

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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JOAN BANACH,

Plaintiff,

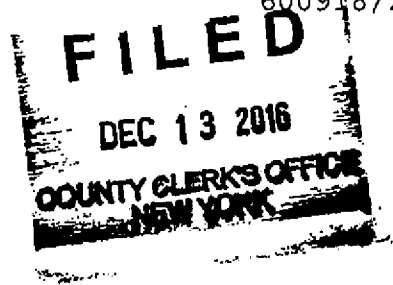
Index No.:

600918/2009

-against-

THE DEDALUS FOUNDATION, INC.,

Defendant.



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RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment & sanctions.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	<u>1,2,3</u>
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	<u>4, 5, 6, 7.</u>
Replying Affidavits.....	<u>8, 9.</u>
Exhibits.....	_____
Memorandum.....	<u>13, 14, 15, 16</u>
Reply Memorandum	<u>10, 11, 12</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This action involves claims between plaintiff Joan Banach, the long-time assistant of artist Robert Motherwell (Motherwell), and defendant The Dedalus Foundation, Inc. (Dedalus), the foundation established to preserve his artwork. In brief, plaintiff alleges that she has been improperly terminated and

subject to gender discrimination. Dedalus maintains that plaintiff breached her fiduciary duty, as well as misappropriated and converted certain Motherwell works. In motion sequence number 023, plaintiff moves, pursuant to CPLR 3212, for summary judgment dismissing Dedalus's counterclaims. Plaintiff further moves for an order imposing sanctions on Dedalus for discovery abuses. In motion sequence 024, Dedalus moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the seventh cause of action in plaintiff's amended complaint for employment discrimination. In motion sequence 025, Dedalus moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to liability on its counterclaim for trespass to chattel. Motions with sequence numbers 023, 024 and 025 are hereby consolidated for disposition.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff's amended complaint:

In 1981, plaintiff was hired by the late artist Robert Motherwell "to care for, consign, and otherwise manage his artwork and to further serve as his assistant." Amended complaint, ¶ 11. Motherwell created the Motherwell Foundation, later renamed the Dedalus Foundation, for the "purpose of fostering the public understanding of modern art and Modernism." *Id.*, ¶ 7. Dedalus is a non-profit corporation formed under the laws of Connecticut and New York. After Motherwell's death in 1991, plaintiff became an employee of Dedalus and a member of Dedalus's Board of Directors (Board).

During her employment with Dedalus, plaintiff held the position of curator, then Director and subsequently, Vice President. Plaintiff also served on the Committee for the Motherwell Painting Catalogue Raisonné (Catalogue Raisonné). The Catalogue Raisonné, a catalogue identifying Motherwell's

paintings, served as the "definitive authority" of the paintings.
41.^{1 2}

On August 22, 2008, the members of the Board, including plaintiff, received an email stating that the Board would be convening for a special meeting to vote on whether or not plaintiff should be removed as a member of the Board. Plaintiff claims that she was never given any reason for the proposed removal. On August 29, 2008, by a vote of 6-2, Dedalus's Board voted to terminate plaintiff as an employee and also to remove her from the Board. Although plaintiff and Board member Dore Ashton (Ashton) voted against the motion, plaintiff was terminated from Dedalus as an employee and a member of the Board on August 29, 2008.

Plaintiff claims that Jack Flam (Flam), who was the president of Dedalus in 2008, retaliated against her by firing her after she attempted to question his judgment regarding the authentication of artwork in the Catalogue Raisonné. For example, plaintiff states that Flam mis-authenticated two Spanish Elegy paintings as authentic, when they were both forgeries. Plaintiff claims that she advised Flam that one of the paintings may be authentic, but that she would need more time to study and review.

In addition, among other examples, plaintiff claims that, in July 2008, she consigned two Motherwell sketches for auction at

¹ This was later renamed the Scientific Committee and plaintiff remained a member of this committee until she was terminated.

² "A catalogue raisonné is a comprehensive, annotated list of all known works of a particular artist and is used as a primary reference by scholars, art dealers, curators, owners, students . . . [and] is critical to establish a reliable corpus of authentic works by Robert Motherwell" Dedalus's summary judgment motion, exhibit B, aff of Katy Rogers (Rogers), ¶ 3.

Christie's. Plaintiff states that these were personally given to her by Motherwell. Flam, as director of the Catalogue Raisonné, viewed the sketches and advised Christie's that the sketches were not authentic. Although he had already given his opinion to Christie's, plaintiff alleges that Flam still requested that plaintiff also view the sketches and give her opinion on their authenticity. Plaintiff told Flam that she was the consignee and that she knew that the sketches were authentic because Motherwell had given them to her. Plaintiff alleges that Flam was "embarrassed" by having to call Christie's and change his opinion on the sketches. Amended complaint, ¶ 81. Flam further advised plaintiff that if she intends on selling a Motherwell, she has to inform Dedalus first.

After this and other incidents where plaintiff questioned Flam, Flam "embarked on a campaign to diminish [plaintiff's] standing, discredit her reputation, vilify and defame her character, and remove her from [Dedalus]." *Id.*, ¶ 83.

On August 6, 2008, Flam asked plaintiff to provide a list of all the Motherwell artwork in her possession. On August 19, 2008, plaintiff identified six works that were given to her by Motherwell still in her possession and another four works that were sold at an auction.

On August 21, 2008, plaintiff states that she was provided with a severance agreement from Dedalus's lawyer. Although she knew she was being terminated, she claims that she was not provided with a reason. The severance agreement set forth that, as a condition of receiving the severance, plaintiff was required to return to Dedalus all of the art, and books, among other things, that she "prepared or obtained during the course of her

employment with Employer, as a director of Employer, or as an employee of Robert Motherwell." Dedalus's exhibit M at 3.³

Evidently, after plaintiff's settlement demands were not met, plaintiff commenced this action by filing a complaint on March 25, 2009. The complaint contained five causes of action grounded in breach of contract, wrongful removal and defamation. That same day, Dedalus filed a federal action against plaintiff, alleging federal and state law claims grounded in theft, conversion and breach of fiduciary duty.⁴

On April 10, 2009, plaintiff filed the instant amended complaint, including a cause of action for employment discrimination along with causes of action for breach of contract, promissory estoppel, breach of contract - third-party beneficiary, breach of right to notice and opportunity to defend, wrongful removal and defamation. In brief, plaintiff had alleged that a letter written by Motherwell, as well as Motherwell's will, entitled her to a life-employment contract. According to plaintiff, Dedalus breached this employment contract when it terminated her without cause.

Pursuant to CPLR 3211 (a) (1) and (7), Dedalus moved to dismiss six out of the seven causes of action. Dedalus argued that plaintiff was an at-will employee who could be terminated without cause, but that cause did, in fact, exist. Dedalus

³ After her employment and her membership on the Board was terminated, plaintiff's lawyer wrote to Dedalus. The letter advised Dedalus that, unless it provides a satisfactory settlement of plaintiff's claims, plaintiff will proceed with a lawsuit against Dedalus. Counsel informed Dedalus that plaintiff was allegedly improperly discharged, among other reasons, because she was guaranteed life-time employment by Dedalus. Plaintiff did not state that she was subject to gender discrimination.

⁴ On October 10, 2009, the District Court of the Southern District of New York declined to exercise its discretionary state jurisdiction over the state law claims and dismissed them.

alleged that plaintiff stole art owned by Dedalus and that she destroyed the evidence of this theft by erasing the hard-drives of Dedalus-owned computers.

This court granted Dedalus's motion to dismiss on May 27, 2010, dismissing all of the claims in the complaint except the one for employment discrimination. In the decision, the court held, among other things, that, plaintiff's employment with Dedalus was terminable at-will under the laws of both Connecticut and New York and that "[c]ontracts for employment for life are unenforceable in New York." *Banach v Dedalus Found., Inc.*, 2010 WL 2357833, 2010 NY Misc LEXIS 2614, *10 (Sup Ct, NY County 2010), *aff'd* 89 AD3d 481 (1st Dept 2011). The court further noted that "Dedalus has not argued for the dismissal of Banach's seventh cause of action alleging employment discrimination, and neither side has provided any argument for or against this cause of action. Therefore, this cause of action remains." *Id.* at *14, *12.

Dedalus now moves for summary judgment dismissing the remaining cause of action for employment discrimination based on plaintiff's gender.

Plaintiff's contentions with respect to gender discrimination:

Plaintiff believes that her termination was motivated by gender discrimination. She alleges that Flam was threatened because plaintiff was a woman and he could not tolerate being questioned by a woman. According to plaintiff, Flam took steps to diminish plaintiff's role and responsibilities, in part, due to her gender.

In the amended complaint, plaintiff argues that Flam wrongly perceived plaintiff to be a "secretary" due to her gender. Plaintiff further alleges that she was paid less than male employees who were less qualified and that she was excluded from certain projects as a result of her gender.

According to plaintiff, in addition to Flam, the members of the Board also engaged in gender bias, in that they did not consider plaintiff to be equal to them in stature or decision-making abilities, due to her gender.

Dedalus's motion for summary judgment:

On its motion for summary judgment, Dedalus maintains that plaintiff cannot provide any evidence that supports a reasonable inference of discriminatory motive for her termination after a 17-year employment with Dedalus. On the contrary, according to Dedalus, Dedalus terminated plaintiff because it reasonably believed that plaintiff was in possession of, and sold, stolen Motherwell art that belonged to Dedalus.

In support of its motion, Dedalus provides an affidavit from Rogers. Rogers has been employed by Dedalus since 2003 and is currently the director of the Catalogue Raisonné and also a member of the Board. Rogers states that on July 15, 2008, while working for Dedalus, she was contacted by Christie's regarding two untitled Motherwell 1958 "ink and pen on paper" drawings. Rogers aff, ¶ 6. Christie's had requested any additional information it could add to its auction catalogue. Rogers states that she did not recognize the two works and she asked Christie's to have the consignor contact the Catalogue Raisonné. By July 23, 2008, the consignor of the two 1958 drawings failed to contact the Catalogue Raisonné. Rogers stated that this "raised a red flag because it is highly unusual for a consignor to ignore a request from a Catalogue Raisonné project. It is in the best interest of an owner to have their work catalogued for inclusion in a Catalogue Raisonné because that confirms the authenticity of the work and raises the market value of an artwork." *Id.*, ¶ 13.

On August 5, 2008, Rogers states that she and Flam went to Christie's to inspect the two drawings. As plaintiff had alleged

in the facts set forth above, plaintiff was then consulted about the two drawings, after Rogers and Flam determined that another member of the Catalogue Raisonné needed to verify the authenticity.

After being consulted, plaintiff advised Rogers that the drawings belonged to her. Rogers stated that plaintiff's husband, not plaintiff, had consigned the drawings on plaintiff's behalf.

Rogers contends that, prior to August 5, 2008, she did not know that plaintiff was the owner of the two drawings or that plaintiff's husband was the consignor. She continues, "[t]hese works consigned by [plaintiff's husband] while concealing the identity of [plaintiff] were entirely unknown to Dedalus and the Project before Christie's contacted me." *Id.*, ¶ 17. Rogers advised that this was a "complete shock," given that plaintiff was a member of Catalogue Raisonné and a Dedalus board member and had previously been asked to disclose her possession of any Robert Motherwell works. *Id.* She further adds that from 2001 to 2004, plaintiff's husband was a private art dealer, and "was one of Dedalus's trusted fiduciary agents authorized to sell Robert Motherwell works for Dedalus." *Id.*, ¶ 18.

Flam testified that, after he and Rogers looked at the two Motherwell drawings at Christie's, he called plaintiff to also have her inspect them. Flam states that he asked plaintiff because he "highly value[s] her opinion." Flam tr at 547. When plaintiff told Flam that the paintings were authentic and that she knew this for sure because she was the owner, Flam testified that he was "really sha'en by this." *Id.* at 548. He states, "I was stunned because she was selling these works that we had no record of at all, whatsoever. She never informed anyone. She had resisted the usual procedure that we get from people we don't even know who have no responsibility . . . to let us know what

the Provenance is or what the circumstances are." *Id.* Plaintiff advised Flam that she could not locate any documents establishing her right to the 10 Motherwell works.

When asked if he was upset about allegedly mis-authenticating works, Flam testified that it was an "absurd question to him." He stated that he had not yet provided an opinion yet on the work, he had doubts about the authenticity and he was being cautious by having another person look at it. Flam continued that this incident made Dedalus seem "incompetent in that we basically had a board member, an employee who was selling the work." *Id.* at 554.

In conclusion, Flam decided to terminate plaintiff because plaintiff, "as an employee, and as someone who was an essential member of the Catalogue Raisonné committee, scientific committee, working on the Catalogue Raisonné, was selling works without ever telling people - not only being secretive about them but works that we had no record of at all and many of which had no inventory numbers." *Id.* at 556-557. Flam further stated that he was also shocked because he had known plaintiff for 26 years and he could not imagine her doing what she did.

When asked about other potential Board members and their duty to disclose their ownership of Motherwell art, Flam testified that plaintiff specifically breached her duty as an employee and a Board member because "[u]nlike other board members who were involved in this, [plaintiff] was an employee and member of the Catalogue Raisonné committee. So it was part of her job and employment with the Dedalus Foundation to be watching after information like this and supplying information like this." *Id.* at 164-165. Flam described what he believed to be "honest practice, especially if one were in possession of work that had an inventory number and they were owned by the person who was responsible . . ." *Id.* at 165.

According to Dedalus, testimony of other Board members further confirms that plaintiff was terminated because they reasonably believed that plaintiff unlawfully sold Motherwell drawings and breached her fiduciary duty. For example, Richard Rubin (Rubin), Board member and former president, testified that he agreed that plaintiff should be terminated. He stated that he "agreed that she shouldn't have had [undocumented material] and I was distressed to know that [plaintiff] was auctioning it off under [her husband's] name, and auctioning it I was distressed." Rubin tr at 117. This decision to terminate plaintiff was supported by the Board and occurred right after, and as a result, of the disclosure of the 10 Motherwell pieces.

Dedalus further claims that any alleged authentication disagreements did not result in any adverse employment action as a result of her gender. Dedalus states that plaintiff was appointed unanimously as Dedalus's Corporate Secretary in 1991. The same Board, with whom she served for 17 years, also voted to promote and elect her as Dedalus's vice president. Flam testified that Morgan Spangle (Spangle) was given some of plaintiff's "day-to-day running of things" because plaintiff had requested that she did not have to come into the office every day. Flam tr at 96. According to Dedalus, plaintiff is unable to establish that she was treated any differently in the terms and conditions of her employment, due to her gender.

According to Dedalus, plaintiff herself admits that she was given important responsibilities while working at Dedalus. Plaintiff was also selected to serve on the Art Committee between 1991 and 2008 with fellow board members Flam, Elderfield, Rosand and Ashton. Among other responsibilities, plaintiff was selected by the Board to serve on the Grants Committee and on the Catalogue Raisonné. According to Dedalus, plaintiff never asked

to be on the Executive Compensation committee or complained that she could not serve on this committee.

Dedalus alleges that plaintiff was an executive officer for 17 years and never complained about gender discrimination. Dedalus claims that plaintiff herself voted on the appointment of the members of the Board, including removing Motherwell's wife as a Board member in 1996. Plaintiff also voted to increase certain Board members' salary and approve their employment contracts.

According to Dedalus, between 1991 and 2008, plaintiff was the third-highest paid employee at Dedalus behind Rubin, while he was president and Flam, while he was president. Dedalus alleges that, at the time she was terminated, plaintiff was the third-highest paid employee at Dedalus and Rogers was the fourth. According to Dedalus, plaintiff has not provided any evidence that her salary was ever incommensurate with her background and time spent at Dedalus. It is undisputed that plaintiff lacks any educational degree beyond high school. However, for example, both Flam and Rubin have PhD's and go to the office every day, while plaintiff does not.

Finally, Dedalus argues that any alleged discriminatory comments made by Rubin were made in the 1990's, and are outside the statute of limitations.

In her affidavit submitted to support both this and another motion, some of plaintiff's allegations include the following with respect to gender discrimination:

- Without providing any specific allegations, plaintiff states that, although she was an "accomplished painter, curator and author, I was thought of and referred to by [Dedalus] officers as an 'office secretary.'" Plaintiff's aff dated August 21, 2015, ¶ 7.

- Without providing any specific dates or details, plaintiff claims that Rubin made comments about her appearance and suggested that when she entered her 50's, she should consider hormone replacement therapy to "keep [her] looks up." *Id.* Rubin further told plaintiff a story about how he was pursued by a younger college student and this made plaintiff uncomfortable. *Id.* In addition, following Motherwell's death, Rubin "explicitly told me that he expected me to be his secretary and gave me many clerical functions to perform." *Id.*
- Plaintiff claims that, on unspecified dates and times, Flam made unwelcome comments on her appearance such as "commenting on how sexy women looked in heels and jeans when that was my attire." *Id.*, ¶ 11.
- Without providing any examples, plaintiff alleges that she was paid less than her male peers. She further contends that she and the other female board member, Ashton, were excluded from the all-male compensation committee "which favored the men with high salaries and stipends." *Id.*, ¶ 12.
- Plaintiff provides other examples of differential treatment in that she was excluded from meetings. She further alleges that she was sued for breach of fiduciary duty for failing to disclose her ownership of Motherwell works while "Rubin and Flam never disclosed their ownership without criticism,

penalty or other adverse action." *Id.*

Plaintiff claims that some of her responsibilities were shifted to Spangle, a new male hire, who had no comparable credentials or experience.

- After Flam's alleged mis-authentication of a Spanish Elegy painting, among others, plaintiff states that she "became increasingly concerned about Flam's authentication mistakes and his failure to follow procedure." Flam further "made authentication mistakes" regarding the two Motherwell sketches owned by plaintiff and consigned by plaintiff's husband. "Ultimately, after conferring with me, Flam had to reverse his opinion, which he had given without following Foundation procedures." *Id.*, ¶ 23. Plaintiff believes that, after the authentication and other disputes, "the male leadership took steps to ensure that Ashton and I would no longer have a role at [Dedalus]." *Id.*, ¶ 25. "I was summarily terminated and removed from the Board on wholly fabricated grounds that I was a thief and had violated my fiduciary duty." *Id.*
- Flam "demanded" that plaintiff provide a list of the Motherwell art she owned. According to plaintiff, she was "unaware of any policy by which Dedalus Board members were required to disclose their ownership or sale of Motherwell works." *Id.*, ¶ 24.

- Plaintiff claims, for the first time, that after an overseas business trip taken together in 2004, Flam and plaintiff's relationship "seemed changed. Flam regularly asked me out to dinner, ordered bottles of expensive wine for us, and charged it all to [Dedalus]." *Id.*, ¶ 10.⁵

Plaintiff further contends that the treatment of Ashton, the other female Board member, demonstrates gender bias in the workplace. For example, plaintiff claims that Ashton was also left out of the Compensation Committee, left out of meetings where key decisions took place and that Ashton's opinions were not "heeded in the same way as those of her male colleagues." Plaintiff's memo of law at 18.

Ashton states, "[plaintiff] and I were regularly excluded from meetings at which key decisions were made about the operation and future of the organization. I would often see Flam and Elderfield huddled together in conversation. They were apparently discussing issues and making decisions . . ." Ashton aff, ¶ 9. Ashton believes that, "[i]n 2008, a number of authentication disputes arose which, in the end led to the ouster

⁵ Among other allegations, including, but not limited to, excerpts from Joachim Pissarro's deposition, plaintiff includes an incident she discovered after she was terminated as well as Board minutes that took place the year after she was terminated. However, these are not relevant to plaintiff's claims that she was terminated based on gender or that her gender impacted the conditions in the office.

of [plaintiff] from her employment at [Dedalus] and her position on the board." *Id.*, ¶ 12. Ashton further states that plaintiff's gender affected the treatment she received by the male leadership at Dedalus.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact [internal quotation marks and citation omitted]." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility [internal quotation marks and citation omitted]." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010).

Plaintiff's Affidavit:

During plaintiff's deposition in 2014, counsel asked plaintiff if there was anything else she remembered about the year 2004 that was not in her amended complaint, affidavit or testimony that she was relying on for her claim of discrimination. Plaintiff responded that there was nothing else. However, now, in an affidavit dated August 21, 2015, submitted after her amended complaint and testimony, plaintiff, for the first time, mentions that Flam treated her differently after they went on a business trip together in 2004. "Plaintiff's affidavit, which contradicted [her] deposition testimony, created only a feigned issue of fact, and [is] insufficient to defeat defendant's motion." *Mermelstein v East Winds Co.*, 136 AD3d 505, 505 (1st Dept 2016). As a result, the court will not consider plaintiff's allegations in her affidavit regarding gender discrimination that were not in her testimony.

II. NYCHRL:

Pursuant to the New York City Human Rights Law (NYCHRL), as stated in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender.

In evaluating claims under the NYCHRL, the court must evaluate the claims with regard for the NYCHRL's "uniquely broad

and remedial purposes." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009) (emphasis in original). "For [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." *Id.* at 78; see e.g. *Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 (1st Dept 2013) (Court held that plaintiff's testimony regarding disability-based discrimination raised issues of fact as to whether she was treated differently under the NYCHRL or suffered an adverse employment action under the New York State Human Rights Law).

In addition, the Appellate Division, First Department, has reaffirmed the applicability of the burden-shifting analysis to discrimination cases, as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) in addition to the mixed-motive analysis. See *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012) ("an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases").

In the burden-shifting analysis, the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004).

Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* at 965. If the employer meets this burden, the plaintiff is still entitled to "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination [internal quotation marks and citation omitted]." *Id.*

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination [internal quotation marks and citations omitted]." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 127.

Applying these principles to the case at hand, Dedalus is entitled to summary judgment dismissing the seventh cause of action alleging gender discrimination in violation of the NYCHRL.

As set forth below, plaintiff has not raised any issues of fact that Dedalus's proffered reasons for terminating her were pretextual or that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor" for Dedalus's actions. *Id.* at 127; see also *Carryl v MacKay Shields, LLC*, 93 AD3d 589, 590 (1st Dept 2012).

Turning to the burden-shifting test, plaintiff's allegations cannot support an inference of discrimination. Plaintiff claims that she was terminated, in part, due to her gender because Flam could not handle a woman questioning his authority. Plaintiff argues that plaintiff knew of and challenged Flam's alleged misjudgment and that spurred Flam's campaign "designed to eliminate anyone who might question his judgment or procedures, and to bolster his own credibility and fortify his position with the Foundation." Amended complaint, ¶ 50. However, even viewing the evidence in the light most favorable to plaintiff, plaintiff has not provided any evidence that Flam's purported negative reactions were targeted to her as a result of gender. See e.g. *Melman v Montefiore Med. Ctr.* (98 AD3d at 126) ("[M]ere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code") (internal citation and quotation marks omitted).

Nonetheless, even if plaintiff met the prima facie burden in the *McDonnell Douglas* framework, plaintiff has failed to produce

any evidence demonstrating that the decision to terminate her was pretextual.

The recorded chain of events in August 2008 leading up to plaintiff's termination are not in dispute. On August 5, 2008, the record indicates that Flam and Rogers discovered that plaintiff owned undocumented Motherwell works and was consigning them through her husband. Rogers, as well as the Board members, testified that they were shocked to learn that plaintiff had not documented these works, given her job and her position on the Board. Plaintiff later advised Flam that she owned 10 Motherwell works but could not document her ownership. Shortly after listing the 10 works, plaintiff was terminated.

Plaintiff does not dispute that she was on the Catalogue Raisonné and responsible for documenting and cataloguing all known Motherwell works to be included in the Catalogue Raisonné. For example, plaintiff's amended complaint states that she "developed the system by which [Motherwell's] works were recorded and his records kept." Amended complaint, ¶ 15. In addition, during testimony, plaintiff agreed that she was "given a very important responsibility within The Dedalus Foundation to help oversee, catalogue, control, reconcile and help establish a reliable system of control over the foundation's artwork inventory." Plaintiff's tr at 296.

Plaintiff does not dispute what occurred but claims that she

did nothing wrong because, among other things, the Motherwell works were gifts to her. However, plaintiff does not provide anything but speculation that Flam or the Board members decided to terminate her for reasons other than what transpired at Christie's. Moreover, it is not unreasonable that someone who is responsible for ensuring the accuracy and authenticity of Motherwell artwork and inventory would be terminated for not including her ownership of Motherwell artwork on that inventory. "Conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment." *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005).

Dedalus has provided a legitimate business reason for plaintiff's termination. Although plaintiff argues, for various reasons, that she did nothing wrong, plaintiff has failed to demonstrate how Dedalus's decision, at the time, to terminate her, was pretextual. See e.g. *Melman*, 98 AD3d at 121 ("[A] challenge . . . to the correctness of an employer's decision, does not, without more, give rise to the inference that the [adverse action] was due to [] discrimination [internal quotation marks and citations omitted]").

Turning to the mixed-motive analysis, none of plaintiff's allegations can establish that her termination was motivated, even in part, by discrimination. See e.g. *Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 (1st Dept 2014) ("Even under the mixed-

motive analysis applicable to City Human Rights Law claims, plaintiff's claim fails, because there is no evidence from which a reasonable factfinder could infer that [protected status] played any role in defendant's decision to terminate [her]").

Plaintiff claims that she was not provided with a reason for her termination and apparently this demonstrates pretext. This argument is dubious, considering plaintiff's emails with Flam regarding the undocumented artwork and plaintiff's severance agreement, which condition the severance on the return of Motherwell's art. Nonetheless, the court, as a result of granting Dedalus's motion to dismiss, has already determined that plaintiff, as an at-will employee, could be terminated at any time. In addition, pursuant to Dedalus's by-laws and the relevant Connecticut provision, the court held that directors could be removed without cause. See *Banach v Dedalus Found., Inc.*, 2010 WL 2357833, 2010 NY Misc LEXIS 2614.

Allegations of disparate treatment:

In an attempt to demonstrate that other women also experienced gender discrimination while working at Dedalus, plaintiff offers the testimony and affidavit of Ashton. However, this affidavit is conclusory and does not support plaintiff's claim that Dedalus's actions were based on a discriminatory animus or that she was treated less well due to her gender. For example, plaintiff only speculates that other Board members did

not give Ashton's opinion the same weight as the male Board members. Moreover, Ashton was only a Board member, not an employee of Dedalus, and conceded that she was only in Dedalus's offices on occasion.

In addition, while stating that she was excluded from making key decisions, during her testimony, Ashton could not remember what key decisions, if any, she was excluded from. Ashton testified at 136. By way of another example, Ashton's affidavit stated that plaintiff was treated like a secretary by the male executives at Dedalus. During her deposition, Ashton was asked what conduct she witnessed that supports this allegation, to which, Ashton replied, "I don't have an answer for that." *Id.* at 29.

Plaintiff asserts that Dedalus is an "inhospitable place for women." Plaintiff aff, ¶ 6. Plaintiff provides the example of how all of the four women originally appointed by Motherwell to the Board have either resigned or been removed. However, this argument is specious, as plaintiff herself voted to remove Motherwell's wife from the Board in 1996.

In another instance, plaintiff claims that she was excluded from meetings "at which key decisions were made," but does not give any examples except for the Board meeting at which she was terminated. *Id.*, ¶ 13. The record reflects that plaintiff was indeed present at this meeting and that she did not vote in favor of her removal. In addition, although it is undisputed that

plaintiff was appointed to several other prestigious committees, plaintiff states that she was excluded from the Compensation Committee but there is no indication that she requested to be on this committee.

Discriminatory comments:

Without specifying any dates, plaintiff states in her affidavit that both Flam and Rubin made gender-stereotyped comments to her about her appearance and that Rubin told her an inappropriate story. Plaintiff further claims that, following Motherwell's death, Rubin asked plaintiff to perform clerical functions. She further alleges that she was thought of as an office secretary.

Plaintiff commenced this action on April 10, 2009. Any allegations that occurred prior to April 10, 2006 are time-barred as outside the three-year statute of limitations. See CPLR 214 (2). By her own testimony, plaintiff confirms that most of the alleged comments were made in the 1990's. However, even if any of the alleged comments were within the statute of limitations, they are not actionable, as *Dedalus* has established that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'." *Williams v New York City Hous. Auth.*, 61 AD3d at 80.

Disparate pay:

Plaintiff generally asserts that she was "paid less than my male peers." Plaintiff aff, ¶ 12. She disputes Dedalus's salary data, which places her as the third highest paid employee at Dedalus. Regardless, this salary discrepancy does not create a triable issue of fact.

"With respect to plaintiff's gender-based unequal pay claim, she was required to establish that she is a member of a protected class, that she was paid less in such position than others similarly situated, and that her receipt of lower wages occurred under circumstances giving rise to an inference of sex discrimination."

Curto v Zittel's Dairy Farm, 106 AD3d 1482, 1483 (4th Dept 2013).

In this situation, plaintiff has not established that she was paid less than others similarly situated. Both Rubin and Flam, the only two employees who earned more than plaintiff, have PhD's, while plaintiff does not have any educational degree beyond high school. Moreover, plaintiff does not provide any evidence that her alleged lower salary is the result of a discriminatory animus.

Further, as noted by Dedalus, plaintiff, as a Board member, voted and approved every salary, including the other male employees' and her own. As plaintiff voted to approve these

salaries, "without voicing any objection, there was a complete ratification and acquiescence." *Winter v Bernstein*, 177 AD2d 452, 453 (1st Dept 1991).

Plaintiff further claims that some of her job responsibilities were given to a less-qualified male. Without providing any dates or circumstances surrounding this allegation, even if this did occur, this alteration of job activities is not an adverse action that is actionable as employment discrimination. See e.g. *Ragoo v New York City Taxi & Limousine Commn.*, 132 AD3d 562, 562 (1st Dept 2015) ("Even assuming that the transfer and reassignment resulted in a change of plaintiff's duties, the transfer was at most an alteration of her responsibilities, and not an adverse employment action as she retained the terms and conditions of her employment, and her salary remained the same [internal quotation marks and citations omitted].") Plaintiff has raised no issue of triable fact that the shifting her responsibilities was motivated in part by discrimination.

The court finds that plaintiff's claims that she was treated less well due to her gender are conclusory and cannot defeat summary judgment. Even under the NYCHRL, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 131. The court in an employment discrimination case "should not sit as a super-

personnel department that reexamines an entity's business decisions [internal quotation marks and citation omitted]." *Id.* at 121. Accordingly, Dedalus is entitled to summary judgment dismissing plaintiff's remaining cause of action in the complaint for employment discrimination.

Plaintiff's motion for summary judgment on all counterclaims:

Counterclaims three and nine through twelve have been dismissed in prior motions. In addition to the facts set forth above, additional relevant facts are as follows:

Dedalus states that plaintiff began working for Motherwell in 1981, "where one of her main responsibilities was to catalogue all of his works with studio numbers." Answer with second amended counterclaims (Answer), ¶ 43. Dedalus states that, prior to Motherwell's death, plaintiff was the sole person responsible for assigning studio inventory numbers to Motherwell works.

After Motherwell passed away, plaintiff worked for Dedalus, where one of her main responsibilities was to "assist in organizing and inventorying all of Motherwell's works and later assist in creating Motherwell's Catalogue Raisonné." *Id.*, ¶ 47. Dedalus states that plaintiff controlled the inventory and would supervise this inventory, which consisted of almost 10,000 original works. Plaintiff would provide audit information to Dedalus's accountants and would also price the works. When

questioned about an artist's catalogue of works, plaintiff testified that she understood, "in a general sense," the importance of noting in the Catalogue Raisonné, "whether the work was a gift or an acquisition from some subsequent owner because that reflected the artist's intent, his circle of friends, his close contacts" Plaintiff's tr at 839.

Dedalus maintains that, in 2005, it discovered that plaintiff took home certain Motherwell works without permission, including a Metropolitan Museum Sketchbook. Dedalus alleges that plaintiff was "observed surreptitiously returning" materials to Dedalus. Answer, ¶ 59.

As set forth previously in the facts, Dedalus claims that the August 2008 incident at Christie's was the first time it found out that plaintiff was surreptitiously selling undocumented Motherwell works. Flam was "shocked by [plaintiff's] failure to deal with Dedalus and its Board in an honest, open and disinterested matter, as required by her fiduciary duties." *Id.*, ¶ 72. Dedalus claims that its reputation was also damaged by the Christie's incident, as it appeared unprofessional, as Dedalus's president did not even know of the existence of a Motherwell work that was consigned by one of its long-time Board members.

In total, prior to litigation, Dedalus claims that plaintiff misappropriated at least 10 Motherwell works and sold them for at least \$93,200.00. When she provided the email to Flam in 2008,

plaintiff had no documentation to support her rightful ownership of the works. *Id.*, 94.

Subsequent to litigation by, among other things, contacting art galleries, Dedalus "uncovered [plaintiff's] pattern of secret, deception and misappropriation." *Id.*, ¶ 99. To list a few examples, Dedalus claims the following:

- An art gallery informed Dedalus that plaintiff sold a Motherwell there in 1996. This painting was not on the list originally given to Flam in 2008. Additional undocumented paintings were sold by plaintiff in 1996 and 1997 and were not recorded in the Catalogue Raisonné by plaintiff, nor were they reported to Flam on the list.
- Ten Motherwell works are listed on their studio cards as being destroyed, despite Dedalus's contention that this is false, as Motherwell was openly averse to destroying his works.
- Dedalus claims that Motherwell was careful with the works he gifted. Although Motherwell created thousands of unique works over 50 years, he only gifted approximately 170 works. This would be a rate of approximately three per year to all his friends and family.
- Dedalus does not believe that plaintiff was gifted these works and, as a result, the works belong to Dedalus as provided for in Motherwell's will. It states, "when [plaintiff], without authority or right, intentionally exercised control over, or removed or misappropriated or sold or hid

Motherwell artwork, whether during Motherwell's lifetime, or after title passed to Dedalus . . . such artwork rightfully belongs to Dedalus and must be returned." *Id.*, ¶ 120.

- Dedalus states that plaintiff purposely made false entries into the inventory records to hide the misappropriation of works. Dedalus provides the two examples of In White with Green Stripe (Green Stripe) and Altamira Elegy, where Dedalus consigned the works after Motherwell died, and then, after the galleries closed, plaintiff took possession of the works and sold them for personal gain. According to Dedalus, plaintiff made it appear, "falsingly and misleadingly, that the works had been lost by the consignee." *Id.*, ¶ 130. After misleading Dedalus to think that the works were lost, plaintiff secretly had her husband consign at least one of the works at an auction. Dedalus alleges that plaintiff committed fraud by tampering with the records.
- Dedalus alleges that plaintiff is using confidential information that belongs to Dedalus, that she learned on the job, to compete with Dedalus as a Motherwell expert.
- In addition, according to Dedalus, plaintiff misappropriated confidential archival material, consisting of, but not limited to, valuable archival documents material to Dedalus's business and economic viability. Some of this material includes the ownership of all Motherwell works, pricing history and scholarly correspondence.

Plaintiff claims that every Motherwell work she owned was a gift by Motherwell. She states that she worked as "Motherwell's personal assistant and curator for the last 10 years of his life. We became very close during that period and over the years I worked for him he gave me many small drawings, prints and one original painting. He was a very generous man"

Plaintiff aff, ¶ 2. Motherwell's will indicates that plaintiff should receive \$200,000, provided she survives Motherwell and is still working for him at the time of his death. Plaintiff's exhibit 5 at 7. Plaintiff contends that she is an artist too, and that she and Motherwell "were both painters and had many discussions about the creation and meaning of art." Plaintiff's aff, ¶ 5.

After Motherwell's death, Sotheby's was hired to do an estate appraisal. According to plaintiff, the Sotheby's appraisal listed every unique work in the estate. As the works that were allegedly gifted to her were not listed, they do not comprise the property of Motherwell's estate that would belong to Dedalus. In addition, plaintiff claims that, although Dedalus has identified 46 works that are purportedly stolen, Dedalus's claims must fail as speculative because it cannot identify whether some of these works were gifts. Plaintiff concedes that she was gifted approximately 16 drawings, one painting and 32

prints. She believes that she is entitled to summary judgment dismissing the counterclaims grounded in theft because Dedalus cannot prove otherwise.

According to plaintiff, Motherwell gave her Green Stripe and Altamira Elegy. Neither of these prints were in the Sotheby's Estate appraisal after Motherwell's death. Plaintiff claims that there were many prints created for Green Stripe and Altamira Elegy and that the ones inherited by Dedalus are not the prints that she owned.

Plaintiff alleges that other people also received Motherwell works as gifts and that these works did not have studio numbers associated with them. Plaintiff further states that she had previously disclosed to Flam, Rubin and Spangle, on an unspecified date, her ownership of certain Motherwell works. According to plaintiff, there was no official policy for Board members to disclose their ownership of Motherwell works until after she was terminated.

Dedalus rebuts Motherwell's donative intent by stating, among other things, that plaintiff maintained no gift records for the works, despite recording other gifts Motherwell gave people, and that no one knew or saw her with the works, and that plaintiff affirmatively hid her possession and sales of these works from Dedalus. By way of example, Dedalus provides the

inventory records for Motherwell's seven gifts of work to his ex-wife and the records for Motherwell's gift to Flam in 1988. This gift to Flam was recorded by plaintiff.

Dedalus argues that the Motherwell estate appraisal by Sotheby's does not demonstrate that plaintiff owned the works not listed, as plaintiff herself was the one charged with overseeing the estate appraisal. Dedalus provides the Board meetings' minutes from December 1994, where plaintiff "reported that there are approximately 100 works not included in Sotheby's Master Appraisal, which have a projected value of approximately \$2,000,000." Dedalus's exhibit 110 at 4.

According to Dedalus, plaintiff has breached her fiduciary duty by selling Motherwell's works, without any documentation, disclosure or even the record that she was the alleged owner, or that they were gifted. Dedalus provides the records from an art gallery where plaintiff consigned a Motherwell work in 2001 (Elegy Drawing, 1986). Plaintiff did not tell Flam about this alleged gift when he asked her for the list in 2008. The provenance of this work does not state that plaintiff acquired it as a gift and there is no inventory number associated with this work. This work had never been updated to the Catalogue Raisonné and, according to Dedalus, plaintiff concealed her ownership and sale of it.

Dedalus also provides several examples of how plaintiff's husband consigned works for her and plaintiff's identity was concealed. For example, in 2006, plaintiff had her husband anonymously consign a 1958 Motherwell work for plaintiff, through Christie's. Dedalus claims that she hid her identity and failed to provide the accurate provenance that the work was an alleged gift. There was no studio number attached to the work and Dedalus had no record of this work. Christie's was unaware that plaintiff was the owner or that she was a Board member of Dedalus, who also did business with Christie's.

In response to Green Stripe and Altamira Elegy, Dedalus claims that plaintiff falsified these records to reflect that these works were lost and that there is no proof of these unknown multiple trial proofs of the same work.

Regarding a disclosure policy, Rubin testified that Dedalus had a policy in 2001 or 2002, when the Catalogue Raisonné was fully underway, that the Board members disclose their ownership of Motherwell works. As far as he recalled, although there was no formal Board resolution, everyone on the Board was asked about their ownership of works. Rubin testified that he himself provided plaintiff with information about the Motherwell works that he was gifted or purchased. Rubin further stated that he remembered receiving a written email prior to plaintiff's termination asking for disclosure, but he could not locate this

email. Rubin was only able to locate an email dated September 2008 where he emailed Flam, "In answer to your second request, I am forwarding again my holdings and history of Motherwell works of art." Bantle affirmation, exhibit 45 at 1.

Dedalus responded in its interrogatories that, on April 6, 2004, it requested that its Board members disclose their ownership of Motherwell works. The record reflects that Rogers sent Flam an email in 2004 asking him for information about Motherwell works owned by Board members. A letter was drafted in 2004 asking Board members to provide information about Motherwell works that they "may know of in private collections, or that may be in your own possession." Bantle affirmation, exhibit 44 at 3. Flam testified that "letters were sent out a few times" Flam tr at 147. However, there is no accurate confirmation that this letter was received by the Board members, as Flam testified that he was not sure if the letter was sent out because Rogers and Joachim Pizzaro "are the two people who asked to be responded to." Flam tr at 163.

Rogers followed up with an email in 2007 to Flam that, although she had heard from him, she needs to "find out exactly what [Rubin] and [plaintiff] own and if anyone else happens to have anything." Bantle affirmation, exhibit 44 at 4. Flam further testified that an email was sent to the Board members in 2006 or 2007 asking them again to disclose their ownership. This

email is not in the record.

On reply, plaintiff seems to introduce inventory records apparently documenting her ownership of some Motherwell works. However, the court declines to consider plaintiff's arguments that were made for the first time in reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion [internal quotation marks and citation omitted]." *Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21 (1st Dept 2002).

Equitable Estoppel

In plaintiff's motion to dismiss the counterclaims, this court held, among other things, that Dedalus sufficiently pled facts to apply equitable estoppel to toll the statute of limitations on the replevin, conversion and diversion of corporate opportunity counterclaims. See *Banach v Dedalus Foundation, Inc.*, 2012 WL 251567, 2012 NY Misc LEXIS 190, *10-16 (Sup Ct, NY County 2012). The court noted that concealment allegations may form the basis for an equitable estoppel assertion and that whether or not Dedalus had the duty to investigate an alleged theft is a question of fact.

Plaintiff now claims, in her motion for summary judgment, that equitable estoppel cannot be asserted because Dedalus has

failed to prove that plaintiff altered inventory records. According to plaintiff, as Dedalus cannot prove that she altered records instead of concealed them, equitable tolling should not apply. However, the court disagrees and finds that Dedalus need not demonstrate actual affirmative misrepresentation or theft, and that its concealment allegations may form the basis for equitable tolling. "The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense." *Zumpano v Quinn*, 6 NY3d 666, 673 (2006). It is undisputed that plaintiff had a fiduciary relationship with Dedalus. "Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship . . . which gave the defendant an obligation to inform him or her of facts underlying the claim [internal quotation marks and citation omitted]." *Id.* at 675.

Moreover, triable issues of fact remain with respect to the allegations that plaintiff altered records as well, either personally or directed others to, regarding at least Green Stripe and Altamira Elegy. On plaintiff's motion for summary judgment, no evidence has been presented that Dedalus should have been on notice as a result of an annual accounting in 1999. Similarly, there is no indication that Dedalus should have been on notice to investigate any alleged theft of the Motherwell works or archival

material prior to the July 2008 Christie's incident.

Accordingly, equitable estoppel applies to toll the statute of limitations for the counterclaims of breach of fiduciary duty, replevin, conversion and diversion of corporate assets.

*First counterclaim-breach of fiduciary Duty as to art and archival material:*⁶

"To state a claim for breach of fiduciary duty, [Dedalus] must allege that (1) [plaintiff] owed [it] a fiduciary duty, (2) [plaintiff] committed misconduct, and (3) [Dedalus] suffered damages caused by that misconduct." *Burry v Madison Park Owner LLC*, 84 AD3d 699, 700-701 (1st Dept 2011).

Regardless of whether or not the Motherwell works were gifted to her, plaintiff claims that she did not breach a fiduciary duty by failing to disclose her ownership of the Motherwell works because Dedalus did not have a policy imposing a duty of disclosure. In addition, plaintiff alleges that the breach of fiduciary counterclaim for these allegations must fail because Dedalus cannot establish that plaintiff's actions proximately caused Dedalus to sustain damages.

⁶ This counterclaim was dismissed as duplicative of the conversion claim but only with respect to the allegation that plaintiff breached her fiduciary duty by misappropriating and selling artwork belonging to Dedalus. The court did not dismiss the counterclaim as to the allegations that plaintiff failed to disclose her possession or sale of Motherwell art and failed to record inventory of Motherwell works.

Dedalus claims that other directors reported their gifts to plaintiff and that plaintiff, given the specific nature of her job to catalogue all known Motherwell works, owed Dedalus the obligation to disclose Motherwell works owned by her. It is unclear as to whether there was an official policy that directors had to report their Motherwell works prior to the email distributed in 2008 after plaintiff was terminated. However, “[c]redibility is not properly determined on summary judgment.” *Meissner v Yun*, 126 AD3d 565, 566 (1st Dept 2015).

Plaintiff was an officer and director of Dedalus and owed it a fiduciary duty. It is undisputed that plaintiff’s job while at Dedalus was to record and inventory all known Motherwell works in order to preserve his legacy. According to Dedalus, this inventory included gifts that Motherwell gave to people, including plaintiff. Regardless of whether there was an official formal written policy in place for directors to report their Motherwell works, the court finds that questions of fact remain as to whether or not plaintiff breached her fiduciary duty by not disclosing the Motherwell artwork she owned and sold prior to the email she sent Flam in August 2008.

The court notes that, after litigation commenced, in her response to the first set of interrogatories, plaintiff provided a list of additional Motherwell works that she allegedly owned. This list was more comprehensive than the one initially provided

to Flam. Subsequent to this, Dedalus was informed, by contacting art galleries, of additional works that may have been sold. As a result, additional questions of fact remain as to whether plaintiff continued to breach this duty by only initially advising Dedalus of a partial ownership list.

Several of the Motherwell works did not list plaintiff as the owner and did not state that it was a gift. Plaintiff argues that her alleged failure to assign studio inventory numbers does not constitute fiduciary misconduct. She continues that the job of assigning inventory numbers stemmed from her job responsibilities as an employee of Motherwell, not as an officer of Dedalus.

The court disagrees with plaintiff's contentions. Plaintiff herself testified that she understood the importance, to the artist's legacy and the auction catalogue, of providing the accurate provenance. Even acting in the capacity as just an employee, not even a fiduciary, given plaintiff's job, she is "prohibited from acting in any manner inconsistent with [her] agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of [her] duties [internal quotation marks and citation omitted]." *CBS Corp. v Dumsday*, 268 AD2d 350, 353 (1st Dept 2000).

Given the allegations that plaintiff regularly recorded inventory numbers to other Motherwell works given as gifts, coupled with plaintiff's unique position on the Catalogue Raisonné, questions of fact remain as to whether she breached her fiduciary duty by not assigning inventory numbers to her own gifts or breached her duty by not providing the accurate provenance for the artwork that she sold.

In addition, plaintiff again contends, as she did in the motion to dismiss, that the breach of fiduciary duty claim should fail as Dedalus cannot demonstrate that it sustained damages as a result of her failure to assign inventory numbers. Dedalus identifies its damages as the losses it sustained when plaintiff sold any Motherwell works that did not belong to her. In any event, at this time, Dedalus need not plead specific damages as "this never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty [This] action . . . is not merely to *compensate* the plaintiff for wrongs committed by the defendant but . . . to *prevent* them. . . . [internal quotation marks and citations omitted]." *Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 409 (1st Dept 1990). Accordingly, plaintiff is denied summary judgment dismissing the first counterclaim for breach of fiduciary duty.

Archival material:

In the motion to dismiss, the court dismissed all archival material counterclaims because Dedalus failed to "put [plaintiff] on fair notice as to what she is to defend." *Banach v Dedalus Foundation, Inc.*, 2012 WL 251567, 2012 NY Misc LEXIS 190 at *20. This included the first counterclaim of breach of fiduciary duty with respect to archival materials and the eighth counterclaim of replevin as to archival materials. Dedalus has subsequently identified five groups of archival materials; archival paintings, Motherwell's annotated book and notes, Dedalus's photographs, interviews with Motherwell and reference images. Dedalus further specified how plaintiff allegedly misappropriated them and what the damages are to Dedalus as a result. For example, Dedalus claims that plaintiff took archival materials related to Motherwell's 1951 mural along with photographs of his 1947 house and some letters that did not belong to her and used them as a way to compete with Dedalus. The court finds that Dedalus has sufficiently alleged its claims with respect to archival material and questions of fact remain as to whether plaintiff breached her fiduciary duty with respect to that material.

Second counterclaim-replevin:

In its second counterclaim, Dedalus contends that plaintiff, "without authority, intentionally exercised wrongful

control over Motherwell artwork owned by Dedalus, in violation of Dedalus' right to possession and ownership of the works, and refused to return the works." Answer, ¶ 209. Plaintiff claims that Dedalus cannot plead a claim for replevin because it cannot prove that it owned the works in plaintiff's possession.¹ Further, plaintiff argues that she has been gifted all of the Motherwell works in question and that the Sotheby's appraisal listed all of the Motherwell works owned by Dedalus.

In order to establish a cause of action for replevin, Dedalus must establish that plaintiff is "in possession of certain property of which [Dedalus] claims to have a superior right." *Batsidis v Batsidis*, 9 AD3d 342, 343 (2d Dept 2004). In opposition to the motion, Dedalus has set forth sufficient evidence to create a triable issue of fact. Plaintiff's job was to keep an accurate inventory of Motherwell's work, yet she did not record the gifts to her and she did not inform Dedalus about the works. There is documentation to support the gifts to other people, while there is none to support the subject works to plaintiff. When Flam asked her about her ownership of Motherwell works, plaintiff only provided a fraction of the works that she allegedly owned. Only as a result of litigation did Dedalus learn of the many other purported gifts. The Sotheby's

¹ In the motion to dismiss, the court held that Dedalus was unable to assert a replevin counterclaim for any work already sold by plaintiff because it is no longer in her possession.

appraisal, which was worked on by plaintiff, is not an accurate reflection of all of the works owned by Dedalus, as the appraisal, by plaintiff's own statements, does not include over 100 works.

At this time, questions of fact and issues of credibility remain as to the rightful owner of the remaining Motherwell works and archival material that still remain in plaintiff's possession. "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues [internal quotation marks and citation omitted]." *Ruiz v Griffin*, 71 AD3d at 1115.

Accordingly, plaintiff's motion for summary judgment on the second counterclaim for replevin as to art and the eighth counterclaim for replevin as to Dedalus's archival material is denied.

Fourth counterclaim-misappropriation and diversion of corporate opportunity:

In this counterclaim, Dedalus alleges that plaintiff misappropriated and diverted corporate opportunity when she "wrongfully seize[d] Dedalus' opportunity to either sell, or retain and preserve its own works and instead [plaintiff] sold them herself for her profit, at the expense and to the damage of Dedalus." Answer, ¶ 218. "A corporate opportunity is defined as

any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business." *Matter of Greenberg (Madison Cabinet & Interiors)*, 206 AD2d 963, 964 (4th Dept 1994). Questions of fact remain as to whether or not plaintiff owned all of the artwork she claims and whether or not any duties were breached by, among other things, not informing Dedalus about proposed sales that could be competing with Dedalus's own sales. Accordingly, plaintiff is denied summary judgment on this counterclaim.

Fifth counterclaim-conversion:

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). In the motion to dismiss, this court dismissed the conversion claim as to any works that plaintiff allegedly converted before Motherwell's death in 1991, as "Dedalus never took ownership of, or had a vested interest in, any Motherwell works until Motherwell died and his estate distributed them." *Banach v Dedalus Foundation, Inc.*, 2012 WL 251567, 2012 NY Misc LEXIS 190 at *14.

As set forth extensively in the facts, Dedalus alleges that plaintiff wrongfully exercised control over Motherwell artwork that belonged to Dedalus. Dedalus lists several works that were either allegedly stolen and/or consigned. As issues of fact and credibility remain as to when and if the works were converted, summary judgment is denied.

Seventh counterclaim-fraud:

"An action alleging a cause of action for fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered or, with reasonable diligence, could have been discovered." *Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 315 (1st Dept 2006). Plaintiff argues that the statute of limitations should bar this claim as Dedalus could have discovered the alleged fraud by 2001, after an annual audit completed by Dedalus's accountants. Dedalus alleges that it did not suspect or have any cause to suspect fraud until 2008. Accordingly, at this time, issues of fact preclude summary judgment on the issue of the applicability of the statute of limitations. See e.g. *Id.*, 25 AD3d at 316 ("This inquiry involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed

of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact").

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by [Dedalus] and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). To support its claim for fraud, Dedalus alleges that plaintiff intentionally caused false entries to be made in Dedalus's inventory system in 1998 and 1999. These entries regarding Green Stripe and Altamira Elegy were inaccurate, as the works were not lost, but plaintiff allegedly misappropriated the works and then sold them in a secondary market without Dedalus's knowledge or consent. Dedalus has alleged that, even if plaintiff did not create the inaccurate inventory, she directed someone else to create this false record.

In opposition to summary judgment, Dedalus provides relevant documentary evidence as well as testimony from employees that worked with plaintiff on the inventory, that create issues of fact and credibility. As a result, plaintiff is denied summary judgment on this counterclaim.

Dedalus's motion for partial summary judgment as to liability for trespass to chattel:

In its sixth counterclaim, trespass to chattel as to computer data, Dedalus alleges that plaintiff intentionally and wrongfully destroyed computer information without the awareness and consent of Dedalus, thereby depriving Dedalus of such information.

The additional facts relevant to this motion are as follows:

During the course of her employment, Dedalus provided plaintiff with an Apple iBook and two Apple iMacs so that she would be able to work from home. Dedalus maintains that the computers were not gifts and that they were provided to plaintiff solely for employment and Board work. After plaintiff was terminated, on December 23, 2008, Dedalus sent a demand for plaintiff to return the computers. On January 27, 2009, plaintiff returned the iMacs to Dedalus but did not return the iBook. The two iMacs had been erased of all their data except for their operating systems.

Dedalus provides a receipt from a Tekserve store located in Manhattan indicating that, on January 15, 2009, plaintiff took the iBook to the store to be erased. The receipt states that the iBook had a bad hard drive. On January 16, 2009, plaintiff also took the two iMacs to Tekserve to also be erased. The receipt states that Tekserve "zeroed out drive and restored system to factory settings." Spangle aff, exhibit F at 2. The receipt

further noted that plaintiff, who was the listed customer, wanted to "zero out drive and have a clean [sic]." *Id.*

Dedalus claims that the computers "would have included information about Motherwell works, their inventory, consignment, sales, purchases and the whereabouts of Motherwell works. Dedalus has been dispossessed of this data, and of the physical iBook itself with all of its data by reason of [plaintiff's] actions." Spangle aff, ¶ 8.

Plaintiff testified that she used the computers for her work at Dedalus and also for her own personal use, such as for her own artwork and for personal correspondence. She continued that she used to back-up her work and that whatever she had "on the computer that was related to Dedalus work was saved and given to Dedalus when I returned all my materials." Plaintiff's tr at 780.

Plaintiff does not deny wiping the hard drives clean for the two iMacs. She concedes that she did not ask Dedalus permission about what she could or could not do with Dedalus's property, but that she wanted her personal material removed from the computers. She testified that, prior to erasing the hard drives, she "had already put all of Dedalus's files onto a CD or a couple of CDs, and those were returned." *Id.* at 789. She states that she "just wanted to make sure that my personal data was not on the computer." *Id.* at 790.

According to Dedalus, plaintiff did not provide it with all of the information on the hard drive. Plaintiff herself testified that, although it varied from week to week, in some weeks, plaintiff could be working on dozens of documents on her computer. Plaintiff further testified that she worked on Dedalus matters until she was terminated and she was, on average, working on two documents a week. However, Dedalus states that the CD only contained a handful of documents. Moreover, although plaintiff was employed in 2008 for 34 weeks Dedalus states that the CD does not contain one document that was modified or created during 28 of those 34 weeks.

Plaintiff testified that she created the CD of relevant Dedalus documents prior to erasing the hard drive. However, Dedalus provides an affidavit from a computer expert who states that the CD was created on January 27, 2009. As this is one week after the hard drives were wiped clean, plaintiff could not have used the erased iMacs to create this CD.

With respect to the iBook, plaintiff testified that she did not recall seeing the iBook after August 2008, because "it was a computer that was not working properly, so I wasn't using it." Plaintiff's tr at 1080. Plaintiff continued that she did not know what happened to the iBook and that she did not have it in her possession when she returned the other property to Dedalus. When first questioned about discarding the iBook, plaintiff had

stated that she discarded it several years prior to 2009. When asked about bringing the allegedly lost iBook to Tekserve on January 20, 2009, plaintiff just answered that she did not have the iBook on January 20, 2009. Then, plaintiff stated that she does not have the iBook but that she may have asked Tekserve to recycle the iBook but that she does not remember. This is after Dedalus demanded return of all its property on December 23, 2008.

To establish a claim for trespass to chattel, Dedalus must prove that plaintiff intentionally and physically interfered with "use and enjoyment of personal property in [Dedalus's] possession, without justification or consent. An essential element . . . is harm to the condition, quality or material value of the chattels at issue [internal quotation marks and citations omitted]." *AGT Crunch Acquisition LLC v Bally Total Fitness Corporation*, 2008 WL 293055, 2008 NY Misc LEXIS 8414, *9-10 (Sup Ct, NY County 2008).

Here, plaintiff cannot raise a triable issue of fact in response to Dedalus's motion for partial summary judgment as to liability on its trespass to chattel claim. The record reflects that, after plaintiff was terminated, Dedalus asked her to return Dedalus property still in her possession, namely, the iBook and two iMacs. Regarding the iMacs, shortly after receiving the notice, without asking for any consent from Dedalus, plaintiff brought the computers to the store and paid to have the hard

drives intentionally erased. As a result, Dedalus suffered harm because they were not returned in the same condition as when they were given to plaintiff. Moreover, although plaintiff claims that the CD provided to Dedalus is the information she backed up on the iMacs prior to wiping the hard drives clean, the record demonstrates that this is impossible. The CD provided to Dedalus with this alleged data was not created until after the iMacs had already been erased. As a result, not only the computers themselves were altered or impaired, but also the computer data itself which contained important inventory information.

With respect to the iBook, plaintiff originally averred that she discarded the iBook several years prior to her termination. Nevertheless, the record indicates that plaintiff took, brought this iBook to the store to have the hard drive erased. During testimony, after being questioned about this occurrence, plaintiff states that she did not have the iBook anymore and that she must have told the technician to recycle the iBook. Here, similar to above, Dedalus has shown prima facie merit to its claim for trespass to chattel concerning the iBook. By taking the iBook to the store and attempting to wipe the hard drive clean and then either taking it home or allegedly advising the store to recycle it, plaintiff intentionally interfered with Dedalus's property and its ability to use it.

While it is impossible to know exactly how much information was permanently erased from the iMacs, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels." *Register.com, Inc. v Verio, Inc.*, 126 F Supp 2d 238, 250 (SD NY 2000), *affd as mod* 356 F3d 393 (2d Cir 2004). Therefore, although Dedalus has established that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law on its claim for trespass for chattel, the issue of damages is reserved for trial.

Plaintiff's motion for sanctions:

In plaintiff's motion for summary judgment on the counterclaims, plaintiff seeks to impose sanctions on Dedalus for alleged discovery abuses. Plaintiff claims that, despite demanding production of "write off records, and Flam's September 2008 request for board disclosure of Motherwell works," Dedalus has not produced such records. Plaintiff further argues that Dedalus's counsel should be sanctioned because counsel falsely maintained that plaintiff altered inventory records.

Dedalus argues that plaintiff's request for sanctions should be denied and that plaintiff and her counsel should be sanctioned for making a frivolous application.

There is no basis to conclude that Dedalus engaged in discovery noncompliance. First, as noted by Dedalus, plaintiff

initiated summary judgment, and filed her note of issue on October 2, 2014. "By filing a note of issue, in which [she] certified that all discovery had been completed, plaintiff waived [her] right to conduct further depositions, and [she] has failed to demonstrate any extraordinary circumstances arising after [she] filed the note of issue [internal citation omitted]." *Abbott v Memorial Sloan-Kettering Cancer Ctr.*, 295 AD2d 136, 136 (1st Dept 2002).

In any event, sanctions are not warranted as Dedalus "has not engaged in a willful failure to comply with [its] discovery obligations, warranting sanctions." *Scott v King*, 83 AD3d 510, 511 (1st Dept 2011). The record indicates that Dedalus has complied with its discovery obligations and inventory records have been produced including a "write off" list of not found prints.

Dedalus states that there are no other "write off" list documents. Although Dedalus's Board has not been able to produce the letter asking each director to disclose his/her ownership of Motherwell art, "[a party] may not be compelled to produce information that does not exist or which he [or she] does not possess [internal quotation marks and citations omitted]." *Romeo v City of New York*, 261 AD2d 379, 380 (2d Dept 1999).

In addition, sanctions are not warranted as against Dedalus's counsel for frivolous conduct. Contrary to plaintiff's

contentions, Dedalus has not conceded that it was unaware of any inventory records altered by plaintiff. In opposition to plaintiff's motion for summary judgment on the counterclaims, Dedalus has alleged that plaintiff altered inventory records concerning at least two paintings. Dedalus further claims that the computer records may have been altered, either by plaintiff or by another employee, acting under plaintiff's direction.

In its discretion the court declines to impose sanctions against plaintiff.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Joan Banach's motion, motion sequence 023, for summary judgment dismissing the remaining counterclaims and for an order for sanctions, is denied in its entirety; and it is further

ORDERED that the motion of defendant The Dedalus Foundation, Inc., motion sequence 024, for summary judgment dismissing the remaining cause of action herein is granted, and the complaint is dismissed in its entirety.

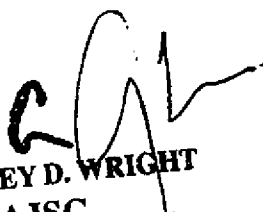
ORDERED that the motion of defendant The Dedalus Foundation, Inc., motion sequence 025, for partial summary judgment as to liability on the counterclaim for trespass to chattel is granted, with the issue of damages reserved for trial;

ORDERED that all remaining counterclaims are severed and

shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

December 8, 2016

ENTER: 
GEOFFREY D. WRIGHT
AJSC

J.S.C

FILED
DEC 13 2016
COUNTY CLERK'S OFFICE
NEW YORK