Matthews v Symbion Power LLC
2020 NY Slip Op 32526(U)
July 30, 2020
Supreme Court, New York County
Docket Number: 653331/2019
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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SIMON MATTHEWS,

Plaintiff,

- v -

SYMBION POWER LLC,

Defendant.

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INDEX NO. 653331/2019

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

OSTRAGER, J.:

Before the Court is a motion by defendant Symbion Power LLC ("Symbion Power") to renew a portion of its previous motion to dismiss or in the alternative to clarify the Court's prior order dated January 28, 2020 (NYSCEF Doc. Nos. 55 and 89). Also before the Court is plaintiff Simon Matthew's ("plaintiff") cross-motion for renewal and reargument, or in the alternative for clarification, of the previous motion to dismiss to address one typographical error and one substantive point of law, as well as a request that the Court refer the parties to the Court's ADR program.

Turning first to defendant's motion, defendant poses two questions:

> 1. Would the addition of the submitted affidavit of Paul Hinks by which Symbion Power agrees to submit to jurisdiction in Cyprus with regard to plaintiff's claim convince the Court to change its ruling on *forum non conveniens* and dismiss this case?
> 2. When the Court dismissed the claims based on the written contracts but not the claims based on an oral contract and on the equitable theories of promissory estoppel and unjust enrichment, did the Court intend to limit plaintiff's damages to $57,530.08, the amount claimed with respect to the breach of the oral contract, or to $656,227.62, reflecting damages for claims not only based on the oral contract but on the two dismissed written contracts?

See NYSCEF Doc. No. 61 p. 1 – 2. With respect to the first question, the motion is denied. The Court fully considered defendant's *forum non conveniens* argument in its January 28, 2020 order on the state of facts that existed as of the time the motion was decided. A party may renew a motion to dismiss "based upon new facts not offered on the prior motion that would change the prior determination." CPLR 2221 (e)(2). A motion to renew must "contain reasonable justification for the failure to present such facts on the prior motion." *Id.* at (e)(3). In support of its motion, defendant provides an affirmation by Paul Hinks, CEO of Symbion Power, stating that Symbion Power would not contest jurisdiction in a related Cyprus action if plaintiff sought to bring his claims in that action rather than in this court. *See* Affirmation of Paul Hinks NYSCEF Doc. 30 ¶ 3. Further, Hinks states that he "did not include these facts in [his] prior affirmation to this Court because [he] did not understand it necessary." *Id* at ¶ 4. Defendant's post-decision offer to consent to jurisdiction elsewhere is not the type of new fact that is the basis for reconsideration.

Turning next to defendant's request for clarification regarding damages: The Court did not intend to limit plaintiff's damages to $57,530.08, the amount claimed on Count II for breach of an alleged oral contract. In the January 28, 2020 order, the Court dismissed Counts I and III which were for breach of two written contracts between plaintiff and non-party Symbion Power (Europe) Ltd. ("Symbion Europe"). A scrivener's error in the decision indicated that the Court was dismissing Counts I and II, but the decision clearly indicates that what was intended was the dismissal of Counts I and III and, by this decision, that scrivener's error is corrected and Counts I and III are dismissed. The Court declined to dismiss Count II for breach of an alleged oral contract between plaintiff and defendant Symbion Power LLC, Count IV for promissory estoppel, and Count V for unjust enrichment. To the extent the January 28, 2020 order is unclear,

the dismissal of Counts I and III and the survival of Counts II, IV, and V was the intent of the Court, to which this opinion adheres.

The crux of plaintiff's argument was and is that although the written contracts described in Counts I and III were entered into with Symbion Europe, plaintiff performed work for and was paid by defendant Symbion Power. The Court rejected plaintiff's argument, discussed in more detail below, that Symbion Europe was acting as an agent for Symbion Power. However, based on plaintiff's detailed allegations that his work was done for and not compensated by Symbion Power, the Court did not dismiss plaintiff's alternative quasi-contract claims, as potential means for plaintiff to recover for his uncompensated work not covered by the alleged oral contract described in Count II. In other words, while the Court determined that plaintiff could not recover from Symbion Power under written contracts entered into with Symbion Europe, plaintiff may potentially recover from Symbion Power under a quasi-contract theory for the work performed at the direction of Symbion Power. Thus, the Court did not intend to limit plaintiff's potential damages to the $57,530.08 sought in Count II.

In support of its request for clarification, defendant essentially reargues that plaintiff should not be permitted to recover under promissory estoppel or unjust enrichment for work performed pursuant to the two written contracts (which were the subject of the dismissed Counts I and III). Putting aside whether defendant's request for clarification is a veiled or improper attempt for reargument, the Court will reiterate its reasoning for denying defendant's motion to dismiss the two alternative quasi-contract claims, Counts IV and V.

The Complaint clearly states that Counts IV and V for promissory estoppel and unjust enrichment are alternatives to plaintiff's breach of contract claims based on direct promises made by Symbion Power to plaintiff. *See* Complaint NYSCEF Doc. No. 14 at ¶ 59 and 63:

> To the extent that defendant [Symbion Power] contends it is not a party to the Employment Contracts, it is estopped from denying its promises to compensate Plaintiff. [Symbion Europe], acting as defendant [Symbion Power's] agent, and defendant [Symbion Power] directly, made numerous promises to Defendant that if he provided services to defendant [Symbion Power] and incurred expenses related to such services, defendant [Symbion Power] would pay him for such services and reimburse his work-related expenses. ¶59.
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> To the extent that defendant [Symbion Power] contends it is not a party to the Employment Contracts, it has been unjustly enriched by Plaintiffs' services provided to defendant [Symbion Power], for which services defendant [Symbion Power] represented it would compensate Plaintiff, inducing Plaintiff's services on defendant [Symbion Power's] behalf and his expenditure of monies to pay expenses necessary to perform such services.¶ 63

While generally a plaintiff may not recover in quasi-contract if there is a valid agreement governing the same subject matter, plaintiff here cited compelling authority demonstrating that a plaintiff may recover in quasi-contract from a stranger to the contract in the interest of justice.

In a 2019 decision, United States District Court Judge Jesse Furman reviewed conflicting authority in New York regarding this precise issue. In *Lee v. Kylin Mgmt. LLC*, No. 17-CV-7249 (JMF), 2019 WL 917097, at *2 (S.D.N.Y. Feb. 25, 2019), Judge Furman chronicled several cases which held that "the mere existence of a written contract governing the same subject matter does not preclude recovery in quasi-contract from non parties so long as the other requirements for quasi contracts are met." *See Lee* at 2 *citing Seiden Assocs., Inc. v. ANC Holdings, Inc*., 754 F. Supp. 37, 40-41 (S.D.N.Y. 1991) (internal quotation marks omitted). Judge Furman found that this rule is "more consistent with precedent from the New York Court of Appeals, which recognized an unjust enrichment claim brought against a third party despite a related contract in *Bradkin v. Leverton*, 257 N.E.2d 643 (N.Y. 1970)." *Id* at 2. Moreover, Judge Furman opined that this rule is more consistent with the very "logic of the equitable doctrine of quantum meruit which is designed to prevent unjust enrichment where the absence of an enforceable contract otherwise prevents recovery from [noncontracting] parties." *See id citing Seiden* at 41.

Indeed, the *Lee* Court echoes the New York Court of Appeals in *Bradkin v. Leverton*, 26 N.Y.2d 192, 196 (1970). In *Bradkin* the Court permitted a claim for unjust enrichment against a company's owner despite a written contact between the plaintiff and the company, stating that a "quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result." Analyzing *Miller v. Schloss*, 218 N.Y. 400, 407 (1916), the Court of Appeals noted "[a]lthough there was no agreement between them, express or implied, the defendant received a benefit from the plaintiff's services under circumstances which, *in justice*, preclude him from denying an obligation to pay for them." *Id* (emphasis added).

Here, the Court dismissed plaintiff's claims for breaches of contracts that were unmistakably signed by a non-party Symbion Europe. Nevertheless, the Court recognizes that plaintiff has put forth evidence, both in opposition to the pre-answer motion to dismiss and in opposition to the present motion, supporting plaintiff's allegations that defendant Symbion Power made promises to pay plaintiff for his services and caused plaintiff to incur unreimbursed expenses related to those services, and that Symbion Power was enriched to plaintiff's detriment. Indeed, there is no real dispute that plaintiff's work was directed and controlled by Symbion Power. For example, plaintiff reported to Paul Hinks ("Hinks"), who was then, and is now, chief executive officer of Symbion Power and holds no position at Symbion Europe. Plaintiff negotiated salary and other terms of his employment with Hinks and Del Copeland ("Copeland"), who was then Symbion Power's Chief Operating Officer. NYSCEF 40 ¶ 6. Plaintiff was held out to foreign governments as an employee of Symbion Power LLC. *Id* at 15 and NYSCEF Doc. No. 43. Complaints that plaintiff was not being paid were directed to and answered by Hinks. *Id* at 18 and NYSCEF Doc. No. 45. Accordingly, based on the specific

circumstances of this case, and in the interest of justice, the Court found, and now reaffirms, that plaintiff's quasi-contract claims IV and V are sufficiently pled to survive a pre-answer motion to dismiss.

Plaintiff cross-moves for reargument and renewal on plaintiff's agency theory of liability against Symbion Power for contracts entered into by Symbion Europe. Plaintiff contends that the Court misapprehended the law by applying the corporate veil piercing test rather than the common-law agency test to determine whether Symbion Europe was acting as an agent for Symbion Power. Plaintiff also seeks to renew, offering purportedly new evidence --- a document allegedly demonstrating that Symbion Europe was an agent for Symbion Power.[1] On this point, the Court denies reargument because the Court did not overlook any fact or principle of law in its prior decision. The Court adheres to its prior ruling and clarifies it as follows.

In the January 28, 2020 order the Court held that:

> Since Symbion is not a signatory to the 2009 and 2011 contracts, those claims must be dismissed. Plaintiff argues that he may assert these claims against Symbion based on an alleged agency relationship between Symbion and Symbion Europe. However, plaintiff [did] not plead this assertion with sufficient specificity; as plaintiff would have to allege, at a minimum, that Symbion completely dominates and controls Symbion Europe. Thus, as a matter of law, plaintiff cannot assert a claim against Symbion pursuant to a contract plaintiff entered into with Symbion Europe. Although plaintiff submitted documentation that plaintiff's work was supervised by Symbion, plaintiff cannot have a breach of contract claim against Symbion pursuant to a contract that he knowingly entered into with Symbion Europe.

See NYSCEF Doc. No. 55 at p. 2. Plaintiff argues the Court's ruling that plaintiff would have had to allege that Symbion (US) completely dominates and controls Symbion Europe to allege an agency relationship was erroneous. Plaintiff relies on *Royal Indus. Ltd. v. Kraft Foods, Inc.*, 926

[1] Plaintiff's basis for renewal is NYSCEF Doc. No. 99. Plaintiff states in an affirmation (NYSCEF Doc. No. 98) that this document was not available to him at the time Symbion Power moved to dismiss, and argues the this document demonstrates that Symbion Power treated plaintiff as its employee and represented to third parties that plaintiff was Symbion Power's employee. The Court denies renewal based on this evidence because as discussed above (p. 4), this type of evidence was already in the record and was considered in the Court's analysis.

F. Supp. 407 (S.D.N.Y. 1996) and Restatement (Second) of Agency § 14M, which state that where there is a parent/subsidiary relationship, the court should apply common-law agency principles rather than the corporate veil piercing test to determine whether there is an agency relationship. The Court in *Royal Industries* specifically admonishes against conflating the two tests. In opposition, defendant cites *LoCurto ex rel. Estate of LoCurto v. Jevic Transp., Inc*., No. 99 CV 2314(ILG), 2004 WL 469820, at *2 (E.D.N.Y. Jan. 14, 2004), which states that "[i]n the case of a parent-subsidiary relationship, the same factors informing a judgment regarding the piercing of a corporate veil are applied in determining whether one corporation is acting as the agent of a related corporation. Applying a different standard would undermine the strong policy that exists concerning the presumption of separateness and respecting the corporate entity." (internal citations omitted).

As a preliminary matter, the Court notes that neither the Court of Appeals nor the First Department has ruled on this precise issue and, as shown by the cases cited above, there is a federal split of authority regarding when, in parent/subsidiary relationship, there is also an agency relationship. In any event, neither line of cases is binding here because Symbion Power and Symbion Europe do not have a parent /subsidiary relationship. Symbion Power and Symbion Europe are sister companies which are both subsidiaries of Symbion Holdings LLC.

In the absence of a clear precedent regarding the test for when a related corporation acts as an agent for another corporation which is not its parent or subsidiary, equally important to the Court's determination is the fact that plaintiff knowingly entered into the written contracts with Symbion Europe fully aware of the corporate structure of Symbion Holdings LLC and its subsidiaries. *See* NYSCEF Doc. No. 89 at p. 2 ("plaintiff cannot have a breach of contract claim against Symbion pursuant to a contract that he knowingly entered into with Symbion Europe."). Indeed, plaintiff has affirmed that he understood he was signing a contract with Symbion Europe

so that he would be required to bring his claims on his written contracts with Symbion Europe in Cyprus. *See* Affirmation of Simon Matthews, NYSCEF Doc. No. 40 at ¶ 7 ("Numerous [Symbion Power] personnel, including Hinks, explained to me that [Symbion Power] used [Symbion Europe] to make written employment agreements with [Symbion Power] employees in order to shield [Symbion Power] from exposure to claims and force employees to pursue remedies against [Symbion Europe] in Cyprus in the event of a dispute."). It is on this basis that the Court severed and dismissed Counts I and III for breach of the written contracts among plaintiff and Symbion Europe. Accordingly, the Court adheres to its prior ruling.

As noted above, the parties correctly observed that the January 28, 2020 order mistakenly dismissed Count II instead of Count III. The parties are correct that this is a scrivener's error. In summary, the order of the Court is that: Count I for breach of a written contract is dismissed, Count II for breach of an oral contract survives, Count III for breach of a written contract is dismissed, Count IV for promissory estoppel survives, and Count V for unjust enrichment survives.

Finally, plaintiff makes an unopposed request that the Court refer the parties to the Court's ADR program. The Court will file an ADR referral order.

Dated: July 30, 2020

BARRY R. OSTRAGER, 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