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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CHAD EMORY, **JUSTINE GLASSMOYER,** and **PETSMART, INC.,** **Plaintiffs,** **v.** **JENNA JORDAN.** **Defendant.**	**Case No. 18-CA-006083**

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

This is a case about a militant organization's unlawful scheme to fill its coffers at any cost. The Complaint alleges that Jordan worked with PETA to infiltrate PetSmart to fabricate so-called evidence in connection with PETA's fundraising efforts. Plaintiffs seek money damages as compensation for the substantial harm they suffered from Jordan's violation of their constitutional and common law rights.

Jordan has moved to dismiss the contract and common law claims in Plaintiffs' suit on various grounds.[1] But she does not dispute the critical allegations in the Complaint describing her criminal enterprise to "infiltrate" PetSmart and steal the company's confidential information and unlawfully damage its reputation. For the reasons set forth below, the Defendant's motion to dismiss should be denied, and the Court should allow discovery to proceed in this case.

[1] The Defendant has not moved to dismiss the Plaintiffs' claims for damages related to her unlawful recordings of conversations.

FACTUAL ALLEGATIONS

In considering a motion to dismiss a court must accept as true all of the allegations of the complaint and the plaintiff must be given every reasonable inference from the facts. *Locker v. United Pharm. Grp., Inc.*, 46 So. 3d 1126, 1127 (Fla. 1st DCA 2010). At all times relevant to this case, Jordan was a paid operative of People for the Ethical Treatment of Animals ("PETA"). (Compl. ¶ 28.) According to its own promotional materials, PETA exists to accomplish two goals: (1) end private ownership of animals and (2) extend full human rights to animals. (Compl. ¶ 18.) But as a 501(c)(3) tax-exempt organization, PETA is an active fundraiser and relies on donations from the public to operate. (Compl. ¶ 26.)

Last year alone, PETA's revenue exceeded $50 million. (Compl. ¶ 24.) And in 2017, PETA contributed significant resources to enlist the help of Jordan and other agents to infiltrate companies. (Compl. ¶ 25.) PETA worked with these covert agents and instructed them to manufacture misleading reports from inside these companies, which PETA then uses to support its fundraising efforts. (Compl. ¶¶ 25-26.) PETA targeted PetSmart because it is one of the largest sources for pet adoptions in the United States and its campaigns against PetSmart have provided significant revenue to PETA. (Compl. ¶ 24.)

On March 29, 2017, Jordan submitted an employment application at PetSmart's location in Lake Pleasant, Arizona, to further this scheme. (Compl. ¶31.) To induce PetSmart into hiring her, Jordan intentionally misrepresented a litany of facts that were material to her application. (Compl. ¶¶ 32-39.) Such facts include her ongoing relationship with PETA, her previous employment history, and her intention to defraud PetSmart, unlawfully record its employees, and fabricate damaging information about the company. (Compl. ¶¶ 32-39, 54.) In her application, Jordan also affirmed that she had "withheld nothing that would, if disclosed, affect this application unfavorably." (Compl. ¶ 34.)

But when she submitted her application on March 29, 2017, Jordan knew that these representations were false, and she was acting as a PETA operative who always intended to defraud PetSmart. (Compl. ¶¶ 38-39.) PetSmart reasonably relied on Jordan's misrepresentations, and it was these misrepresentations which caused PetSmart' substantial injury. (Compl. ¶ 40.) Jordan also applied to work at PetSmart's locations in Brandon, Florida, and Bellevue, Tennessee. (Compl. ¶ 41.)

PetSmart takes seriously its duty to care for pets and provide premier services and products to pet owners. (Compl. ¶ 42.) And when Jordan was hired, she received training and signed a number of documents which laid out her obligations and the level of care required by the company. (Compl. ¶ 44.) Specifically, PetSmart informed Jordan that when she observed a sick or injured pet, she was required to transport the pet to a medical professional so that it could receive immediate veterinary care. (Compl. ¶¶ 42-43.)

But soon after she started working at PetSmart, Jordan refused to follow PetSmart's procedures. Instead of transporting pets who were infirm, Jordan refused to seek out medical treatment for pets that were in her care. (Compl. ¶ 84.) Beginning in April of 2017 and continuing throughout the remainder of her employment at PetSmart, Jordan recorded conversations with PetSmart representatives Chad Emory and Justine Glassmoyer. (Compl. ¶ 57-62.) Jordan then supplied these recordings to her contacts at PETA in Norfolk, Virginia, who doctored the footage to damage PetSmart's reputation and standing with its customers. (Compl. ¶ 44.) Jordan also improperly accessed and downloaded PetSmart's customer information, vendor lists, correspondence, personnel information, *inter alia*, and she disseminated this information to PETA and other third parties. (Compl. ¶ 66-67.)

ARGUMENT

Tellingly, the Defendant does not dispute these facts. Instead, the Defendant's motion argues: (1) the independent tort rule prohibits the Plaintiffs from pleading contractual damages and tort damages for Jordan's misconduct; (2) the Plaintiffs failed to state a claim for fraudulent inducement; and (3) the Complaint does not support a claim for breach of fiduciary duty under Florida law. As explained more fully below, each of these arguments must fail. ***First,*** the well-pleaded allegations in the Complaint satisfy all four of the elements of fraudulent inducement. ***Second,*** although the Plaintiffs must eventually elect whether to proceed based on either its tort claims or its contractual claims, Florida's liberal pleading rules permit plaintiffs to plead alternative claims. The Court cannot at this early stage dismiss the Complaint simply because it contains alternative theories of relief. ***Third***, the Plaintiffs are entitled to proceed on their unjust enrichment claims because the contracts at issue are void. ***Fourth***, because the Complaint alleges that the Defendant's criminal scheme spanned several states, the laws of those respective states—and not Florida—govern the extent of her fiduciary relationship with PetSmart.

I. THE COMPLAINT PROPERLY STATES A CLAIM FOR FRAUD IN THE INDUCEMENT.

The Defendant argues that PetSmart's fraud in the inducement claim should be dismissed. (Def.'s Mot. at 9.) But the Defendant's own brief properly identifies the four elements required to plead a fraudulent inducement claim: (1) misrepresentation of material fact; (2) the defendant's awareness of the statement's falsity; (3) the defendant intended the plaintiff to rely on the misrepresentation; and (4) plaintiff's injury flowing from the misrepresentation. (Def.'s Mot. at 9, citing *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010).)

The Complaint satisfies all four of these elements: Jordan "intentionally omitted" her employment history—specifically the fact that she had been terminated from working at a zoo in 2016 after her employer discovered she unlawfully recorded employees and misused the zoo's

confidential information. (Compl. ¶ 33.) She also falsely stated that she was not a PETA employee. (Compl. ¶ 32.) Jordan knew that each of these facts was false and she misrepresented them to induce PetSmart into offering her a position with the company. (Compl. ¶ 34.) Jordan's actions damaged PetSmart's business reputation and "caused a number of customers to no longer patronize PetSmart and purchase its pets or pet services." (Compl. ¶ 99.) The Complaint further alleges that Jordan's fraud caused PetSmart to suffer diminished sales, loss of customer goodwill, the conversion of its confidential information, and $16,855.95 in compensation and benefits to Jordan. (Compl. ¶¶ 105-106.)

But the Defendant's motion to dismiss argues that the Plaintiffs' fraudulent inducement count should be dismissed because "the Complaint contains no allegations that Ms. Jordan misrepresented her resume for the purpose of material gain." (Def.'s Mem. ¶ 40.) This argument fails for two reasons. ***First***, there is no requirement under Florida law that fraudulent inducement claims must be based on the defendant's subjective desire for "material gain." ***Second***, the Complaint alleges that Jordan acted under PETA's direction and was compensated by the organization for defrauding PetSmart. At this early stage, all reasonable inferences must be read in favor of the Plaintiffs and these allegations even satisfy the additional requirement the Defendant has engineered. *See Locker*, 46 So. 3d at 1127.

The Defendant also argues that PetSmart's fraudulent inducement claim should be dismissed because it "is nothing more than a repackaged breach of contract claim." But under well-settled black letter law, "actions for fraudulent inducement and breach of contract are not mutually exclusive." *Monco Enterprises, Inc. v. Ziebart Corp.*, 673 So. 2d 491, 492 (Fla. 1st DCA 1996) (citing *Sprayberry v. Sheffield Auto & Truck Service, Inc.*, 422 So. 2d 1073, 1075 (Fla. 1st DCA 1982). "[W]hen . . . fraud occurs in . . . connection with misrepresentations, statements, or omissions which cause the complaining party to enter into a transaction, then such

fraud is fraud in the inducement and ***survives as an independent tort***." *Output, Inc. v. Danka Bus. Sys., Inc.*, 991 So. 2d 941, 944 (Fla. 4th DCA 2008) (emphasis added). And "actions for fraudulent inducement and breach of contract are not mutually exclusive." *Monoco*, 673 So.2d at 492. Therefore, Florida law is clear that there is nothing duplicative about the Plaintiffs' fraud in the inducement claim and it is properly pled alongside the Plaintiffs' additional count for breach of contract.[2]

Likewise, the Defendant's argument that PetSmart "affirm[ed]" the contracts between Jordan and PetSmart must fail. The Complaint belies the Defendant's strained reading: PetSmart did not limit its requested remedies to damages under the contracts that Jordan fraudulently induced PetSmart into entering. Instead, PetSmart seeks damages resulting from that fraud, an injunction compelling Jordan to return to PetSmart the materials she fraudulently obtained, and to destroy any copies that remain in her possession. Under Florida Rule of Civil Procedure 1.110(b), "[e]very complaint shall be considered to pray for general relief." Mechanistic recitals for remedies are unnecessary, and the Plaintiffs were not required to explicitly seek rescission of the contract in the prayer for relief.

The Defendant's motion to dismiss Count 1 should be denied because the Complaint properly alleges fraudulent inducement.

II. PETSMART PLED BREACH OF CONTRACT AS AN ALTERNATIVE THEORY OF LIABILITY.

The gravamen of the Defendant's motion to dismiss is that the Plaintiffs cannot recover damages for contract claims and tort claims that arise from the same misconduct. Specifically, the Defendant argues that PetSmart's breach of contract claim (Count 9) prohibits it from pursuing claims for fraud (Count 2), conversion (Count 3), trespass to chattels (Count 4), and

[2] The Defendant's reliance on *Rolls v. Bloss & Nyitray, Inc.*, 408 So. 2d 229 (Fla. 3d DCA 1981), misstates Florida law, as that case does not address fraudulent inducement claims.

trespass (Count 5). But even though the bases of liability are disparate, at this early stage, the Florida Rules of Civil Procedure allow plaintiffs to plead causes of action in the alternative:

> A pleader may set up in the same action as many claims or causes of action or defenses in the same right as the pleader has, and claims for relief may be stated in the alternative if separate items make up the cause of action."

Fl. R. Civ. Pro. 1.110(g); *Mather-Smith v. Fairchild*, 135 So. 2d 233, 234 (Fla. 2d DCA 1961); *see also Alvarez v. Puleo*, 561 So. 2d 437, 437 (Fla. 2d DCA 1990) ("A party may plead and litigate inconsistent remedies."). This is precisely what has occurred presently. Count 9 of the Complaint is for breach of contract and is only an alternative theory of liability, in the event that the Court rules that PetSmart is not entitled to proceed on its primary claim of fraudulent inducement against Ms. Jordan.

Therefore, under the plain meaning of the Florida Civil Rules, the presence of one count sounding in contract, pled in the alternative, does not bar the Plaintiffs' preceding tort claims. And as described above, because the Complaint alleges facts sufficient to demonstrate that the agreements between Jordan and PetSmart were void as a result of Jordan's fraudulent inducement, the Defendant's argument that the independent tort rule bars the Plaintiffs' tort claims is a non-starter.

All but one of Defendant's case citations on the independent tort rule relate to post-judgment appeals. The sole case Defendant cites addressing the independent tort rule on a motion to dismiss arises from a federal court in the Southern District of Florida, *XP Global, Inc. v. AVM, L.P.,* No. 16-cv-80905, 2016 WL 4987618 (S.D. Fla. Sept. 19, 2016), and is inapposite here because the plaintiff in that case failed to allege that the defendant misrepresented any material facts.

In contrast, the Complaint in this case alleges that Jordan withheld information concerning her past and current employment, including with PETA, upon which PetSmart relied

to its detriment after Jordan unlawfully recorded conversations with PetSmart personnel, disclosed confidential documents and information to third-parties, and manipulated video recordings to create a public smear campaign against PetSmart. (Compl. ¶¶ 31–41, 53–68, 125.) Therefore, the Defendant's argument that Count 9 of the Complaint serves as a bar to Counts 2 through 5 of the Complaint is without merit, as Count 9 is pled in the alternative to the Complaint's claims sounding in tort.[3]

III. PETSMART IS ENTITLED TO PROCEED ON ITS UNJUST ENRICHMENT CLAIM.

The Complaint asks the Court for relief under a theory of unjust enrichment because Jordan "unjustly received benefits at the expense of PetSmart through her wrongful conduct." (Compl. ¶ 160.) The Defendant urges the Court to dismiss the Plaintiffs' unjust enrichment claim because there is "[a]n express contract between the parties." (Def.'s Mot. at 10.) But the Defendant again ignores the fact that the Complaint alleges that the parties entered into the contracts as a result of Jordan's fraudulent inducement. This renders any contracts between the parties as void. Moreover, "[u]nder Florida law, a party may simultaneously allege the existence of an express contract and alternatively plead a claim for unjust enrichment." *Real Estate Value Co., Inc. v. Carnival Corp.*, 92 So. 3d 255, 263 n.2 (Fla. 3d DCA 2012). This alternative pleading is appropriate where one of the parties asserts that the contract governing the dispute is invalid. *E.g. Baron v. Osman*, 39 So. 3d 449, 451-52 (Fla. 5th DCA 2010). Because the Plaintiffs' fraudulent inducement claim puts the validity of the contracts attached to the Complaint at issue, Florida law is clear that the Plaintiffs may plead breach of contract alongside and in the alternative to their unjust enrichment claim.

[3] To the extent the Court finds that Plaintiffs' Complaint is not sufficiently clear with respect to pleading Count 9 in the alternative to the preceding counts in the Complaint, Plaintiffs should be allowed leave to amend.

In *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. 5th DCA 1998), the Fifth District Court of Appeal stressed that if the causes of action are properly pled, then the questions of fraud, equitable estoppel, reliance, unjust enrichment and ***even whether an express contract applied*** to the disputed actions were premature for the court to decide on a motion to dismiss, as the court must take as true all well-pled allegations. For the same reasons as those outlined in *Williams*, this Court should deny the Defendant's motion to dismiss.

IV. THE COMPLAINT PROPERLY PLEADS THE EXISTENCE OF A FIDUCIARY RELATIONSHIP.

The Defendant's motion also argues that PetSmart's breach of fiduciary claim is fatally flawed because it fails to satisfy fiduciary requirements under Florida law. (Def.'s Mot. at 11.) Without conceding this point, the Defendant fails to acknowledge that Jordan's scheme spanned at least three states. Accordingly, Florida's choice of law rules apply the significant relationship test. *Jenkins v. Rockwood*, 820 So. 2d 426, 427 (Fla. 4th DCA 2002) ("the local law of the state where the injury occurred determines the rights and liabilities of the parties unless with respect to the particular issue, some other state has a more significant relationship to the parties and the occurrence.") (citing *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980)).[4] This means that the law of the state where each respective incident occurred would control PetSmart's breach of fiduciary duty claim.

Courts sitting in the jurisdictions in which Jordan was employed for PetSmart have held that "an employee has a fiduciary duty of loyalty to the employer." *Knott's Wholesale Foods, Inc. v. Azbell*, 1996 WL 697943 at *3 (Ct. App. Tenn. 1996); *Efird v. Clinic of Plastic & Reconstructive Surgery*, 147 S.W.3d 208, 219 (Ct. App. Tenn. 2003) (same). Jordan's actions in illegally videotaping PetSmart personnel and facilities and obtaining confidential documents and

[4] As set forth in the Complaint, Jordan frequently relocated in order to fraudulently obtain access to separate PetSmart locations and was domiciled in Arizona, Tennessee, and Florida at different times throughout her "undercover" activities on behalf of PETA. (Compl. ¶¶ 31, 41, 55–56, 91–92.)

information from PetSmart stores through a pattern of deceit was certainly not "solely in the benefit of the employer" within the scope of her employment. *Id*. And, in fact, the Complaint alleges that the goal of Jordan's campaign of deceit was to launch an unfair and unjustified public smear campaign against PetSmart on behalf of PETA.

CONCLUSION

For the forgoing reasons, the Defendant's Motion to Dismiss should be denied in its entirety.

Dated: December 7, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing document will be filed with the Clerk of Court using the CM/ECF system on December 7, 2018, which will send notification of such filing to the following:

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