Auffarth v Herald Natl. Bank
2012 NY Slip Op 33343(U)
July 25, 2012
Sup Ct, NY County
Docket Number: 600800/10
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

PATRICIA AUFFARTH et al

-v-

HERALD NATIONAL BANK

INDEX NO. 600800/10

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is by defendant to dismiss certain causes of action of the complaint is granted in part and denied in part per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 25, 2012

J.S.C.

MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

PATRICIA AUFFARTH, as the Executor of the Estate of HENRY AUFFARTH, MARSHALL PERRIN, COSTAS ZIOZIS, CARL BRONSTEIN, JOSEPH BARNETT AND LAWRENCE GORE, Plaintiffs, -against- HERALD NATIONAL BANK, Defendant.	Index. No.: 600800/10 DECISION AND ORDER Motion Sequence No.: 003

MELVIN L. SCHWEITZER, J.:

Background

This is a motion by Herald National Bank (the Bank) to dismiss certain causes of action in the complaint brought by former officers of the Bank. The court grants the motion in part and denies it in part.

The Bank hired plaintiffs Messrs. Auffarth, Ziozis, Perrin, Gore, Bronstein, and Barnett between October 2008 and March 2009. The Bank was a start-up, and its President and CEO, David Bagatelle, approached each plaintiff while he was working at another financial institution. Each plaintiff was employed in an executive capacity while working for the Bank. All six plaintiffs were terminated on February 12, 2010.

Plaintiff Auffarth was employed for 11.5 months of his 24-month employment term, and seeks 12.5 months of salary and guaranteed bonus. Plaintiff Perrin was employed for 15 months of his 24-month employment contract, and seeks 9 months of salary and guaranteed bonus. Plaintiff Ziozis was employed for 15.25 months of his 24-month employment contract, and seeks

8.75 months of salary and guaranteed bonus. Plaintiffs Auffarth, Perrin, and Ziozis claim they are entitled to payment of their remaining salaries and bonuses under the separation pay provisions contained in their employment contracts, or alternatively, under the terms of their two-year employment agreements with the Bank. Plaintiffs Bronstein and Barnett were each employed for 11 months out of their 24-month employment contracts, and seek 13 months of salary and guaranteed bonus. Plaintiff Gore was employed for 16 months and seeks his Year 1 guaranteed bonus under the terms of his employment contract and a pro rata portion of the guaranteed bonus for the amount of time he worked past the end of year 1.

Plaintiffs brought suit for breach of contract, violations of New York Labor Law 191, 193, and 198, and fraudulent inducement. Pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), the Bank moves to dismiss part of the first cause of action, and the second, third, fifth, sixth, eighth, ninth, eleventh, twelfth, fourteenth, fifteenth, seventeenth and eighteenth causes of action.

A motion to dismiss pursuant to CPLR 3211(a)[1] will only be granted if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002). In deciding a motion to dismiss pursuant to CPLR 3211 (a) (7) the court "assumes the truth of the complaint's material allegations and whatever can be reasonably inferred therefrom." *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992). The Bank's motion to dismiss will be denied if "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Id.* at 105 (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Motion to dismiss the NYLL 191 claim

Counts two, five, eight, eleven, fourteen, and seventeen allege violations of NYLL 191, which governs the frequency of wage payments for enumerated categories of employees. This section applies to "manual workers," "railroad workers," "commissioned salespersons," and "clerical and other worker[s]." NYLL 191 [a][b][c][d]. The catchall category of "clerical and other worker[s]" does not apply to corporate officers because there is an explicit exemption of bona fide executives in its definition. NYLL 190[7], *see also Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 (2008) ("employees serving in an executive, managerial or administrative capacity do not fall under section 191 of the Labor Law"). Since plaintiffs' executive statuses are not disputed, their NYLL 191 claims fail. Accordingly, the court grants the Bank's motion to dismiss plaintiffs' claims under NYLL 191.

Motion to dismiss the Plaintiffs' NYLL 193 claims for withheld bonuses

Counts two, five, eight, eleven, fourteen, and seventeen allege violations of 193 and are based on the Bank's alleged failure to pay plaintiffs full salaries and their bonuses. Though the Bank concedes that bonuses can be considered wages under NYLL 193, it maintains that only bonuses which have been earned and vested can be considered wages, and that the bonuses in this case were neither earned nor vested. The Bank also points to language of the bonus provision of the employment agreements, which specifies that plaintiffs are entitled to a "guaranteed cash bonus for each full year." The Bank argues that the plaintiffs needed to be employed for an entire year in order to be eligible for their bonuses.

The relevant provision of the employment agreement states:

> Your starting annual salary will be $[Plaintiff's salary] and will be paid to you on a bi-weekly basis. At the conclusion of each year of employment as [Plaintiff's

position], we will review your base salary to determine if an increase is warranted.

You will be entitled to a guaranteed cash bonus for each full year as follows:

Year 1: $[Bonus] annually, payable at six (6) month intervals*

Year 2: $[Bonus] annually, payable at six (6) month intervals**

*Plaintiffs Gore, Perrin, and Ziozis' bonus provisions provided for yearly lump sum payments instead of installments at six-month intervals. (Ex. D, E, F)

**Plaintiff Gore's contract only provided for one year of employment and, accordingly, only one year of bonus pay. (Ex. D)

For each year, if your bonus pool exceeds the guaranteed bonus amounts, as indicated above, you will be entitled to that higher amount. (Ex. A-F)

Plaintiffs argue that their rights to bonuses vested upon commencement of their employment with the Bank. They put forward an interpretation of the bonus provision that would allow for bonuses to be paid ratably, and claim that the one-year requirement only applies to the Bank's obligation to pay the *full* bonus. Plaintiffs also contend that the meaning of the bonus provision is ambiguous, and therefore inappropriate for resolution on a motion to dismiss. The court agrees that the bonus provision is ambiguous.

In a motion to dismiss, the court is obligated to accept all of the facts alleged in the amended complaint as true and will deny the motion to dismiss if the allegations in the complaint state a legally cognizable claim. *McGill*, 179 AD2d 105. It is sufficient that NYLL 193 encompasses a failure to pay bonuses and the plaintiffs alleged that the Bank failed to pay them their bonuses. Accordingly, the Bank's motion to dismiss the claims based on NYLL 193 is denied.

Motion to dismiss Auffarth, Perrin, and Ziozis' claims for separation pay under NYLL 193

Plaintiffs Auffarth, Perrin, and Ziozis also allege that the Bank failed to pay them separation pay under NYLL 193.

The separation pay provision included in the Auffarth, Perrin, and Ziozis employment agreements states:

> If you are terminated without cause during the first two years of employment, for each of those years Heritage [Heritage later changed its name to Herald, all references to "Heritage" refer to the Bank] will pay you a lump sum in a gross amount equal to one (1) times your Base Salary and each Year's Bonus (minus applicable taxes and withholdings), less the amount of Base Salary and Bonus already paid to you for that year, this lump sum payment will be made to you within thirty (30) days of such termination.

Plaintiffs argue that separation pay is included within the NYLL's definition of "wages" under section 190(1), which defines "wages" as:

> [T]he earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission, or other basis. *The term "wages" also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article*, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article. (emphasis added).

While it is true that separation pay is included within the NYLL's definition of wage supplements and can be considered "wages" (NYLL 198-c(2) states that the term "benefits or wage supplements" includes separation pay), NYLL 198-c(3) states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week." (NYLL 198-c(3)). Plaintiffs argue that section 198-c(3) is inapplicable because it provides for criminal penalties and this is a civil suit. Plaintiffs fail to cite any case law which supports their claim that NYLL 198-c is inapplicable in a civil suit simply because it provides for criminal penalties.

On the contrary, the Bank cites numerous cases in which courts have applied NYLL 198-c to civil cases to deny executives separation pay under NYLL 198-c(3). *See Cohen v ACM Med. Lab., Inc.*, 178 Misc 2d 130, 135 [Sup. Ct. Monroe County 1998] ("The intertwining of the definitions and sections of the [New York] Labor Law then leads to the conclusion that deductions from separation pay, for the exempt administrative class defined in Labor Law § 198-c, would not be prohibited under Labor Law § 193."), *Wagner v Edisonlearning Inc.*, No. 09 civ. 831, 2009 U.S. Dist. Lexis 32965 at *10 [SDNY Apr. 17, 2009] (implying that the plaintiff's contention that NYLL 198-c could not apply because it provided for criminal penalties was inconsequential and concluding that the plaintiff, as an executive, was not entitled to separation pay under NYLL 193 because of NYLL 198-c(3)), *Edwards v Schrader-Bridgeport Int'l, Inc.*, 205 F Supp 2d 3, 32 [NDNY 2002], *Gerzog v London Fog Corp.*, 907 F Supp 590, 603 (EDNY 1995).

Plaintiffs rely on one case to support their claim for separation pay, *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 715 NYS2d 366 [2000]. But *Truelove* does not address the provision in NYLL 198-c(3) that denies executives earning over $900 per week separation payments. Because the plaintiffs' claims for separation pay are explicitly barred by NYLL 198-c(3), the Bank's motion to dismiss Auffarth, Perrin, and Ziozis' separation pay claims is granted.

Motion to dismiss the NYLL 198 claim

In 2011, the New York State Legislature enacted the Wage Theft Prevention Act, which amended NYLL 198 by increasing liquidated damages available to successful plaintiffs from 25% to 100%. The plaintiffs filed their original complaint before the Wage Theft Prevention Act was passed, but amended their complaint to seek 100% liquidated damages after the

amendment went into effect. There is a strong presumption against applying statutes retroactively. However, remedial statutes are typically regarded as an exception to this presumption. *See Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 584 (1998). *See also Ji v Belle World Realty*, No. 603228/08, 2011 WL 5118170 [Sup. Ct. NY County Aug. 22, 2011] (the liquidated damages provision of NYLL 198 is remedial and should be applied retroactively). A motion to dismiss under CPLR 3211 (a) (7) should be denied if "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *McGill*, 179 AD2d 105. The plaintiffs' amended complaint alleges that each plaintiff is entitled to 100% liquidated damages under NYLL. As the court agrees with the court's decision in *Ji*, it thus denies the Bank's motion to dismiss.

Motion to dismiss the Fraudulent Inducement claim

The court finds the fraudulent inducement claim to be insufficient to state a cause of action. Under New York law, one of three conditions must be met before a fraud claim is allowed to coexist with a breach of contract claim. The fraud claim must seek special damages that are caused by the misrepresentation that are unrecoverable as contract damages, demonstrate a legal obligation that is separate from the duty to perform under the contract, or demonstrate a fraudulent misrepresentation that is extraneous or collateral to the contract. *Bridgestone/Firestone v Recovery Credit Servs.*, 98 F3d 13, 20 [2d Cir. 1996]. Plaintiffs do not satisfy the first prong because the special damages they seek, "damages for foregone opportunities," are not recoverable in a fraud claim. *See Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421, 646 NYS2d 76, 80 [1996]. Moreover, special damages must be pleaded with particularity, so plaintiffs' allegations that they are entitled to "amounts to be proven at trial" is an insufficient pleading of special damages. *See Drug Research Corp. v Curtis Pub. Co.*, 7

NY2d 435, 441, 199 NYS2d 33, 37-38 [1960]. Plaintiffs do not claim they can satisfy the second *Bridgestone* prong. And finally, plaintiffs cannot satisfy the third prong because they fail to show a fraudulent misrepresentation occurred that was either extraneous or collateral to the contract.

In addition to failing to satisfy any of the three prongs elaborated in *Bridgestone*, plaintiffs' fraudulent inducement claims must be dismissed because they do not allege sufficiently detailed circumstances under which the fraud took place. CPLR 3016 (b) requires the circumstances constituting a claim for fraud be stated in detail. Here, the basis for the alleged fraudulent inducement is that the Bank's President and CEO, Bagatelle, "knew, or should have known" that when he hired the plaintiffs "the Bank could not employ [them] at the stated level of compensation, during the term of employment that Bagatelle promised." While this contains detail, it does not allege an intent to deceive. Paragraph 109 of amended complaint does allege an intent to trick and defraud, but it does not provide further detail. The court finds no basis to link these two paragraphs. Plaintiffs' fraudulent inducement claims must be dismissed.

Motion to dismiss a portion of Auffarth's breach of contract claim

The Bank also moves to dismiss Auffarth's claim for life insurance damages. After reviewing the allegations set forth by Auffarth, it is clear that Auffarth's claims to life insurance benefits fails. Auffarth's employment agreement stated that he would receive life insurance coverage "[d]uring your employment with Heritage." Auffarth began his employment on March 2, 2009. As the Bank points out in its motion to dismiss, even if Auffarth had remained at the bank for the entirety of the two-year term contemplated by the employment agreement, he would not have been entitled to life insurance benefits at the time of his death because he died on

August 22, 2011, just over five months *after* his employment agreement would have expired. Auffarth alleges that "[b]ut for the improper conduct of the Bank, Mr. Auffarth would have been covered by life insurance at the time of his death." This statement is contradicted by the express terms of the employment agreement, which only provide life insurance coverage for the duration of the plaintiffs' employment, which, in Auffarth's case, could have extended until March 2, 2011 at the latest. In light of this timeline, the court finds Auffarth's argument to be without merit. Accordingly, defendant's motion to dismiss Auffarth's life insurance policy claim is granted.

Accordingly, it is

ORDERED that the court grants defendant's motion to dismiss plaintiffs' causes of action related to NYLL 191; and it is further

ORDERED that the court denies defendant's motion to dismiss plaintiffs' causes of action related to NYLL 193 as they pertain to bonuses; and it is further

ORDERED that the court grants defendant's motion to dismiss plaintiffs' causes of action related to NYLL 193 as they pertain to separation pay; and it is further

ORDERED that the court denies defendant's motion to dismiss plaintiffs' causes of action related to NYLL 198; and it is further

ORDERED that the court grants defendant's motion to dismiss plaintiff Auffarth's breach of contract claim pertaining to life insurance benefits.

Dated: July 25, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.