

Lynch v Stevelman

2013 NY Slip Op 33135(U)

December 11, 2013

Supreme Court, New York County

Docket Number: 654377/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 654377/2012
LYNCH, KATE
vs.
STEVELMAN, IAN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 determined in
accordance with the accompanying decision/order.

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

Dated: 12/11/13

_____, J.S.C.
SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

-----X
KATE LYNCH,

Plaintiff,

-against-

Index No: 654377/2012
Submission Date: 9/18/13

DECISION AND ORDER

IAN STEVELMAN, BWAY.NET, INC., AND
OPEN NET, INC.,

Defendants.

----- X
For Plaintiff:
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280 Madison Avenue, Suite 300
New York, NY, 10016

For Defendants:
Ellenoff Grossman & Schole, LLP
39 Remsen Street, Apt. 1E
Brooklyn, NY, 11201

Papers considered in review of the motion to dismiss:

Notice of Motion 1
Affidavit and Memo in Opp 2-3
Reply 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of an employment agreement, defendants Ian Stevelman (“Stevelman”), Bway.net, Inc. (“Bway.net”) and Open Net, Inc. (“Open Net”) move to dismiss the complaint.

Plaintiff Kate Lynch (“Lynch”) and Stevelman created Bway.net in 1995 as co-equal shareholders and co-presidents. Stevelman and Lynch executed identical employment agreements, a partnership agreement, a shareholder’s agreement and a note for a loan. By 1998, the company had 12 employees.

In 2001, Bway.net terminated Stvelman for failure to perform his duties, pursuant to his 1997 employment agreement. Bway.net commenced an action seeking a judgment declaring the validity of Stvelman's termination, and an order restraining him from having access to the corporation. Stvelman asserted counterclaims for, *inter alia*, breach of his employment agreement and unjust enrichment. In an order dated November 9, 2004, Judge Shirley Kornreich held that Stvelman's termination was proper, and awarded him severance in the amount of \$315,676.25 plus interest, pursuant to his employment agreement.

Bway.net failed to make payments to Stvelman. Bway.net and Stvelman entered into a stipulation of settlement on August 25, 2005, whereby Bway.net agreed to pay Stvelman an initial lump sum of \$100,000, and an additional sum of \$200,000 payable in monthly installments of \$3,500 beginning on September 1, 2006. If Bway.net defaulted on any monthly payment, Stvelman would be entitled to entry of judgment in the full amount of \$200,000 plus interest and attorneys fees. Bway.net made the initial payment on August 25, 2005 by obtaining a loan from Songbird Company ("Songbird"). That loan was secured by a lien against Bway.net.

Bway.net was unable to make payments to Songbird or to Stvelman. Stvelman then commenced an action in 2006, alleging that Lynch orchestrated fraudulent conveyances through the Songbird loan in order to evade paying the 2004 judgment. Stvelman alleged that Bway.net, OpenNet and Lynch engaged in a scheme to defraud

him by depleting Bway.net's assets through a phantom foreclosure by Songbird, transferring assets out of Bway.net into OpenNet, and Lynch using loan proceeds to satisfy personal debts arising out of her control and operation of Bway.net. According to Lynch, OpenNet was merely a successor company to Bway.net. In an order entered on August 24, 2007, Judge Kornreich appointed Stevelman as temporary receiver over the affairs of Bway.net. On September 26, 2007, the parties entered into another stipulation of settlement. Stevelman was to be paid \$2,500 monthly and in the event of a default, the entire amount, less any payments paid, would become due and Stevelman would become the legal owner of the shares and be designated the sole officer and director of Bway.net and Open Net, and Lynch would withdraw as director and officer.

Pursuant to the stipulation, Open Net paid Stevelman \$35,000 in a lump sum payment, and \$2,500 monthly thereafter from November 2007 through February 2010, at which point Open Net defaulted. The company was operating at a loss, and owed a substantial amount of money to various creditors. Based on the default, Stevelman notified Lynch that he was going to exercise his rights under 2007 settlement agreement, and demanded that Lynch step down from the company immediately.

Stevelman then moved to enforce the September 26, 2007 stipulation of settlement. In an order dated November 15, 2010, the court declared Stevelman the owner of Lynch's shares in Open Net and Bway.net and the sole officer and director of the corporate defendants, directed Lynch to withdraw as officer and director of the

corporate defendants, and granted a money judgment to Stevelman of \$15,000 plus interest against Lynch personally. Immediately thereafter, Stevelman took control of the corporate defendants.

Lynch then moved to reargue/renew the November 15, 2010 decision, and on June 7, 2011, Stevelman was directed to indemnify Lynch against any liabilities of Bway.net which had been guaranteed by Lynch personally that were incurred after Stevelman took over.

Lynch commenced the instant action in or about December 2012. Lynch alleged that from April 1997 through November 2010, she performed her duties properly pursuant to her 1997 employment agreement. She drew an annual salary of \$60,000 but stopped receiving a salary as of January 15, 2006 because there was not enough money available to meet all of the corporation's obligations. She claimed that as of the November 2010 takeover of the corporation by Stevelman, she was owed \$292,500.00 in unpaid compensation by Open Net. She maintained that pursuant to the employment agreement, all accrued compensation was to be paid promptly upon her termination and she was also contractually entitled to severance in the amount of \$631,352.50 plus \$13,500.00 in book value.

She further maintained that since Stevelman took over the corporations, he refused her access to her personal email, personal property and business records. Further, the corporate defendants have failed to make any rent payments to the owner of the corporate

office space and when they vacated the premises, there was unpaid rent due in the amount of \$115,673.47. The owner of the office space sued Lynch to recover that unpaid rent.

Lynch asserted claims for (1) breach of her employment agreement, claiming that she was owed unpaid salary and severance; (2) violation of Business Corporations Law §630; (3) unjust enrichment in that the corporate defendants received the benefit of her services from January 15, 2006 through November 24, 2010, during which time she received no salary; (4) quantum meruit in that the corporate defendants received the benefit of her services from January 15, 2006 through November 24, 2010, during which time she received no salary; (5) an accounting; and (6) conversion of certain items of Lynch's personal property, personal email account, personal banking information and privileged legal documents. Finally, she alleged that she was entitled to legal fees incurred in this action, and incurred from defending herself in the suit brought by the owner of the office space.

Stevelman, Bway.net and Open Net now move to dismiss the complaint. They first argue that they could not have breached Lynch's employment agreement by failing to pay her severance, because said agreement, which was only with Bway.net, was no longer in effect. In any event, the corporate defendants never terminated Lynch, so as to trigger any severance provision, rather, the Court issued a ruling in November 2010, removing Lynch from the corporation, in accordance with the terms of the 2007 settlement

agreement. They further argue that Lynch elected to fire herself and forego compensation and collected unemployment benefits in 2006.

They next maintain that Lynch's claims for quantum meruit and unjust enrichment, which could only be directed at Open Net because Lynch did not perform any services for Stevelman or Bway.net from 2006-2010, must be dismissed. Lynch fails to set forth any details as to what services she rendered for Open Net and how Open Net benefitted from such services. Further, she chose to stop taking a salary, and instead just received whatever benefits arose from her equity in the corporation during that time.

They next argue that Stevelman can not be held liable for the debts of Open Net pursuant to Business Corporation Law §630 because he was not a shareholder during the period from which Lynch seeks payment. In addition, she was not a corporate employee as contemplated by the statute, rather, she was the sole owner and manager of the corporation.

Finally, they argue that the claims for an accounting and for conversion must be dismissed because Stevelman owes no fiduciary duty to Lynch, as their business relationship ended in 2001 and her conversion claim is duplicative of her claim for breach of her employment agreement.

In opposition, Lynch argues that the merger clause in the 2007 settlement agreement did not divest her of her rights to severance, bonuses and accrued compensation. Rather, that settlement agreement did not cover the 1997 employment

agreement, instead, it addressed only the 2005 settlement agreement. She next argues that her application for unemployment benefits does not constitute a waiver of her rights pursuant to the 1997 employment agreement. Finally, she maintains that her claims for equitable relief should not be dismissed, and Stevelman should remain a defendant in this lawsuit because he now owns and operates the corporate defendants.

Discussion

In determining whether to grant a motion to dismiss pursuant to CPLR §3211, the court should accept as true the facts alleged in the pleading, accord the drafter the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dept. 2002).

First, the court dismisses Lynch's claim for breach of her employment agreement. Lynch's employment was never "terminated" pursuant to the employment agreement, so as to trigger any right to severance or accrued compensation. Rather, pursuant to the 2007 stipulation, when the corporate defendants defaulted in making payments to Stevelman, Lynch forfeited her rights as officer and director of the corporate defendants. Lynch was directed to withdraw from the corporations by the court in 2010, enforcing the 2007 stipulation entered into by the parties. Therefore, she is not entitled to severance or accrued compensation in accordance with the termination provisions in the employment agreement.

Next, the court dismisses Lynch's second cause of action asserting a violation of Business Corporation Law §630. Business Corporation Law §630 operates to impose personal liability against corporate shareholders for the debts of their corporation. *See East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 884 N.Y.S.2d 94 (2nd Dept. 2009); *Stuto v. Kerber*, 26 Misc. 3d 535 (Sup. Ct. Alb. Co., 2009) *aff'd* 77 A.D.3d 1233 (3rd Dept. 2010) *aff'd* 18 N.Y.3d 909 (2012). Here, Stevelman was not a shareholder of the corporation defendants from 2006-2010, which is the time period which Lynch is seeking to recover unpaid wages, and therefore, Lynch can not sustain this cause of action.

Defendants also seek to dismiss Lynch's claims for unjust enrichment/quantum meruit. Unjust enrichment requires sufficient proof that 1) the defendant was enriched, 2) such enrichment was at the plaintiff's expense, and 3) in equity and good conscience, the defendant should be required to return the money or property to the plaintiff. *See Cruz v. McAneney*, 31 A.D.3d 54 (2nd Dept. 2006). Quantum meruit requires sufficient proof of 1) performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) the reasonable value of the services, and 4) the expectation of compensation therefor. *See Atlas Refrigeration-Air Conditioning, Inc. v. Lo Pinto*, 33 A.D.3d 639 (2nd Dept. 2006). The court finds that sufficient facts have been pled to support these claims as asserted against Open Net/Bway.net. While defendants allege that these claims should be dismissed as against Bway.net because Lynch "fired

herself from Bway.net in early 2006," the court finds that further discovery is required to shed light on the relationship between Open Net and Bway.net during the relevant time period, and to determine which company, if any, can be held liable to Lynch. However, the court agrees with defendants' argument that these claims should be dismissed as asserted against Stevelman, because he had no involvement with Bway.net or Open Net during the applicable time period for these claims.

Finally, the court will not dismiss Lynch's cause of action alleging conversion. Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights. *See Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283 (2007). Here, reading the complaint in a light most favorable to Lynch, the conversion claim is sufficiently stated by allegations that specified items of Lynch's personal property that were on site at the corporate defendants' location were not returned to her.¹

In accordance with the foregoing, it is hereby

ORDERED that defendants Ian Stevelman, Bway.net, Inc. and Open Net, Inc.'s motion to dismiss the complaint is granted to the extent that the first cause of action for breach of the employment agreement is dismissed, the second cause of action for violation of Business Corporation Law §630 is dismissed, the third cause of action for unjust enrichment only as asserted against defendant Ian Stevelman is dismissed, the

¹ In her complaint, Lynch also asserts a claim for an accounting. However, in her opposition papers, she does not advance any arguments in support of that claim and therefore, it seems to have been abandoned.

fourth cause of action for quantum meruit only as asserted against defendant Ian Stevelman is dismissed, the fifth cause of action for an accounting is dismissed, and the remaining causes of action are severed and shall continue; and it is further

ORDERED that defendants Ian Stevelman, Bway.net, Inc. and Open Net, Inc. are directed to serve an answer to the remaining causes of action in the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
December 11, 2013

ENTER:



J.S.C.
SALIANN SCARPULLA