Columbia Artists Mgt. LLC v Zemsky/Green Artists Mgt. Inc.
2010 NY Slip Op 33935(U)
September 13, 2010
Supreme Court, New York County
Docket Number: 600578/09
Judge: Melvin L. Schweitzer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: _____ PART 45
Justice

Columbia Artists Management LLC

- v -

Zemsky/Green Artists Mangmt

INDEX NO. 600578/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss is Denied; this motion by defendants for a Stay is Denied, each per the attached Decision and Order

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

Dated: September 13, 2010

Melvin L. Schweitzer J.S.C.
MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

COLUMBIA ARTISTS MANAGEMENT LLC,	:	
Plaintiff,	:	Index No. 600578/09
-against-	:	DECISION AND ORDER
ZEMSKY/GREEN ARTISTS MANAGEMENT INC., ALAN GREEN and BRUCE ZEMSKY,	:	Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is the court's decision with respect to defendants' motion to dismiss the complaint.

Background

This matter arises out of a strained, and ultimately broken, employment relationship among a professional artists management entity and two of its employees. The critical facts, as alleged, occur after the separation of the employees from the artists management entity and involve the alleged conduct of the now former employees with respect to certain clients, or former clients, of the entity, a roster of prominent professional vocal artists in the opera world.

Plaintiff, Columbia Artists Management LLC (CAMI), employed Defendants Alan Green (Mr. Green) and Bruce Zemsky (Mr. Zemsky) to provide management services for performing artists. In February 2005, Messrs. Zemsky and Green left CAMI and incorporated Zemsky/Green Artists Management Inc. (Zemsky/Green) to perform similar services. Plaintiff asserts causes of action against defendants for tortious interference with contract, unjust enrichment, conversion and breach of fiduciary duty and is seeking recovery of $2,500,000 in damages. Defendants have moved to dismiss all four causes of action pursuant to CPLR 3013 and CPLR 3211 (a) (1) and (7).

Messrs. Zemsky and Green had been employed as managers at CAMI for almost 20 years. The terms of their employment were governed by written employment agreements, of which the last were dated May 24, 2002 (Agreements). According to Messrs. Zemsky and Green, prior to the expiry of the Agreements in January 2005, they received unacceptable offers of renewal which they were forced to reject. Then they hastily exited CAMI to form their own firm, Zemsky/Green. At that time, a number of CAMI's opera artist clients moved their accounts to Zemsky/Green and terminated their contractual relationships with CAMI.

The gravamen of the complaint challenges the conduct of Messrs. Zemsky and Green after their exit from CAMI and their formation of Zemsky/Green. Plaintiff asserts that fifty of Zemsky/Green's new opera clients that had been clients of CAMI failed to pay past due amounts to CAMI under their then extant at-will representation contracts with CAMI. These amounts represent commissions allegedly due for services performed for these artists by CAMI prior to the termination of the at-will contracts. CAMI asserts that the obligation of their now former clients to pay for services performed by CAMI thereunder survived termination.

CAMI alleges that these breaches by their former clients were precipitated by the defendants in that they were trying to seek a share of the commissions for the services they rendered to the clients when they were CAMI employees. Allegedly, Messrs. Zemsky and Green prompted some of the clients to send notices to CAMI in May 2005 claiming that no amounts were due from them because CAMI was not licensed as an employment agency under Article 11 of New York General Business Law (GBL).[1] The notices stated that CAMI was not

---

[1] GBL § 171 (8) of Article 11 defines a "Theatrical employment agency" as any person who, among other things,

> "procures or attempts to procure employment or engagements for . . . the legitimate theater, motion pictures, radio, television, phonograph recordings transcriptions, opera, concert, ballet, modeling or

authorized to represent them at the time they were on CAMI's client roster. Some clients acknowledged that they sent these notices to CAMI at the behest of Messrs. Zemsky and Green.

CAMI contends that Messrs. Zemsky and Green were aware that CAMI was not required to be licensed under GBL Article 11, and that, as noted above, the real motivation for their actions was an attempt to divert a portion of the commissions due CAMI to themselves.

CAMI did obtain a license under GBL Article 11 in 2004. The American Guild of Musical Artists (AGMA), acting on behalf of all performing artists which it represents, has taken the position in a related declaratory judgment action before this court, that any commissions collected by CAMI from performing artists at a time when it did not have an Article 11 license should be returned to the artists.

Discussion

To succeed on a motion to dismiss under CPLR 3211 (a) (1), a defendant must show that the relied-upon documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 (1st Dept 1998). To determine whether there is a basis for dismissal under CPLR 3211 (a) (7), the court's role is to determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v Martinez*, 84 NY2d 83, 84 (1994). On such a motion to

---

other entertainments or exhibitions or performances, but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor."

Section 172 requires that employment agencies (as defined in § 171 (8)) be licensed:

"No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article. Such license shall be issued by the commissioner of labor, except that if the employment agency is to be conducted in the city of New York such license shall be issued by the commissioner of consumer affairs of such city. Such license shall be posted in a conspicuous place in said agency."

dismiss, the court is to accept facts as alleged in the compliant as true and to accord plaintiffs every possible favorable inference. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977). When evidentiary material has been considered on such a motion to dismiss, the criterion is whether the pleader *has* a cause of action and dismissal is not appropriate unless an alleged material fact is not a fact at all and no significant dispute exists concerning it. *Id.*

While the facts alleged in the compliant are presumed to be true, the court, however, need not accept as true "[v]ague and conclusory allegations." *Marino v Vunk*, 39 AD3d 339, 340 (1st Dept 2007), and such allegations are insufficient to sustain a cause of action. "Bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true." *Kopelowitz & Co., Inc. v Mann*, 23 Misc 3d 1112(A), 2009 WL 1037734, at * 3 (Sup Ct Kings Cty Apr. 17, 2009) (citations omitted). *See also Jericho Group v Midtown Dev.*, 32 AD3d 294, 298-99 (1st Dept 2006) (citations omitted).

The court now discusses seriatim the claims subject to the motion to dismiss.

Tortious Interference

CPLR 3013 requires that a claim be pled with sufficient particularity so as to give the court and parties notice of the transactions, occurrences, or series of transactions and occurrences that are intended to be proved and the material elements of each cause of action. The court concludes that insofar as the CPLR 3013 standard is concerned, the claim set forth here, and the other claims in this action, meet this standard, and plaintiff's motion to dismiss under CPLR 3013 is in all respects denied.

The material elements of a tortious interference claim include (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendants' knowledge of that contract; (3) the defendant's intentional interference with that contract; and (4) resulting breach and

damages. *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 (1996). An essential aspect of this analysis is that the breach would not have occurred 'but for' the interference conduct of the defendant. *68 Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857, 858 (2d Dept 2005).

Plaintiff contends that the actions of the defendants which led to the breach of plaintiff's contracts with their clients were motivated by Messrs. Zemsky and Green's attempts to arm twist plaintiff during employment termination negotiations in which they were seeking a share of the disputed commissions. Plaintiff asserts that these defendants had knowledge of the terms of the contracts between CAMI and its clients in that they had been handling their accounts throughout the term of their employment at CAMI. Plaintiff also alleges that Messrs. Zemsky and Green were aware of CAMI's position that it did not need a license under GBL Article 11 in order to perform the services it rendered for these clients. Plaintiff contends defendants used this information to their timely advantage to induce the breach of numerous client contracts.

Defendants counter that these facts are not sufficient to establish a cause of action. They add that the 'but for' analysis, *i.e.* there is no cause of action 'but for' the tortious conduct of the defendants, is refuted by documentary evidence here which establishes CAMI's legal position that it did not need a license to collect commissions from the clients as incorrect. They refer to AGMA's public proclamation that any agency that did not have a license under GBL Article 11 was not authorized to collect commissions, and thus argue that the clients would have terminated their contracts with CAMI irrespective of the advice given to the clients by the defendants.

In a case in federal court, *Columbia Artists Management, LLC v Swenson & Burnalas, Inc.*, 2008 WL 4387808 (SDNY), CAMI sought to recover fees in connection with its representation of a prominent performing opera artist. The artist there argued that the fees were

not collectable, and that all fees previously paid by her should be repaid, as CAMI was not properly licensed as a theatrical employment agency under GBL Article 11. CAMI countered that there was no private right of action under GBL Article 11 and that defendant, therefore, was obligated to pay its fees. CAMI also argued that its business only incidently involved the seeking of employment for the artists it managed and, therefore, it was exempt from the licensing requirements. The court there held that no private right of action existed for violation of this GBL provision, and that the fees thus were payable. Even if, as a matter of law, this court were not to agree with the reasoning of the court on this point, there still would be open questions of fact pertaining to the issue whether CAMI is exempt from the GBL Article 11 licensing requirement given the principal nature of its business and the services it performs for its clients.[2] Consequently, defendants arguments for dismissal of CAMI's complaint pursuant to CPLR 3211 (a)(1) is not well taken.

The court here is of the opinion that plaintiff has satisfactorily plead a case for tortious interference. Plaintiff specifically has alleged (1) its contractual relationship with the artists; (2) that defendants were aware of the existence of the contracts between the plaintiff and its former clients due to their unique position as former employees of CAMI; (3) defendants intentional interference by stating that (i) a number of artists informed plaintiff they were acting pursuant to specific instructions from Messrs. Zemsky and Green, and (ii) Messrs. Zemsky and Green retained a portion of the commissions for themselves; and (4) their contracts with the artists were breached and a large portion of commissions due to them was withheld, thereby resulting in damages.

---

[2] Also, as referenced *supra*, since CAMI did obtain a license under Article 11 in 2004, there are questions of fact associated with when any past fees allegedly were earned.

As far as defendants contention that the 'but for' analysis of defendants' conduct does not satisfy the tortious interference test because of the independent pronouncement by AGMA that CAMI was not authorized to collect commissions as an unlicensed entity, this court believes the validity of AGMA's position is a question that ultimately will be determined in this case.[3] AGMA is a labor union representing its clients and its position does not in itself give Messrs. Zemsky and Green the authority to interfere with the contractual relations between CAMI and the clients simply on the basis of what AGMA said, if that is what it did.

Defendants also posit that the plaintiff's claim for tortious interference should be dismissed as the allegedly breached contracts are not attached to the complaint, nor does the complaint individually list the terms that have been breached for each contract. Plaintiffs point out that when dealing with a breach of contract claim, the complaint must set forth the terms of the agreement upon which the breach is predicated, either by express reference or by attaching a copy of the contract. *J&L American Enterprises, Ltd., v DSA Direct, LLC*, 814 NYS2d 890 (S.Ct. NY County 2006). The court is of the opinion that the plaintiff is not required to attach a copy of the contracts to the complaint so long as the relevant portions of the contracts is contained therein. Exhibit A to the complaint lists (1) the names of the clients that have allegedly breached their contracts; (2) details of the amounts owed; and (3) the relevant dates of the contracts and individual rates of applicable commissions. The complaint also references contract paragraph 12 (clause dealing with the payment of commissions) and paragraph 13 (termination clause). This, in the court's opinion, is sufficient at this stage of the case..

---

[3] This court has decided that AGMA does not have standing to bring an independent action against CAMI seeking a judicial determination with respect to the issue of fees allegedly payable by artists to CAMI. *See American Guild Musical Artists, Inc. v Columbia Artists Management LLC*, Index No. 603427/08, September 13, 2010.

Defendants next argument is that they cannot be held liable for tortious interference with contract, as they were acting in a fiduciary capacity vis-à-vis their clients. They cite various cases to establish the proposition that an agent cannot be held liable for inducing a principal to breach a contract with a third person, at least where the agent is acting on behalf of his principal and within the scope of his authority. *Cunningham v Lewenson*, 294 AD2d 327 (2d Dept 2002). While plaintiff agrees with this general principal, it points out that this is not applicable when the agent/fiduciary is not acting within the scope of his authority and is "motivated by self interest," *Kartiganer Assocs., P.C. v New Windsor*, 108 AD2d 898, 899 (2d Dept 1985).

Defendants reply by citing *Guard Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 196 (1980) where the court clearly stated as a general principle that if no improper means have been employed a competitor cannot be held liable for interference with a contract. *See also Thur v IPCO Corp.*, 173 AD2d 344, 345 (1st Dept 1991). The question now before the court is whether defendants were acting in an improper manner and were motivated by self interest when they gave advice to the plaintiff's former clients to breach their extant contracts with the plaintiff. Defendants state that plaintiff's sole allegation that Messrs. Zemsky and Green were trying to gain a bargaining advantage with respect to their employment contracts with plaintiff is not true and, in any event, is not a cognizable legal wrong. The court believes the question whether the allegations made by the plaintiff in this respect are true is a question of fact to be decided at a later stage of this proceeding.

Further, plaintiff argues that Messrs. Zemsky and Green's actions in seeking the contested commissions on the one hand, and acting in the best interest of their clients on the other, arguably are inconsistent. The commissions were due pursuant to contracts entered into between the plaintiff and its former clients. Plaintiff posits that Messrs. Zemsky and Green were

not entitled to the commissions individually, or as subsequent representatives of the clients, as these commissions were due for past services rendered by CAMI. The facts as alleged by the plaintiff are sufficient at this stage to allege that the defendants were intentionally trying to harm the plaintiff and were acting in their own interest.

Conversion and Money Had and Received

Plaintiff also has brought actions for conversion and for money had and received against the defendants. It bases its claim on the premise that defendants diverted to themselves commissions owed to the plaintiff by the artists themselves, and hence defendants are in wrongful possession of the plaintiff's property. Defendants, in turn, move for dismissal of these claims on the basis that the plaintiff never had ownership, control or legal possession of the disputed funds/money.

Defendants cite cases to establish two legs of this argument – first, that specific money should be involved to maintain causes of action for conversion, and of money had and received (*see Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 (2d Dept 1975)); and second, plaintiff should have actual legal ownership of the money that has been converted or wrongfully received (*see Tal Priel v Abram Heby, New York 104 Funding Corp.*, 791 NYS2d 873 (Sup Ct NY County 2004)). There is no dispute on these propositions of law. Plaintiff has cited certain cases as examples to establish that the money that was allegedly converted by the defendants was specifically identifiable and that they had an ownership interest in that money. They cite *Steinberg v Sherman*, 2008 WL 1968297 (SDNY May 2, 2008) and *Feinberg v Katz*, 2002 WL 1751135 (SDNY July 26, 2002) to establish that money does not need to be segregated to be

specifically identifiable. Plaintiff also refers to certain cases[4] to establish that CAMI did not need to be in possession of the funds to make a claim for conversion. It asserts that as long as it had a legal right to ownership of the funds that is superior to the right of the defendants, it has a valid claim. Defendants have sought to distinguish these cases on the ground that plaintiff in fact does not have a superior right to possession and has no legal right to the disputed amounts as it had not obtained a license under GBL Article 11 (*see* Reply Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint, ¶ 12).

The court believes plaintiff would have a superior ownership interest in the money that allegedly has been converted by the defendants. These moneys are commissions for past services. Arguably, plaintiff would have had an enforceable right to payment had the defendants not sought it for themselves. The defendants would have no valid legal claim to the money as it became a specific and identifiable amount at the point that the defendants diverted the money to themselves.

Defendants argue that this ownership interest is in doubt as plaintiff did not have the requisite GBL Article 11 license to collect the money. As stated with regard to this issue addressed *supra*, this is a question of fact and this court will not dismiss a claim based on this argument alone.

Defendants also draw a parallel between their case and the case of *Peters Griffin Woodward, Inc. v WCSC, Incorporated,* 88 AD2d 883 (1st Dept 1982). The plaintiff in *Peters* instituted an action against its sales representative alleging the representative breached its

---

[4] *See Bank of India v Weg and Meyers, P.C.*, 257 AD2d 183, 191-192 (1st Dept 1999); *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 (1st Dept 1992); *LoPresti v Terwilliger*, 126 F3d 34, 41-42 (2d Cir 1997).

contract with the plaintiff and entered into a new (similar) contract with a third party. Plaintiff sought damages for breach of contract against the agent and brought a claim for conversion against the third party. The court correctly stated that the disputed amount in that case was damages for breach of contract, and an action for conversion cannot be based on money whose ownership is disputed. *Peters Griffin* is of limited application here, however, as there is no dispute between the parties or between the plaintiff and the artists regarding the plaintiff's performance of the contracts for which it is seeking payment. The plaintiff's conversion action is based on the defendants' retention of funds that allegedly belong to the plaintiff as they are payments for work done prior to the termination of the contract between the plaintiff and the artists. Accordingly, the motions to dismiss this claim are denied.

As far as the plaintiff's claim for money had and received is concerned, plaintiff only needs to allege that the defendants were "enriched at the plaintiff's expense and that the circumstances are such that equity and good conscience require that defendant make restitution" *Mina Inv. Holdings Ltd. v Lefkowitz,* 16 F Supp 2d 355, 361 (SDNY 1998). Regardless of the plaintiff's legal stand vis-à-vis the artists, plaintiff has properly alleged that the defendants have no right to collect and hold the disputed amounts. Defendants alleged actions are arguably contrary to equity and good conscience in this respect and hence this claim cannot be dismissed at this stage of the proceeding.

Individual Liability

Messrs. Zemsky and Green argue they cannot be held individually liable on a tort theory unless plaintiff alleges the circumstances necessary to pierce the corporate veil associated with Zemsky/Green. Plaintiff counters by pointing out that the allegations against these two individuals are for actions taken by them personally and not as officers of Zemsky/Green. A

number of cases cited by plaintiff establish the proposition that individual officers can be held liable for their tortious conduct. *See generally Davidcraft Corp. v Danu Int'l, Inc.*, 1992 WL 162997 (SDNY June 24, 1992); *Herald Hotel Assocs v Ramada franchise Sys., Inc.*, 595 NYS2d 28 (1st Dept 1993). Defendants present no counter to this argument. The court agrees with the plaintiff's position, as the law is clear in limiting the piercing of the corporate veil to specific circumstances, but these circumstances are of no relevance here. Plaintiff's case does not relate to Messrs. Zemsky and Green's actions through the garb of Zemsky/Green. Plaintiff has sufficiently alleged continuing tortious conduct by Messrs. Zemsky and Green starting with their respective employment negotiations with CAMI and extending to the advice each gave to the artists. Hence the court does not dismiss this claim at this stage of the proceedings.

Fiduciary Duty

Plaintiff alleges a case for breach of fiduciary duty as defendants were high ranking employees in CAMI. Defendants move to dismiss this claim on the ground that they did not have any fiduciary obligation to the plaintiff as they were merely employees and did not hold any office of trust, and even if it is assumed they had some fiduciary obligation to CAMI it did not extend beyond the period of their employment.

Defendants cite the case of *Rodgers v Lenox Hill Hosp.*, 657 NYS2d 616 (1st Dept 1997) for the proposition that there is no fiduciary duty between an employer and employee. While the court there rejected the notion that all employer-employee relationships have a fiduciary basis, it referred to a 'duty of loyalty' that flows from an employee to the employer and stated that an employee must not seek to acquire indirect advantages from third persons for performing duties and obligations owed to his employer.

Defendants also cite a number of cases to establish that even if there was a fiduciary duty, it did not extend beyond the term of their employment with CAMI. *See Foley v D'Agostino*, 21 AD2d 60 (1st Dept 1964); *Royal Carbo Corp v Flameguard, Inc.*, 229 AD2d 430 (2d Dept 1996). These cases bring into question the 'improper' acts of Messrs. Zemsky and Green as employees/officers during the term of their employment with CAMI. Plaintiff argues that defendants are liable for their conduct even after termination of their employment, as long as the conduct in question relates to their period of employment. *See generally Fisher Org v Ryan*, 470 NYS2d 968 (Civ Ct 1983); *Town & Country House and Home Service, Inc. v Newbery*, 3 NY2d 554 (1958).

The court is of the opinion that the defendants did owe a duty of loyalty or a duty not to profit at the expense of the plaintiff for the work performed by them during the term of their employment with the plaintiff. If they diverted a share of the commissions they had no right to claim, in that the work they performed was done as employees for the plaintiff, they in fact breached this duty. Therefore, the court does not grant defendants' motions to dismiss this claim.

Plaintiff also alleges that defendants used confidential information to their advantage. The confidential nature of the information used by the defendants is a question of fact and at this stage of the case, viewing every inference in a light favorable to plaintiff, these unresolved questions of fact prevent disposing of plaintiff's claim on these motions.

Stay of Proceedings

Defendants request a stay of these proceedings as they take the position that the enforceability of the artists' contracts is the subject matter of a case before this court between AGMA and plaintiff. As noted in footnote 3 *supra*, the court has dismissed AGMA's complaint

for lack of standing. The question as to enforceability, to the extent relevant, will be answered in this proceeding. Thus, the defendants request for a stay of these proceedings is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is denied with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that defendants' motion for a stay is denied.

Dated: September 13, 2010

ENTER:

J.S.C.