

**United Staffing Solutions, Inc. v Humanedge, Inc.**

2020 NY Slip Op 32404(U)

July 22, 2020

Supreme Court, New York County

Docket Number: 656623/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM**

*Justice*

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UNITED STAFFING SOLUTIONS, INC.,

Plaintiff,

- v -

HUMANEDGE, INC., ROSA MCLEISH

Defendant.

-----X

INDEX NO. 656623/2019

MOTION DATE 11/27/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 10, 11, 12, 13

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth below, Rosa McLeish’s motion to dismiss the third cause of action for breach of fiduciary duty against her, pursuant to CPLR § 3211 (a) (7), is granted without prejudice.

**THE FACTS RELEVANT TO THE MOTION**

United Staffing Solutions (**USS**) is an employment search services company based in New York City (NYSCEF Doc. No. 1, Compl. at ¶ 1) who employed Ms. McLeish as an “at will” employee pursuant to a certain Agreement (the **Employment Agreement**), dated March 4, 2014, by and between USS and Ms. McLeish (NYSCEF Doc. No. 1 Exhibit A, ¶ 1).

Pursuant to the Employment Agreement, the parties agreed to limit Ms. McLeish’s ability to disclose confidential information that she acquired through her work with USS, both during and following her employment (*id.* at ¶¶ 4–7). To wit, the Employment Agreement provides that Ms.

McLeish was “employed in a confidential relationship with [USS] . . . and [was] entrusted with Confidential Information in connection with the performance of those duties” (*id.* at ¶ 6) which she was obligated not to disclose to others (*id.* at ¶¶ 5, 7). The Employment Agreement also contains non-solicitation provisions that prohibited Ms. McLeish from soliciting either USS’s other employees or its customers to persuade them to cease their relationships with USS (*id.* at ¶¶ 8–10). The Employment Agreement does not refer to or otherwise describe any fiduciary duty owed to or by any party.

Approximately five years later, USS and Ms. McLeigh entered into a Confidential Separation Agreement and General Release (the **Separation Agreement**), effective July 31, 2019, pursuant to which USS and Ms. McLeigh agreed to certain terms and conditions in connection with the end of Ms. McLeish’s employment with USS (NYSCEF Doc. No. 1, Ex. B, Separation Agreement at ¶ 1). Like the Employment Agreement, the Separation Agreement also required confidentiality and non-solicitation and did not expressly provide for a fiduciary relationship or fiduciary duties (*id.* at ¶¶ 10–11). Following the termination of her employment with USS, Ms. McLeish went to work for HumanEdge, Inc. (**HumanEdge**).

According to the Complaint, Ms. McLeish violated her Employment Agreement and Separation Agreement by improperly disclosing USS’s confidential customer information to her new employer, HumanEdge, before and after her employment relationship with USS ended (NYSCEF Doc. No. 1, Compl. at ¶¶ 12–14). USS also alleges that, following the execution of the Separation Agreement, and the termination of her employment relationship, Ms. McLeish

solicited three named USS employees to leave USS and join her at HumanEdge, as well as several unnamed clients (*id.* at 15).

Among other things, as against Ms. McLeish, the Complaint alleges causes of action for breach of contract and breach of fiduciary duty (*id.*). Ms. McLeish now moves to dismiss the third cause of action against her for breach of fiduciary duty pursuant to CPLR § 3211 (a) (7) (NYSCEF Doc. No. 5, Notice of Mtn.).

### DISCUSSION

Pursuant to CPLR § 3211 (a) (7), a party may move for judgment dismissing one or more causes of action on the ground that the pleading fails to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On such motion, the court must afford the pleadings a liberal construction and accept the facts alleged in the Complaint as true, according the plaintiff the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, bare legal conclusions are not accorded favorable inferences, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

CPLR § 3016 (b) imposes a heightened pleading standard for a cause of action for breach of fiduciary duty, requiring that for claims “of breach of trust . . . the circumstances constituting the wrong . . . be stated in detail” (CPLR § 3016 [b]). Simply put, here, the Complaint fails to satisfy the standard.

A fiduciary relationship arises between two persons when one of them is under a duty to act for, or to give advice for the benefit of the other upon matters within the scope of the relation (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Stated differently, a “fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other” (*AG Capital Funding Partners, L.P. v State St. Bank & Tr. Co.*, 11 NY3d 146, 158 [2008] [internal citations omitted]). While it is not mandatory that a fiduciary relationship be formalized in writing (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 115 [1998]), when the parties have made contractual agreements, courts look to those agreements to discover the nexus of their relationship (*Northeast Gen. Corp. v Wellington Advert., Inc.*, 82 NY2d 158, 160 [1933]).

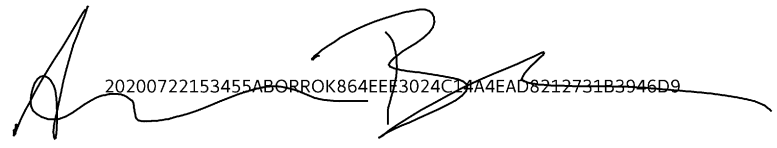
Where an agreement does not indicate a bargained for a fiduciary relationship, courts generally do not impute one (*Northeast Gen. Corp.*, 82 NY2d at 162; *EBC I*, 5 NY3d at 20). Alleging that an employee’s work entailed accessing or managing confidential information is insufficient on its own to create a fiduciary relationship (*see Wiener*, 241 AD2d at 115). Indeed, generally, a fiduciary relationship does not arise between an employer and an “at-will” employee incidental to their employment relationship (*see Sullivan v Harnisch*, 81 AD3d 117, 126 [1st Dept 2010]). With “at will” employees, the cause of action for breach of fiduciary duty is only available when it is alleged that the employee acted directly against the employer’s interests (*Beach v Touradji Capital Mgt., LP*, 144 AD3d 557, 562 [1st Dept 2016]; *see also Sullivan & Cromwell LLP v Charney*, 841 NYS2d 222, 222 [Sup Ct 2007]).

Critically, in the case at bar, the Employment Agreement provides that Ms. McLeish was an at-will employee, who could be terminated at any time, for any reason (NYSCEF Doc. No. 1, Ex. A, Employment Agreement at ¶ 1). Under these circumstances, to survive dismissal, the Complaint must sufficiently allege that Ms. McLeish had acted directly against USS's interests while in its employ — i.e., by embezzling, improperly competing, or usurping business opportunities (*see* NYSCEF Doc. No. 1, Compl. at ¶¶ 15–16). This, the Complaint fails to do. All that is alleged is that Ms. McLeish owed a fiduciary duty to USS, USS was “entitled to and did place their trust and confidence in [Ms.] McLeish to act with the utmost good faith toward USS in the course of her employment” and that, instead, she “sabotage[ed]” the relationship with USS “for her own financial gain [by] using [USS] resources, time, and facilities,” and that during Ms. McLeish's employment she improperly disclosed confidential unidentified client information and after her employment ended that she solicited three former co-workers and certain unnamed clients to come to her new employer. This, as alleged, is insufficient, and, at most, pleads a claim for breach of the Employment Agreement and the Separation Agreement only.

Accordingly, it is

ORDERED that the motion to dismiss the third cause of action for breach of fiduciary duty, pursuant to CPLR § 3211 (a) (7), is granted, and that that cause of action against Ms. McLeish is dismissed without prejudice; and it is further

ORDERED that Ms. McLeish file an answer to the Complaint within 20 days of this Decision and Order.



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7/22/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE