Ishin v Qrt Mgt., LLC
2012 NY Slip Op 33418(U)
August 9, 2012
Sup Ct, New York County
Docket Number: 113925/11
Judge: Manuel J. Mendez

[* 1]

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

SERGEY ISHIN,

Plaintiff,

-v-

QRT MANAGEMENT, LLC, QUANTITATIVE RESEARCH & TRADING, L.P., QRT ADVISERS, LLC, MICHAEL AKSMAN and JOHN BARTNER,

Defendants.

INDEX NO. 113925/11
MOTION DATE 07-11-2012
MOTION SEQ. NO. ~~002~~ 001
MOTION CAL. NO.

* Amended as to motion Seq. #'s only

The following papers, numbered 1 to 5 were read on this motion to Dismiss Pursuant to CPLR §3211 [a] [1], [7] and Cross-Motion to Amend the Complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-2, 3-4
Answering Affidavits — Exhibits ____cross motion	
Replying Affidavits	5

FILED
AUG 17 2012
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion to dismiss this action pursuant to CPLR §3211[a][1],[7], is granted only to the extent that all claims against Jon Bartner, individually are severed and dismissed. Plaintiff's cross-motion pursuant to CPLR §3025[b] to amend the summons and complaint, is denied.

Jon Bartner, (hereinafter referred to as defendant) makes this motion to dismiss this action pursuant to CPLR §3211[a][7], for failure to properly state a cause of action. Defendant claims that members or managers of a limited liability company and limited partnership are not individually liable for breach of contract and that he did not sign the employment contract.

Plaintiff opposes the motion and cross-moves pursuant to CPLR §3025[b], to amend the complaint to add allegations as to John Bartner and assert additional causes of action for quantum merult and unjust enrichment.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the Court construe every fact the plaintiff has alleged as true. The party seeking dismissal must produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (See, Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994] and AG Captial Funding Partners and L.P. v. State Street Bank and Trust Co., 5 N.Y. 3d 582, 842 N.E. 2d 471, 808 N.Y.S. 2d 573 [2005].

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, 614 N.Y.S., 2d 972, 638 N.E. 2d 511 [1994] and Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17,

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

[1977]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept.,2003]).

New York Labor Law Article 6, §190[3], has a broad definition of employer, In the context of a limited partnership or limited liability corporation, the "economic reality test" is employed. There are four factors in the "economic reality test," determination is based on the totality of the circumstances. The economic realty test requires a determination concerning whether the alleged employer, "(1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules and conditions;(3) determined the method and rate of payment; (4) and maintained employment records."(Lauria v. Heffernan, 607 F. Supp. 2d 403 [U.S. Dist. Ct., EDNY, 2009]). Shareholders in a limited liability corporation may be sued under Labor Law, Article 6,§190[3], provided they qualify as employers (Wong v. Yee, 262 A.D. 2d 254, 693 N.Y.S. 2d 536 [N.Y.A.D. 1st Dept., 1999]).

New York Labor Law Article 6, §190[2], defines employee as any person that is employed for hire by an employer. New York Labor Law Article 6, §190[7], is the catchall provision, the other sections apply to manual workers, railroad workers, commissioned salespeople. New York Labor Law Article 6, §190[7], applies to clerical and other workers that are not employed, "...in a bona fide executive, administrative or professional capacity, whose earnings are in excess of $900.00 per week."(McKinney's Cons. Laws of NY, Book 30, Labor Law , Article 6, §190 and Lauria v. Heffernan, 607 F. Supp. 2d 403, supra).

The plaintiff is a Connecticut resident, he brought this action against the defendants QRT Advisors, LLC, QRT Management, LLC and Quantitative Research and Trading, LP, all organized and existing under the laws of the State of Delaware and doing business as a foreign company and partnership in New York. Michael Aksman and Jon Bartner were sued individually, as officers and partners of the remaining defendants. Plaintiff claims that on March 8, 2010, pursuant to a letter agreement, he started working as a computer programmer for the defendants. The letter agreement, signed by plaintiff and Michael Aksman, as managing member, states that a plaintiff will earn a base salary of $120,000.00. The agreement also provides for an additional bonus of $60,000.00 per year for two years, guaranteed for as long as he remains employed. Plaintiff received a letter advising him that effective December 1, 2010, plaintiff was terminated from employment and he would receive a pro-rated bonus in the first quarter of 2011, when they were distributed. Plaintiff was unemployed from December 1, 2010 through May, 2011, and claims he never received his bonus.

The Complaint asserts three causes of action against all of the named defendants (Mot. Exh. A). There are two causes of action for breach of contract the first includes a claim of wrongful termination and the second includes a claim of failure to pay an earned bonus. The third cause of action is for violation of the wage provision of Article 6 of the New York State Labor Law.

Defendant pursuant to CPLR §3211[a][1], seeks to dismiss this action and provides as documentary evidence, a copy of the letter agreement and the termination letter (Mot. Exh. A, 1 & 2). Defendant claims the letter agreement establishes the plaintiff was an at will employee with no definite terms of employment and has no claim for wrongful termination. Defendant states that the complaint does not allege he personally is plaintiff's employer

and he is a non-signatory to the agreement. Defendant seeks to dismiss this action pursuant to CPLR §3211[a] [7], claiming he cannot be found individually liable because there are no facts asserted that would create individual liability and no clear evidence that he is plaintiff's employer or that he intended to substitute or add personal liability on behalf of the entities and under Delaware Law, 6 Del.C. §18-303. Defendant claims that there is no basis to sustain plaintiff's Labor Law cause of action because plaintiff's income exceeded $900.00 per week, as a programmer plaintiff is a professional and a member of the administrative staff.

Plaintiff opposes defendant's motion claiming that the letter agreement states a twenty-four month term establishing he is not an employee at will. Plaintiff claims that the bonus was earned and the defendant's refusal to pay constitutes a breach of contract. Plaintiff claims that the defendant was an owner/employer on behalf of the entities and therefore liable under Article 6 of the New York Labor Law. Plaintiff claims that pursuant to Article 6 of the New York State Labor Law, plaintiff was not an administrative or professional employee and regardless of the amount of his wages, he is entitled to be paid in full.

Plaintiff was retained by QRT Management, LLC, and the letter agreement was signed by Michael Aksman as a managing member. Plaintiff has not established that Jon Bartner as a member or shareholder is individually liable under the causes of action for breach of contract. Plaintiff has not established that there is basis pursuant to New York Labor Law Article 6, §190[3], to find that Jon Bartner was his employer. Plaintiff's annual salary, not counting his bonus, was $120,000.00, he earned more than $900.00 per week.

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party. To establish prejudice there must be a showing of hindrance in preparation of the case or the prevention from taking measures in support of a party's position (Kocourek v. Booz Allen Hamilton, Inc., 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [N.Y.A.D. 1st Dept., 2011] and Loomis v. Civetta Corinno Constr. Corp. 54 N.Y. 2d 18, 429 N.E. 2d 90, 444 N.Y. S .2d 571 [1981]). Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action or is patently insufficient as a matter of law (Davis & Davis, P.C. v. Morson, 286 A.D. 2d 584, 730 N.Y.S. 2d 293 [N.Y.A.D. 1st Dept. 2001] and Non-Linear Trading Company, Inc. v. Braddis Associates, Inc., 243 A.D. 2d 107, 675 N.Y.S. 2d 5 [N.Y.A.D. 1st Dept.,1998]).

A determination as to whether a written agreement is ambiguous is a question of law. An agreement that does not establish a fixed duration, results in a presumed "employment at will, terminable by either party, at any time. An agreement that states a salary is measured for a period of time does not establish employment was more than as an employee at will (Todd v. Grandoe Corp., 302 A.D. 2d 789, 756 N.Y.S. 2d 658 [N.Y.A.D. 3rd Dept., 2003] and LaSalle v. Board of Educ. of Bridgehampton Union Free School Dist., 82 A.D. 3d 1167, 919 N.Y.S. 2d 524 [N.Y.A.D. 2nd Dept., 2011]).

The existence of an enforceable contract covering the issue of compensation, precludes recovery in quantum merult (Shuit v. Tree Line Management Corp., 46 A.D. 3d 405, 847 N.Y.S. 2d 580 [N.Y.A.D. 1st Dept. 2007]).

Plaintiff cross-moves pursuant to CPLR §3025[b], to amend the complaint. Plaintiff seeks to add allegations and documentary evidence as to Jon Bartner's role as employer, and assert a cause of action for violation of the Delaware Wage and Payment Collection Act. Plaintiff also seeks to assert additional causes of action for quantum merult and unjust enrichment. Plaintiff claims that the amended pleadings address alleged defects as stated in the defendant's motion papers.

Plaintiff annexes four exhibits to the proposed Second Amended Summons and Complaint. Exhibit 2 is a copy of the termination letter signed by Michael Aksman. Exhibits 3 and 4, are letters sent by plaintiff's attorney to both Michael Aksman and Jon Bartner. Exhibits 2, 3, and 4 do not establish that Jon Bartner is plaintiff's employer. Exhibit 1 is an series of e-mails starting March 1, 2010 through March 2, 2010. Only one e-mail dated March 1, 2010, involves Jon Bartner extending an offer on behalf of QRT Management, LLC, the remaining e-mails were sent by Michael Aksman. Plaintiff has not established a basis to add the exhibits or assert the additional causes of action.

Plaintiff has not established that the defendants would not be surprised or prejudiced by the proposed amendments. Plaintiff has not provided a basis to amend the complaint, there remain issues of fact as to the terms of the written agreement, but an agreement exists. Plaintiff's claims based on quantum meruit and unjust enrichment apply to compensation for rendered services, to the extent he seeks to recover for the entire two year period, those causes of action would not apply. Plaintiff has not established that the Delaware Wage and Payment Collection Act, applies in this New York action.

Upon review of all the papers submitted with this motion and cross-motion, this Court finds that Jon Bartner has established a basis pursuant to CPLR §3211[a][1],[7], to dismiss the claims asserted against him individually. Plaintiff has not established a basis to replead and submit a Second Amended Summons and Complaint. The amendment seeks to provide more detailed descriptions still does not result in proper causes of action.

Accordingly, it is ORDERED that JON BARTNER 's motion to dismiss in lieu of an answer pursuant to CPLR §3211[a] [1],[7], is granted, only to the extent that all claims against Jon Bartner, individually are severed and dismissed, and it is further,

ORDERED, that the causes of action asserted against the remaining defendants in the complaint are continued, and it is further,

ORDERED, that plaintiff's cross-motion pursuant to CPLR §3025[b] to amend the summons and complaint, is denied.

This constitutes the decision and order of this court.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: August 9, 2012

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE