4Food, LLC v Einstein HR, Inc.
2020 NY Slip Op 33032(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 652520/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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4FOOD, LLC, MICHAEL SHUMAN

Plaintiffs, DECISION AND ORDER

Index No. 652520/16

- v -

MOT SEQ 004

EINSTEIN HR, INC, LAYNE DAVLIN,

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking, *inter alia*, damages for breach of an agreement to procure insurance, the defendants, Einstein HR, Inc. (Einstein) and its president Layne Davlin (Davlin), move pursuant to CPLR 3212 for summary judgment dismissing the second cause of action of the complaint, alleging fraud, as against Davlin. The plaintiffs, 4Food LLC (4Food) and its president Michael Shuman (Shuman), oppose the motion and cross-move for summary judgment on the complaint, or in the alternative, for an order directing further discovery, and for attorneys' fees.

The motion is denied and the cross-motion is granted in part.

II. BACKGROUND

In December 2010, 4Food, a New York-based food service company, entered into a "Professional Employment Agreement" with Einstein, which performs outsourced human resources functions for other companies, such as payroll processing, benefit plan management, and the procurement of insurance. Pursuant to the agreement, from a term starting May 25, 2010 and ending upon termination of the agreement, 4Food was to outsource to Einstein various human resources functions including, *inter alia*, the procurement and maintenance of workers' compensation insurance.

4Food alleges that it paid to Einstein all insurance premiums necessary for the procurement of its employees' insurance, including workers' compensation insurance, and that Einstein represented that it did procure and maintain workers' compensation insurance through February 2012, when 4Food terminated its contract with Einstein. However, in April 2012, 4Food received a Notice of Penalty from the New York State Workers' Compensation Board, Bureau of Compliance (WCB). The notice stated that the WCB had determined that 4Food failed to maintain workers' compensation insurance for its employees for the time period of April 18, 2011 through December 31, 2011. The notice also assessed a $50,000 fine against 4Food and Shuman.

The plaintiffs further allege that, after receiving the notice, 4Food contacted Einstein to inquire as to whether

Einstein had actually procured the insurance. The plaintiffs claim that Davlin stated that Einstein had procured and maintained workers' compensation insurance for 4Food's employees from April 2011 through December 2011, and thereafter provided 4Food with a certificate of insurance, obtained from Einstein's insurance broker, non-party Pritchard & Jerden, Inc. The certificate of insurance indicated that 4Food was afforded coverage by non-party insurance companies Guarantee Insurance Company and Ullico Casualty Company for the term April 1, 2011 through April 1, 2012.

Based upon Einstein's representations and the certificate of insurance, the plaintiffs sought review of the WCB's penalties. The WCB determined that, contrary to Einstein's claims that it had procured and maintained workers' compensation insurance, no such policy was in effect for 4Food from April 18, 2011 to December 21, 2011. Rather, it appeared that due to incomplete paperwork between Einstein, its insurance broker, and the insurance companies, the policy did not take effect until December of 2011. After the WCB denied 4Food's review of its $50,000 penalty, by letter dated June 3, 2013, the WCB notified the plaintiffs that it would accept $18,000 to settle the penalty. However, 4Food declined to settle at that amount. Subsequently, on April 7, 2014, the WCB again wrote to the plaintiffs stating:

> "While it does appear the leasing company you contracted with may have been at fault for the lapse in coverage it is the employer's responsibility to ensure coverage is in place. Taking full consideration of all the relevant facts presented in this matter, and in accordance with the authority granted under the Workers' Compensation Law of the State of New York, the Board hereby agrees to accept $5,000 in full satisfaction of [the penalty]."

4Food denies receiving the April 7, 2014 letter, and claims that on November 12, 2014 a judgment was entered against 4Food and Shuman in the amount of $50,000.

On May 9, 2016, 4Food filed the complaint in this action. The first cause of action for breach of contract against Einstein alleges that Einstein breached its agreement by failing to procure workers' compensation insurance. The second cause of action for fraud against both defendants alleges that Einstein and Davlin knowingly misrepresented to 4Food that it would procure workers' compensation insurance and instead retained the premiums paid by 4Food without procuring insurance. The third cause of action for unjust enrichment against Einstein also alleges that Einstein retained the insurance premiums paid by 4Food and failed to procure insurance. The complaint also seeks contractual attorneys' fees.

The defendants failed to timely answer.

The plaintiffs moved for leave to enter a default judgment. The defendants opposed the motion and cross-moved for leave to

serve a late answer pursuant to CPLR 3012(d). By order dated July 5, 2017, the court denied the plaintiffs' motion, finding that the plaintiffs established, *prima facie*, proof of their claims against Einstein. However, since the defendants submitted proof demonstrating that their delay in answering was due to a miscommunication with the plaintiffs regarding an agreed-upon extension and they showed some proof of procuring insurance, the cross-motion for leave to serve a late answer was granted.

In their answer, the defendants offer general denials, and assert several affirmative defenses and a counterclaim for contractual attorneys' fees. The defendants deny the plaintiffs' allegations that the subject insurance policy was not in effect from April 18, 2011 through December 31, 2011, and that the defendants knowingly misrepresented the coverage period.

Discovery was completed and the instant motions ensued.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable

issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Defendants' Motion for Summary Judgment

Although the defendants, in their Notice of Motion, move to dismiss all causes of action in the plaintiffs' complaint, the defendants' moving papers address only the second cause of action for fraud as against Davlin in his personal capacity. Indeed, the defendants, in opposing the plaintiffs' cross-motion for summary judgment, state that their motion is limited to the second cause of action as alleged against Davlin. Therefore, any portion of the motion seeking additional relief has been abandoned. See Faith v Town of Goshen, 167 AD3d 980 (2nd Dept. 2018); 87 Chambers LLC v 77 Reade, LLC, 122 AD3d 540 (1st Dept. 014); Rodriguez v Dormitory Auth. of State of New York, 104 AD3d 529 (1st Dept. 2013)

The defendants' motion to dismiss the second cause of action for fraud as against Davlin is premised upon their argument that his actions were taken as an officer of Einstein and that 4Food fails to establish any justification for piercing the corporate veil or imposing individual liability. Specifically, the defendants claim that nothing in the plaintiffs' complaint alleges that Davlin exercised dominion and control over Einstein, or that Davlin abused the privilege of doing business in the corporate form to perpetrate a wrong. See Morris v New York State Dep't of Taxation & Fin., 82 NY2d 135 (1993).

However, as correctly noted by the plaintiffs, the complaint is not seeking to pierce the corporate veil and hold Davlin personally liable for Einstein's purported failure to procure insurance. Instead, the complaint alleges that Davlin made fraudulent representations to 4Food that it had workers' compensation insurance both (i) throughout the term of the agreement, causing 4Food to continue to pay its insurance premiums, and (ii) after the notice of penalty was served on 4Food, causing 4Food to seek a review of the penalty.

It is well settled that "a corporate officer who participates in the commission of a tort [*i.e.* fraud] may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." Espinosa v Rand, 24 AD3d 102, 102 (1st Dept. 2005) citing American Express Travel Related Servs. Co., Inc. v N. Atl. Resources, Inc., 261 AD2d 310, 311 (1st Dept. 1999). As such, the defendants' argument that the second cause of action for fraud must be dismissed solely because Davlin was acting as a corporate officer for Einstein is without merit.In that regard, the defendants further argue that the plaintiffs cannot establish that Davlin knew of the falsity of his statements to 4Food. To establish, *prima facie*, entitlement to summary judgment dismissing a cause of action for fraud, a defendant

must establish 1) that it did not make a material representation or omission that was false; 2) that it did not know of the falsity of the misrepresentation or have any intent to deceive the other party; 3) that it did not cause any justifiable reliance by the plaintiff; or 4) that the plaintiff did not suffer damages as a result of the representation or omission. See New York Univ. v Continental Ins., 87 NY2d 308 (1995); J.A.O. Acquisition Corp. v Stavisky, 18 AD3d 389 (1st Dept. 2005); Cohen v Houseconnect Realty, 289 AD2d 277 (2nd Dept. 2001).

In support of their motion, the defendants submit, *inter alia*, Davlin's deposition testimony, in which he states that (i) prior to this instance, Einstein's submission of an initial form to its insurance carriers seeking to add a company, the insurance carrier's acceptance, and issuance of a certificate of insurance was sufficient to provide coverage, (ii) he believed that 4Food had been provided workers' compensation insurance based upon Einstein's submissions to its insurance carriers and the certificate of insurance he was provided for 4Food, which shows the effective dates of the policy to be April 1, 2011, to April 1, 2012 (iii) in October 2011, Davlin he was informed by Pritchard & Jerden, Inc. that the insurance was not in effect due to a missing signature on an application form, and (iv) after Einstein provided the missing signature, the policy became

effective but Davlin was unable to have the carriers retroactively provide workers' compensation coverage. Davlin further testified that after becoming aware of the penalty issued against 4Food, he had Einstein's attorney contact the WCB and attempt to resolve the issue, and that the attorney thereafter told him that the issue had been resolved.

These submissions are insufficient to establish Davlin's entitlement to summary judgment dismissing the second cause of action against him. While Davlin's deposition testimony does demonstrate that Davlin was unaware that 4Food did not have workers' compensation insurance from April 1, 2011 through October 2011, when he was informed of the issue by Pritchard & Jerden, Inc., he also testified that neither he nor Einstein informed 4Food of this lack of coverage and that 4Food continued to pay insurance premiums on a policy that did not provide coverage. Davlin's deposition testimony further demonstrates that Davlin was aware that the insurance providers could not retroactively cover 4Food, and that, after speaking with Einstein's attorney, he represented to 4Food that the insurance issue was resolved prior to 4Food seeking the review of the penalty issued by the WCB. As such, there are triable issues of fact as to whether Davlin's failure to apprise 4Food of its lack of coverage or his representation to 4Food that it was covered prior to it seeking the review were knowingly false.

Therefore, the defendants have not established their entitlement to summary judgment on this claim as a matter of law. Indeed, their own submissions raise triable issues of fact. As such, their motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra.

C. Plaintiffs' Cross-Motion for Summary Judgment

The plaintiffs cross-move for summary judgment on all three causes of action of the complaint. The defendants oppose the cross-motion on the grounds that it is untimely, since the Note of Issue was filed July 1, 2019, and was beyond the scope of their own motion. The defendants timely moved for summary judgment on the second cause of action on August 30, 2019. On October 18, 2019, beyond the 60-day deadline imposed by this courts' rules but within the 120-day deadline under Brill v City of New York, 2 NY3d 648 (2004), the plaintiffs cross-moved for summary judgment on the complaint.

Where a party moves for summary judgment beyond the deadline mandated by court order, the lateness may only be excused upon a showing of good cause for the delay, which must be something more than mere law office failure. See Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med.

Sciences of Cornell Univ., 114 AD3d 472 (1st Dept. 2014); see also Brill v City of New York, 2 NY3d 648 (2004). An untimely cross-motion seeking summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds, as the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds can establish the requisite good cause to review the merits of the untimely cross motion. See Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280 (1st Dept 2006); CPLR 3212(a).

The plaintiffs argue that their cross-motion should be considered because the issues raised in the defendant's motion for summary judgment dismissing the second cause of action, in addition to providing good cause for their cross-motion for summary judgment on the second cause of action, also address the same issues raised in regard to the first and third causes of action. Specifically, the plaintiffs argue that the grounds relied upon by the defendants in their motion for summary judgment, *i.e.* that Davlin did not know of Einstein's failure to procure and maintain workers' compensation insurance, encompass the grounds for its cross-motion for summary judgment on the first and third causes of action for breach of contract and unjust enrichment, as they all relate to when Einstein properly procured insurance for 4Food. The court finds the plaintiff's

argument to be meritorious. Therefore, the plaintiffs establish good cause for the court to review the merits of their untimely cross-motion for summary judgment.

i. First Cause of Action - Breach of Contract Against Einstein

To establish a cause of action for a breach of contract, a party must demonstrate (1) the existence of a contract, (2) the party's performance under the contract, (3) the opposing party's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

As previously noted, this court, in its Order dated July 5, 2017, held that the plaintiffs' submissions in support of its motion for default judgment (MOT SEQ 001) demonstrated the plaintiffs' *prima facie* entitlement to default judgment on its first cause of action for breach of contract, at least as against the corporate defendant, but denied the motion for leave to enter a default judgment on other grounds, allowing the defendants to answer the complaint. In support of that motion, the plaintiffs submitted, *inter alia*, the agreement under which Einstein agreed to procure and maintain workers' compensation insurance coverage for each of 4Food's worksite employees for the term of the agreement, the notice of penalty issued by the WCB, and the affidavit of Michael Shuman, averring that 4Food

entered into a contract with Einstein to procure workers' compensation insurance, paid the premiums, and was later penalized by the WCB for the lack of workers' compensation insurance.

Now, in support of the instant motion, the plaintiffs supplement those submissions with, *inter alia*, Davlin's deposition transcript in which he testifies that 4Food was not covered by workers' compensation insurance from April through December of the term of the agreement, Shuman's deposition transcript which further details the statements contained in his affidavit, and 4Food's records reflecting the workers' compensation insurance premiums paid to Einstein.

These submissions further demonstrate, *prima facie*, 4Food's entitlement to summary judgment as they show that, 1) the parties entered into the professional employer agreement, 2) 4Food performed under the contract by making premium payments to Einstein for workers' compensation insurance, 3) Einstein breached the contract by failing to properly procure or maintain the workers' compensation insurance pursuant to the agreement, and 4) that 4Food suffered damages in lost premium payments and the penalty assessed against it by the WCB.

In opposition, the defendants' do not address the merits of the plaintiffs' cross-motion for summary judgment on the first

cause of action, but address only the timeliness of the cross-motion, as discussed above. As such, the defendants' fail to raise a triable issue of fact.

Therefore, summary judgment on the plaintiffs' first cause of action is granted as to liability. However, with respect to damages, the plaintiffs have not submitted evidence sufficient to establish, *prima facie*, the total amount of damages suffered. No evidence was provided to demonstrate the total amount of premiums paid by 4Food or whether 4Food ultimately was able to receive a lower penalty, as such a triable issue of fact remains as to the appropriate amount of damages.

ii. Second Cause of Action – Fraud Against Einstein and Davlin

As already discussed herein, a triable issue of fact exists as to whether Davlin, in both his personal capacity and on behalf of Einstein, purposefully concealed Einstein's failure to procure and maintain workers' compensation insurance and knowingly misrepresented the existence of such insurance following the penalty issued by the WCB.

As the plaintiffs do not allege that any other representative of Einstein, beyond Davlin, knowingly misrepresented the status of 4Food's workers' compensation coverage, and a triable issue exists regarding Davlin's

knowledge, the plaintiffs' cross-motion for summary judgment on the second cause of action is denied.

iii. Third Cause of Action - Unjust Enrichment Against Einstein

As a general rule, where, as here, a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). In any event, the plaintiff has not established entitlement to summary judgment on this claim.

To establish a claim for unjust enrichment, a plaintiff must show that 1) the other party was enriched, 2) at the plaintiff's expense, and 3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. See Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 (2011). The plaintiff has failed to establish the first element of the claim, *ie*. that Einstein was enriched. The plaintiffs rely on the same proof as that rely upon in support of their breach of contract claim - Davlin's deposition transcript, Shuman's deposition transcript, and 4Food's records reflecting its payment of the workers' compensation insurance premiums. However, Davlin testified at his deposition that

Einstein gave all of the insurance premiums paid to it by 4Food to the non-party insurance providers - Guarantee Insurance Company and Ullico Casualty Company. No proof was submitted to dispute that testimony. To the extent the plaintiffs challenge Davlin's veracity, that presents an issue credibility, which is to be resolved at trial. See S.J. Capelin Assoc. V Globe Mfg. Corp., 34 NY2d 338 (1974); DeSario v SL Green Mgt., 105 AD3d 421 (1st Dept. 2013).

D. Plaintiffs' Motion for Alternative Relief

The plaintiffs seek, as alternative relief, an order directing the defendants to produce a "Jackson" affidavit, an affidavit of diligent search efforts stating that no further responsive documents exist. The plaintiffs claim that outstanding document requests made subsequent to Davlin's deposition, held on December 11, 2018, were never provided to them. However, the plaintiffs filed a Note of Issue and Certificate of Readiness on July 1, 2019. The plaintiffs did not move to compel further discovery, nor have they demonstrated any "unusual or unanticipated circumstances" warranting post-note discovery. See 22 NYCRR 202.21(d). Therefore, the portion of the plaintiffs' cross-motion seeking alternative relief is denied.

E. Plaintiffs' Application for Attorney's Fees

Generally, attorney's fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept 1976). The plaintiffs claim entitlement to contractual attorney's fees based on Section 23 of the parties' agreement, which provides that in any action for a default of breach of the contract brought by either party, the *prevailing party* is entitled to reasonable attorneys' fees and other costs.

"To determine whether a party has 'prevailed' for the purpose of awarding attorneys' fees, the court must consider the 'true scope' of the dispute litigated and what was achieved within that scope (see Excelsior 57th Corp. v Winters, 227 AD2d 146 [1996]). To be considered a 'prevailing party", one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof (see Board of Mgrs. of 55 Walker Condo. v Walker St., 6 AD3d 279 [2004])." Sykes v RFD Third Ave. I Assocs., LLC, 39 AD3d at 279 (1st Dept. 2007). The plaintiffs have demonstrated their entitlement to summary judgment on their first cause of action for breach of contract. This being the essential or "central" claim of the complaint, and the defendants having received no relief, the plaintiffs are

the "prevailing party" on the motion. Compare New York University v Clifftower, LLC, 107 AD3d 649 (1st Dept. 2013) [no prevailing party where plaintiff granted partial summary judgment dismissing one of ten counterclaims and defendant denied relief]. Thus, the plaintiffs are entitled to reasonable attorney's fees and costs on the motion. The amount shall be determined following a hearing or trial.

IV. CONCLUSION

The defendants' motion for summary judgment dismissing the second cause of action for fraud as against Davlin is denied. The plaintiffs' cross-motion for summary judgment on the complaint, and for alternative relief, is granted to the extent that they are granted summary judgment on liability on the first cause of action for breach of contract as against Einstein. The plaintiffs' application for contractual attorney's fees is granted as to liability only on the breach of contract claim. The cross-motion is otherwise denied.

Accordingly, it is hereby,

ORDERED that the defendants' motion for summary judgment dismissing the second cause of action as against defendant Layne Davlin is denied; and it is further,

ORDERED that the plaintiffs' cross-motion for summary judgment on the complaint is granted to the extent that summary judgment on the first cause of action for breach of contract against defendant Einstein HR, Inc. is granted on the issue of liability only, with damages and applicable attorneys' fees to be determined at a hearing or trial, and the cross-motion is otherwise denied; and it is further,

ORDERED that the parties are to contact chambers on or before November 13, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: September 11, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON