motion to dismiss in lieu of filing an Answer to the Third-Party Complaint. The Third-Party Complaint's two causes of action against Castro- the second cause of action is asserted against Castro for aiding and abetting Schiano's fraudulent embezzlement scheme, and the fourth cause of action is asserted against Castro for breach of fiduciary duty.

The Court notes at the outset that Ms. Schiano's motion seeks an Order pursuant to CPLR 3212(b), granting summary judgment and dismissing the fourth cause of action, which is for breach of fiduciary duty, but Ms. Castro has not submitted a Statement of Material Facts pursuant to 22 NYCRR § 202.8-g as this Court requires in its individual part rules. Moving forward, counsel for all parties are reminded of the requirement that they submit Statements of Material Facts when moving for summary judgment and a Counterstatement of Material Facts if they are opposing a summary judgment motion. The Court will take the appropriate action and/or impose sanctions for future motions that are non-compliant.

In any event, while Castro initially moved for an Order pursuant to CPLR 3212(b) granting her summary judgment and dismissing the fourth cause of action for breach of fiduciary duty, in her reply papers she withdrew the portion of her motion made pursuant to CPLR 3212(b), as she agreed with the defendant/third-party plaintiff Systems Vend that the pre-joinder summary judgment motion was

premature. Accordingly, the portion of Ms. Castro's motion which seeks an Order pursuant to CPLR 3212 is DENIED as withdrawn.

Ms. Castro also moves for an Order pursuant to CPLR 3211(a)(7), arguing that both the second cause of action, for aiding and abetting, and the fourth cause of action, for breach of fiduciary duty, fail to state a claim as to Castro.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... [the Court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory". (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation and internal citation omitted]). "Further, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such affidavits, the facts alleged therein must also be assumed to be true...Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its [causes of action], of course, plays no part in the determination of a prediscovery [*sic*] CPLR 3211 motion to dismiss". (*Moskowitz v Masliansky*, 198 AD3d 637, 639 [2d Dept 2021][citations and internal citations omitted]).

Third-Party defendant Castro has submitted an affidavit in support of her motion to dismiss. A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7). (*Sokol v. Leader*, 74 AD3d 1180, 1181 [2d Dept 2010] [citing to CPLR 3211(c)]). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'...Yet, affidavits submitted by a defendant 'will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action' ... Indeed, a motion to dismiss pursuant to CPLR 3211(a) (7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all

and unless it can be said that no significant dispute exists regarding it” (*Sokol*, 74 AD3d at 1181-82 [2d Dept 2010] [internal citations omitted]).

The second cause of action in the Third-Party Complaint is for Castro’s alleged aiding and abetting of a fraud. “To recover for aiding and abetting fraud, the plaintiff must plead ‘the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud’ (*Markowits v Friedman*, 144 AD3d 993, 996 [2d Dept 2016] [citations omitted]). “‘Substantial assistance’ requires an affirmative act on the defendant’s part... ‘The mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.’” [*Markowits*, 144 AD3d at 996 [internal citation omitted]).

The allegations in the Third-Party Complaint, given a liberal construction and accepting the facts as alleged as true, sufficiently make out an underlying fraud. However, the Court finds that the allegations set forth in the Third Party Complaint concerning Castro’s alleged knowledge of Schiano’s alleged fraudulent scheme lack the particularity required for an “aiding and abetting fraud” cause of action. (*See Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013] [citations omitted] [“Aiding and abetting fraud ‘is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud’ combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud”]). In this case, even giving the Third-Party Complaint a liberal construction and accepting the facts alleged therein as true, and even as augmented by Schiano’s EBT testimony in a separate pending action that is filed under Index Number 610088/2021, the Court finds that the Third-Party Complaint fails to state a claim for aiding and abetting fraud as to Castro.

Furthermore, the Court finds that the allegations in the Third-Party Complaint stating that Schiano insisted on being alone while, *inter alia*, handling and tallying the cash collected from the vending machines flatly and materially contradicts the allegations that Castro “aided and abetted” Schiano’s fraud by

“knowing” that Schiano was not really making loans to the business, “knowing” that he was converting cash, and “knowingly” using Schiano’s false reports without questioning him. Schiano’s EBT testimony submitted by Systems Vend in opposition to the motion does not clarify or reconcile the contradictory allegations and, accordingly, based on the contradictions between the allegations concerning Schiano’s scheme and Castro’s alleged knowledge of Schiano’s scheme, the Court finds that the Third-Party Complaint fails to state a cause of action against Castro for aiding and abetting Schiano’s fraud. (*See Greene v Doral Conference Ctr. Assoc.*, 18 AD3d 429, 430 [2d Dept 2005]).

Accordingly, the portion of Castro’s motion which seeks dismissal of the second cause of action for aiding and abetting fraud asserted against Castro is GRANTED, and the second cause of action is severed and dismissed.

As to the fourth cause of action, which is for breach of fiduciary duty, “[t]he elements of a cause of action to recover damages 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”. (*Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 178 AD3d 987, 988-89 [2d Dept 2019] [citations omitted]). “A breach of fiduciary duty cause of action must be pleaded with the particularity required by CPLR 3016 [b]”. (*U.S. Fire Ins. Co. v Raia*, 94 AD3d 749, 751 [2d Dept 2012] [citations omitted]).

As Systems Vend correctly contends, “employees owe a duty of loyalty and good faith to their employer in the performance of their duties”. (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011] [citations omitted]). However, the conclusory allegations contained in the Third-Party Complaint, even as augmented by Systems Vend’s opposition papers and the EBT testimony from James Schiano, are conclusory and insufficient to assert a claim for breach of fiduciary duty as against Castro. (*See U.S. Fire Ins. Co.*, 94 AD3d at 751).

Accordingly, the portion of third-party defendant Castro's motion to dismiss which seeks dismissal of the fourth cause of action asserted against her, for breach of fiduciary duty, is **GRANTED**, and the fourth cause of action is severed and dismissed.

Accordingly, it is hereby,

**ORDERED**, that the portion of the third-party defendant Josephine Castro's motion which seeks an Order pursuant to CPLR 3212(b) is **DENIED**, as withdrawn, and it is further,

**ORDERED**, that third-party defendant Castro's motion for an Order pursuant to CPLR 3211(a)(7) seeking an Order which dismisses the Third-Party Complaint as against her is otherwise **GRANTED**, and it is further,

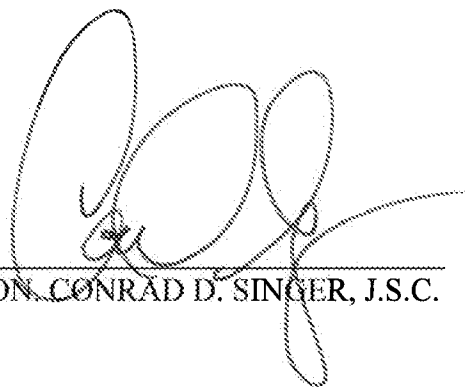
**ORDERED**, that the clerk is hereby directed to enter judgment in favor of third-party defendant Josephine Castro; and it is further,

**ORDERED**, that the clerk is hereby directed to amend the caption to remove Josephine Castro as a third-party defendant; and it is further,

**ORDERED**, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: March 14, 2023  
Mineola, New York



HON. CONRAD D. SINGER, J.S.C.

**ENTERED**

**Mar 17 2023**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE