Wiesen v Potter
2018 NY Slip Op 31197(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 650413/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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JEREMY WIESEN,

Plaintiff,

- v -

RANSEL POTTER, THE BENCHMARK COMPANY, LLC, BEN STOLLER

Defendant.

---X

INDEX NO. 650413/2018

MOTION DATE

MOTION SEQ. NO. 001 & 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 22, 26 were read on this application to/for Dismiss.

HON. BARRY R. OSTRAGER:

Plaintiff Jeremy Wiesen ("Wiesen") brings this action alleging breach of contract and fraud against Defendants Ransel Potter ("Potter"), Ben Stoller ("Stoller"), and The Benchmark Company, LLC ("Benchmark"). Defendants Stoller and Benchmark move separately to dismiss pursuant to CPLR 3211(a)(7) and 3016(b). Defendant Benchmark's motion is granted in its entirety and Defendant Stoller's motion is granted in part. Defendant Potter has neither answered nor appeared and it is unclear whether he has been properly served with the complaint.

Background

On January 25, 2012, Plaintiff Wiesen alleges that he made an oral agreement, later purportedly reduced to writing, with Defendant Stoller, in which Wiesen would receive a commission if Wiesen was able to procure a buyer for the sale of 15 million shares of Facebook

stock from a non-party seller with whom Stoller was familiar. On February 6, 2012, Wiesen sent an email to Stoller introducing Stoller to Defendant Potter, and purportedly setting forth the terms of Wiesen's commission in which Wiesen would receive $0.20 per share sold. Later that day, Potter sent an email to Stoller, copying Wiesen, stating that Potter had buyers ready to purchase the shares at a price of $32.00 a share, and purportedly confirming Wiesen's commission for the sale. On February 7, 2012, Potter told Wiesen via email that it "looks like we have a deal, but need to confirm with buyer."

Wiesen further alleges that Potter and Stoller created and forwarded to Wiesen fictitious emails to mislead Wiesen into believing that no sale of shares was ever consummated, thus denying Wiesen the commission to which he believes he is entitled.

Breach of Contract

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87-88.

Based solely on the allegations in Plaintiff's complaint there was no meeting of the minds sufficient to create a written agreement. Plaintiff's excerpts[1] of email communications between Plaintiff and Defendants Stoller and Potter show, at most, negotiations and ongoing discussions regarding the contours of a sale of shares transaction and accompanying commission. Significantly, the final email from Potter to Wiesen states: "looks like we have a deal, but need to confirm with buyer." No such confirmation of the material terms of the agreement is alleged

[1] Plaintiff, notably, did not even submit the emails as exhibits in his opposition papers to the instant motions.

to have been communicated to Wiesen. Indeed, it is entirely unclear if the sale of shares transaction was ultimately consummated. Consequently, there is no written agreement between the parties.

To the extent that no written agreement can be found in the email communications between the parties, Wiesen asserts that an oral agreement was formed with Stoller on a January 25, 2012 telephone call. Defendants argue that such an oral agreement is barred by the Statute of Frauds. In particular, New York General Obligations Law § 5-701(a)(10) provides that "every agreement is void unless it or some memorandum thereof be in writing … in case of a contract to pay compensations for services rendered in negotiating sale of business, *but that provisions shall not apply to a contract to pay compensation to an attorney at law*." *Rever v. Kayser-Roth Corporation*, 26 N.Y.2d 652, 652 (1970) (emphasis added).

Here, it is undisputed that Wiesen is an attorney admitted to practice in New York. The weight of precedent establishes that it makes no difference whether Wiesen has recently practiced law or whether he was acting in his capacity as an attorney for purposes of this sale of shares transaction. "[T]he New York Court of Appeals has declined to construe this exemption narrowly and has thus held that an attorney need not enjoy the attorney-client relationship with the parties from whom he seeks compensation in order to avail himself of the statutory exemption [of § 5-701(a)(10)]." *Hutner v. Greene*, 734 F.2d 896, 900 (2d Cir. 1984). "Absent some indication from the New York courts or legislature that a functional rather than literal interpretations is to be applied, we decline to read the words 'attorney at law' to cover some members of the New York bar and not others." *Id.* Thus, while Wiesen was not acting in his capacity as an attorney for purposes of the purported sale of shares transaction, his alleged oral

agreement is, nevertheless, not barred by the Statute of Frauds. Therefore, Defendant Stoller's motion to dismiss Plaintiff's breach of contract claim is denied.

Fraud

"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 the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). A fraud claim must be pleaded with particularity under CPLR 3016(b). *Id.* Further, a fraud claim will not lie "where the only fraud claimed relates to an alleged breach of contract." *Treeline 990 Steward Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 791 (2d Dep't 2013). "[A] general allegation that a party entered into a contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud." *Id.*

Here, the allegations that support Plaintiff's fraud claim are the same allegations that underlie Plaintiff's breach of contract claim, and the fraud claim seeks the same recovery as Plaintiff's breach of contract claim. A fraud claim that seeks identical damages to the breach of contract claim must be dismissed as duplicative. *Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 589 (1st Dep't 2011). Plaintiff "did not allege a breach of any duty collateral to or independent of the parties' agreements," and as such, Plaintiff's fraud claim is dismissed. *Id.*

Benchmark

Although it is undisputed that Potter was a Benchmark employee at the time of the alleged negotiations, there are no direct allegations against Benchmark and no allegations that Potter was acting within the scope of his Benchmark employment during the alleged negotiations. There are no allegations that Potter was acting in furtherance of Benchmark's

interests, that Potter was using a Benchmark email address to communicate with Plaintiff, or that Potter was acting in anything but his own personal capacity during the alleged negotiations. *See VFP Investments I LLC v. Foot Locker, Inc.*, 147 A.D.3d 491, 492 (1st Dep't 2017) (dismissing *respondeat superior* theory because employee was acting "solely for personal motives"). Therefore, the doctrine of *respondeat superior* is not properly alleged and Benchmark's motion to dismiss is granted in its entirety.

Punitive Damages

Plaintiff's claim for punitive damages is dismissed. The right to punitive damages arises when: (1) defendant's conduct is actionable as an independent tort; (2) the tortious conduct is of an egregious nature; (3) the egregious conduct is directed to plaintiff; and (4) the conduct is part of a pattern directed at the public generally. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995). Here, there is simply no claim that Defendants' purported conduct was directed at the public generally. The allegations in this run-of-the-mill breach of an alleged oral contract do not come close to the type of wanton conduct warranting a claim for punitive damages. Therefore, Plaintiff's claim for punitive damages is dismissed

Accordingly, it is hereby

ORDERED that Defendant Benchmark's motion to dismiss is granted. The Clerk is directed to dismiss The Benchmark Company, LLC from this action and sever all claims against it; it is further

ORDERED that Defendant Stoller's motion to dismiss Plaintiff's fraud claim is granted and Defendant Stoller's motion to dismiss Plaintiff's breach of contract claim is denied; it is further

ORDERED that Plaintiff's claim for punitive damages is dismissed; it is further

ORDERED that Defendant Stoller file an answer within twenty days of this Decision and Order; it is further

ORDERED that the parties appear for a preliminary conference on July 10, 2018 at 9:30 a.m.

6/12/2018
DATE

BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE