Local 2110, Tech., Off., and Professional Workers, UAW, AFL-CIO v Getter
2019 NY Slip Op 32017(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 651927/2018
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

----------X

LOCAL 2110, TECHNICAL, OFFICE, AND PROFESSIONAL WORKERS, UAW, AFL-CIO,

Plaintiff,

- v -

PHILIP GETTER, JOHN MCGRATH, JOSEPH ALPERIN, GEMPH DEVELOPMENT, LLC

Defendants.

INDEX NO. 651927/2018

MOTION DATE _____

MOTION SEQ. NO. 005, 006

DECISION AND ORDER

----------X

HON. SALIANN SCARPULLA:

In this action, *inter alia*, to recover damages under New York Business Corporation Law Section 630, defendant GEMPH Development, LLC ("GEMPH") moves to dismiss the complaint insofar as asserted against it (motion sequence no. 005), and defendant Philip Getter ("Getter") moves to dismiss the complaint insofar as asserted against him (motion sequence no. 006).

Local 2110 commenced this action on behalf of former employees of Technical Career Institutes, Inc. ("TCI") to recover payments alleged owed to them. Pursuant to a Collective Bargaining Agreement ("CBA"), Local 2110 represented instructors, laboratory technicians, clerical workers and maintenance workers employed at TCI, a New York corporation operating as an accredited educational institution. EVCI Career Colleges Holding Corp., a Delaware holding corporation whose alleged sole purpose was to own educational institutions, was the sole shareholder of TCI. Getter was the

chairman of the board of directors of both EVCI and TCI. Getter was also the sole owner and managing member of GEMPH, a Delaware corporation which was allegedly the largest shareholder of EVCI. John McGrath ("McGrath") was the former president of TCI and EVCI, and a shareholder of EVCI. Joseph Alperin ("Alperin") was the former general counsel of TCI and EVCI, and a shareholder of EVCI.

In 2017, TCI began to have cash flow and other financial difficulties. According to Local 2110, TCI failed to meet its obligations to its employees. Specifically, it failed to make certain benefit contributions and payments, failed to make health insurance payments, and failed to make payroll on several occasions. TCI and/or EVCI, through Getter, entered into several secured transactions to provide cash to TCI. Allegedly, the loans were secured by interests in TCI's assets or future receipts.

Local 2110 filed a grievance on April 21, 2017, alleging that TCI's failure to make premium payments to EmblemHealth for employee health coverage violated the CBA. Local 2110 also filed an action in Federal court seeking "a preliminary injunction in aid of arbitration." On May 25, 2017, Justice George B. Daniels of the Southern District of New York entered a Consent Order under which TCI would provide an alternative health insurance plan on an interim basis while Local 2110 and TCI continued to negotiate a solution to the health insurance issues. If Local 2110 and TCI could not reach a solution themselves, the parties agreed to proceed to a hearing within thirty days before an arbitrator.

TCI began to offer health insurance through CIGNA as of June 1, 2017. Subsequently, after unsuccessful settlement negotiations, in August 2017, Arbitrator Edelman issued an award sustaining Local 2110's grievance and finding that TCI violated the CBA by failing to make the required premium payments, and by providing inferior coverage through CIGNA. TCI was directed to "make eligible employees whole for coverage lost as a result of the failure to provide insurance coverage for the period March 1, 2017 - May 31, 2017" and to "pay eligible employees the difference between coverage provided under the Emblem plan and the Cigna plan, retroactive to June 1, 2017." According to Local 2110, the total amount of medical expenses accrued as a result of TCI's wrongdoing was $553,100.61, none of which has been paid.

On September 1, 2017, TCI notified Local 2110 that it would be ceasing operations as of that date. According to the allegations of the complaint, its employees were all laid off with no notice, the adjunct faculty was not paid for their final pay period, and its employees were not provided with two weeks' notice, two weeks' pay instead of notice, severance, accrued vacation or banked sick leave.

On September 6, 2017, Local 2110 notified Getter that it would submit all unpaid compensation claims, including unpaid wages, severance, layoff notice pay, vacation, banked sick leave and unremitted dues to arbitration pursuant to the CBA. It also notified Getter, McGrath, Alperin and GEMPH that it intended to assert a cause of action against them under New York Business Corporation Law Section 630.

Arbitrator Scheinmann held a hearing and issued an arbitration award dated October 30, 2017 in favor of Local 2110. He concluded that TCI violated the CBA and directed TCI to pay certain amounts owed for unpaid wages, severance, notice pay, vacation, sick leave and union dues. TCI has not made any payments owed.

On November 13, 2017, TCI and EVCI filed a Chapter 7 bankruptcy proceeding in the U.S. Bankruptcy Court for the Southern District of New York.

Local 2110 commenced this action seeking: (1) to recover unpaid wages, benefits, and liquidated damages under New York Labor Law Sections 190(3), 191, 198 and 198-c from Getter; (2) to recover damages under New York BCL Section 630 from Getter, McGrath, Alperin and GEMPH; (3) to recover damages under the Warn Act against Getter and GEMPH; (4) to recover damages for conversion and/or restitution from Getter who allegedly directed that union dues deducted from Local 2110's employees' paychecks not be remitted to the union or returned to the employees; and (5) to recover damages for breach of fiduciary duty from Getter by virtue of his entry into a series of secured transactions while TCI was insolvent.

Pursuant to a stipulation dated February 27, 2019, the action was discontinued as asserted against McGrath and Alperin.

GEMPH now moves to dismiss the complaint insofar as asserted against it (motions sequence no. 005), and Getter moves to dismiss the complaint insofar as asserted against him (motion sequence no. 006). GEMPH and Getter both argue that the cause of action under Business Corporations Law Section 630, which alleges that

employees can sue shareholders of their employer for unpaid wages, must be dismissed insofar as asserted against them because they were not shareholders in the company that employed Local 2110 members. TCI employed Local 2110 members. The parties to the CBA were only Local 2110 and TCI. GEMPH only owned shares of EVCI, and not TCI. Getter owned shares of neither. In any event, even if Section 630 were to apply to shareholders of EVCI as an alter ego of or joint employer with TCI, the cause of action must still be dismissed because EVCI was a publicly traded company, which is exempt from Section 630. Finally, even if Local 2110 could sue GEMPH pursuant to Section 630, Section 630 required that workers can only do so "within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services." Here, no judgment has been entered.

Getter next argues that he cannot be held liable under the WARN Acts because he was not an "employer" of any of Local 2110's members at any time, and individuals cannot be liable under the WARN Acts under a veil piercing or alter-ego theory. Further, GEMPH is merely a "grandparent" of TCI, which is cannot be liable under the WARN Acts.

With regard to the Labor Law cause of action, Getter argues that he is not an employer pursuant to Labor Law Section 190 and therefore, cannot be found liable under this statute. Further, Getter maintains that he cannot be held liable as TCI's alter ego or agent for conversion resulting from TCI's failure to remit union dues, and there is also no allegation that Getter personally took possession of the union dues. In any event, there is

no allegation that Getter took any affirmative act with the subject dues and misused the funds for an inappropriate purpose.

Finally, Getter argues that the cause of action for breach of fiduciary duty must be dismissed because "(1) a creditor may not bring a claim for breach of fiduciary duty based on the dissipation of assets if the creditor has not yet exhausted legal remedies against the corporation; (2) [Local 2110] has not alleged that, at the time that Getter entered into the Cashflow Sustaining Transactions, [Local 2110's] members were creditors of TCI; and (3) to the extent that Getter had any fiduciary duty to [Local 2110's] members, he fulfilled that duty by consistently making decisions in TCI's best business interests." In addition, there was no allegation that Getter entered into any transaction as a result of self-dealing or bad faith.

In support of his motion, Getter submits an affidavit explaining that he was chairman of the board of directors of TCI, however he was never an officer of TCI and never owned any stock in TCI. He explained that EVCI was a publicly held company, with its stock being traded in an over the counter market pursuant to SEC regulations. His responsibilities at TCI included trying to raise money, finding merger partners, and restructuring TCI's finances. He did not hire or fire employees or supervise or control employees. Getter maintained that in August 2017, TCI signed a memorandum of understanding to combine with another for-profit college, ASA College, which he believed would solve TCI's cash flow issues. However, the combination was not

completed, and as such, TCI decided to close on September 1, 2017, when it realized it would not have enough funds to open for the fall semester.

In opposition, Local 2110 first argues that the cause of action under BCL Section 630 is viable because TCI and EVCI can be considered a single employer, a joint employer or alter egos. In addition, Getter, as sole owner and alter ego of GEMPH, is properly treated a shareholder pursuant to Section 630. Further, there is an issue of fact as to whether EVCI is publicly traded. Finally, an action under Section 630 can be maintained without an unsatisfied judgment against the corporation if there is proof that the corporation would not be able to pay the claims in full. Here, there is proof in that TCI and EVCI filed for bankruptcy.

It next argues that GEMPH can be found liable as an employer under the WARN acts and Getter can be found liable under a veil piercing theory, or as an alter ego of the employer. With regard to the Labor Law cause of action, Local 2110 argues that Getter qualifies as an "employer" within the meaning of the statute and therefore, can be found liable. It next maintains that the cause of action for conversion cannot be dismissed because it sufficiently alleged that union dues were deducted from employee paychecks, such dues were never remitted, and Getter "deliberately and knowingly directed that dues money not be remitted to the Union."

Finally, Local 2110 argues that with regard to the cause of action for breach of fiduciary duty, Local 2110 has alleged facts showing that it exhausted legal remedies, its claims had accrued or were certain to accrue when Getter entered into the transactions,

and Getter did not act with the care of a reasonably prudent person in his position by incurring additional liabilities in the face of TCI's insolvency.

Discussion

New York Business Corporations Law Section 630(a) provides that

> The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every domestic corporation or of any foreign corporation, when the unpaid services were performed in the state, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation.

According to the allegations of the complaint, EVCI was a holding company that owned 100% of TCI. Getter was the chairman of both the TCI and EVCI boards. EVCI had no revenue, no accounts receivable, and no officers or employees. TCI and EVCI financial statements were audited together and reported together to government agencies. EVCI did not observe corporate formalities. The cash loans for TCI that Getter had secured to try and prevent TCI from closing, were taken out against TCI and EVCI, either as a single entity or jointly. In addition, Getter was the record and beneficial owner of all issued and outstanding equity interests in GEMPH.

Getter and GEMPH explain that neither was a shareholder of TCI, the employer of the Local 2110 members, and GEMPH only owned shares of EVCI. According to Local 2110, EVCI and TCI should be considered a single employer, joint employer or alter egos, and Getter should be considered as alter ego of GEMPH, and as such, Getter and GEMPH can be treated as shareholders of TCI for the purposes of Section 630.

On a motion to dismiss, where the allegations of the pleadings must be accepted, I find that Local 2110 has adequately stated a cause of action under Section 630 against Getter and GEMPH. Further discovery will yield the true nature of the interrelationships between TCI, EVCI, GEMPH and Getter, but the facts pled in the complaint are sufficient to state a cause of action based on a veil piercing, alter ego or joint employer theory. In addition, the disputed issue of whether "shares of [EVCI] are listed on a national securities exchange or regularly quoted in an over-the-counter market" will also be resolved through further discovery. Finally, while Getter and GEMPH argue that an action under Section 630 can only be maintained if there is an unsatisfied judgment against the corporation, Local 2110 correctly points out that because TCI has filed for bankruptcy, Local 2110 would be unable to institute suit and obtain a judgment against TCI. *See generally Grossman v. Sendor*, 64 A.D.2d 561 (1st Dept. 1978); *Sasso v. Millbrook Enters, Inc.*, 108 Misc.2d 562 (N.Y. Sup. Ct., Nassau Co., 1981). In a January 2019 affidavit, TCI's trustee appointed in the bankruptcy proceeding averred that the possibility of any creditor recoveries in the TCI's chapter 7 case appeared to be remote.

With regard to the WARN Act cause of action, the individual cause of action asserted against Getter was dismissed at oral argument. Local 2110 has sufficiently pled allegations sufficient to state a WARN Act cause of action against GEMPH.

Next, the parties dispute whether Getter can be considered a "employer" within the meaning of Labor Law Section 190. Courts have looked to the economic realities test to determine whether one can be considered an employer within the meaning of Labor

Law Section 190. Under the economic realities test, courts consider "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Matter of Carver v State of New York*, 87 A.D.3d 25, 30 (2nd Dept. 2011)(internal quotations omitted); *see Bonito v Avalon Partners, Inc.*, 106 A.D.3d 625 (1st Dept. 2013). The complaint alleges, *inter alia*, that (1) Getter attending bargaining sessions with Local 2110 and functioned as the "primary and ultimate decision maker" at the sessions, actively negotiating the contract; (2) Getter was Local 2110's point person for all employment grievances; (3) Getter directly communicated with employees about payroll delays; (4) Getter "participated directly in the monitoring and reported required by TCI's accrediting institutions and oversaw compliance efforts with respect to the DOE;" and (5) Getter attended labor management meetings throughout 2016 and 2017, meeting with Union representatives to discuss payroll issues, financing, healthcare coverage, the 401(k) plan and potential closure. At this stage of the litigation, I find that Local 2110 has sufficiently stated a cause of action against Getter as an employer within the meaning of Labor Law Section 190.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *State v. Seventh Regiment Fund*, 98 N.Y.2d 249, 259 (2002)(internal citations omitted); *see also William Doyle Galleries, Inc. v Stettner*, 167 A.D.3d 501(1st Dept. 2018). The complaint alleges

that union dues taken out of Local 2110 members' paychecks were improperly taken and put into a separate account by TCI/Getter and not remitted to Local 2110 or returned to the members. However, the complaint fails to provide sufficient factual allegations to support this cause of action. Further, in a January 2019 affidavit from TCI's trustee appointed in the bankruptcy proceeding, the trustee averred that he had not identified any bank account dedicated to union dues. Therefore, there is no support for the allegation that the subject dues were segregated into a separate account, not to be remitted to the union or its members. As such, the cause of action for conversion is dismissed.

Finally, for its cause of action alleging breach of fiduciary duty, Local 2110 relies on the "trust fund doctrine" by which officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its general creditors. *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000). The "application of the trust fund doctrine in New York customarily has been for the purpose of imposing liability on corporate directors or transferees for wrongful dissipation of assets of an insolvent corporation, in actions later brought by court-appointed receivers, trustees in bankruptcy or judgment creditors." *Id.* at 550.

Local 2110 alleges that "by entering into a series of secured transactions while TCI was insolvent, Getter violated a fiduciary duty to creditors to preserve TCI's assets" and that "in entering into these transactions Getter did not act with the care of an ordinarily prudent person in a like situation. He did not act in good faith." Local 2110 does not provide actual facts sufficient to support its allegations that Getter's decision to

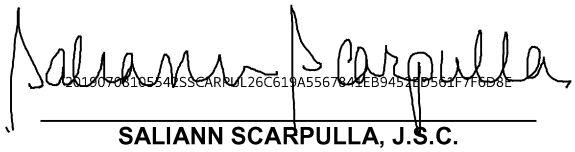
enter into the secured transactions was the result of bad faith or self-dealing. Its allegations are merely conclusory and as such, the cause of action for breach of fiduciary duty is dismissed.

In accordance with the foregoing, it is hereby

ORDERED that defendant GEMPH Development, LLC's motion to dismiss the complaint insofar as asserted against it is denied (motion sequence no. 005); and it is further

ORDERED that defendant Philip Getter's motion to dismiss the complaint insofar as asserted against him (motion sequence no. 006) is granted to the extent that the third cause of action asserting a WARN Act violation is dismissed insofar as asserted against him, the fourth cause of action for conversion is dismissed, the fifth cause of action for breach of fiduciary duty is dismissed, and the remaining causes of action are severed and shall continue.

This constitutes the decision and order of the court.



7/8/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE