XX Group LLC v Kun Jin
2021 NY Slip Op 30598(U)
January 22, 2021
Supreme Court, Queens County
Docket Number: 706456/2020
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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THE XX GROUP LLC, both individually and Derivatively on behalf of NY Student Food Corp.,

Plaintiff(s),

-against-

KUN JIN and ANN LIN,

Defendant(s).

NY STUDENT FOOD CORP.,
A New York Corporation

Nominal Defendant(s)

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Index No.: 706456/2020

Motion Dated: November 17, 2020

Motion Cal. No.:

Motion Seq. No.: 1

The following papers numbered EF6 - EF14 read on this motion by plaintiff for an Order pursuant to CPLR §3211[a][7], to dismiss the counterclaims asserted by the defendants, Kun Kin and Ann Lin ("Defendants") for failure to state a cause of action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF6-EF10
Answering Affidavits - Exhibits	EF11
Reply Affidavits	EF13-EF14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action, both individually and derivatively, against Defendants for breach of fiduciary duties and unjust enrichment based on their alleged failure to turn over corporate books and records for Plaintiff's review, for allegedly paying themselves unreasonable compensation and for allegedly transferring corporate funds to their personal accounts. Defendants have asserted two counterclaims in this action. The first counterclaim purports to set forth an independent cause of action seeking reasonable costs and attorney's fees predicated upon an allegation that the Complaint is spurious, baseless and false. The second counterclaim purports to set forth an independent cause of action seeking punitive damages based upon an allegation that this action is frivolous and that Plaintiff made "willful

and intentional misrepresentations and false accusations." Plaintiff moves to dismiss the counterclaims. The motion to dismiss is opposed by Defendants.

When assessing a motion to dismiss a complaint or counterclaim pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 722-23 [2013]; *see Rabos v R & R Bagels & Bakery, Inc.,* 100 AD3d 849, 851 [2013]; *Mazzei v Kyriacou,* 98 AD3d 1088, 1089 [2012]; *Yellow Book Sales & Distrib. Co., Inc. v Hillside Van Lines, Inc.,* 98 AD3d 663, 664 [2012]). The allegations of the pleading cannot be vague and conclusory (*see Phillips v Trommel Constr.,* 101 AD3d 1097 [2012]), but must contain sufficiently particularized allegations from which a cognizable cause of action reasonably could be found (*see Mazzei v Kyriacou,* 98 AD3d at 1090). The issue is whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Rochdale Village, Inc. v Zimmerman*, 2 AD3d 827 [2003]; *Montes Corp. v Charles Freihofer Baking Co., Inc.*, 17 AD3d 330 [2005]).

Applying these principles to the plaintiff's motion, it is clear that the two counterclaims must be dismissed. The first counterclaim seeks recovery of "attorney's fees, cost, and court fees, along with any and all other fees associated with defending this action." The second counterclaim seeks punitive damages "for being forced to defend said frivolous law suit." Both of the counterclaims are based upon defendants' characterization of the law suit as "frivolous." This Court finds that neither counterclaim states a cause of action, and must therefore be dismissed.

The first counterclaim seeks counsel fees. Generally speaking, the rule in this jurisdiction is that, absent a specific statute or contractual agreement to the contrary, a successful litigant may not recover his legal fees (*Mighty Midgets, Inc., v Centennial Insurance Company*, 47 NY2d 12 [1979]). Certainly, a defendant has no right to such damages based upon its characterization of the complaint as frivolous. As was stated in *Richardson v Pascarella,* 15 Misc.3d 1143(A)[Supreme Court, Onondaga County 2007]):

> "The plaintiff also moves to dismiss the defendants' second counterclaim seeking sanctions and attorney's fees based upon the assertion that the action is frivolous. Attorneys fees and sanctions are permitted by Rule 130.1(d) and CPLR § 8303-a to penalize specific frivolous conduct (*see* 22 NYCRR 130.1(d); *see also* CPLR § 8303-a.). The court, in its discretion may award attorney's fees and sanctions. However, a party is not entitled to such relief as a matter of right

and it may not be pleaded as a distinct cause of action; a party may apply for such relief by motion upon the happening of specific conduct (*see Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc.,* 145 Misc 2d 282 [1989]).

The very language of the rule contemplates a motion made in the context of a pending action and not an independent cause of action. "A party is not entitled to such relief as a matter of right, and it may not be pleaded as a distinct cause of action. A party may apply for such relief by motion upon the happening of specific conduct. An assertion that plaintiff's entire pleading is frivolous may be tested upon a summary judgment motion to dismiss the complaint" (*Murphy v Smith*, 4 Misc 3d 1029(A) [Sup Ct 2004]). A counterclaim for attorney's fees and sanctions based upon the assertion the action is frivolous is improper (*see also Aurora Loan Services, LLC v Cambridge Home Capital, LLC,* 12 Misc3d 1152(A) [Supreme Court, Nassau County 2006]). This, indeed, has been the holding of many trial courts, and at least one appellate court (*see Couch v Schmidt,* 204 AD2d 951 [1994] (holding that "while CPLR 8303-a provides for assessment of sanctions in the nature of costs and counsel fees in a proper case, it does not create an independent cause of action"); *Murphy v Smith,* 4 Misc.3d 1029(A) [Supreme Court, New York County 2004] (holding that a counterclaim based upon an accusation that plaintiff brought a frivolous law suit "is not a recognized cause of action")]; *Yankee Trails, Inc. v Jardine Ins. Brokers, I,* 145 Misc.2d 282, 283 [Supreme Court, Rensselaer County 1989] (holding that a counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper)). In addition, the cases cited by defendants do not support their position as those cases involved applications made in the course of pending litigation and did not involve a separate cause of action. In sum, a counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous, is improper (*Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc.,* 145 Misc.2d 282 [Sup Court, Rensselaer County, 1989]). Accordingly, the first counterclaim is dismissed.

The result is the same with regards to the second counterclaim for punitive damages. Defendants are attempting to assert an independent cause of action for punitive damages. It is well settled that a cause of action for punitive damages may not stand alone as a separate cause of action (*Randi A.J. v Long Island Surgi-Center,* 46 AD3d 74, 80-81 [2007] ("New York does not recognize an independent cause of action for punitive damages"); *Grazioli v Encompass Ins.* Co.,40 AD3d 696 [2007] (" 'a demand for punitive damages may not constitute a separate cause of action for pleading purposes' [citations omitted]"); *Benjamin Park v YMCA of Greater New York Flushing,* 17 AD3d 333 [2005] ("Supreme Court correctly dismissed the third cause of action to recover for punitive damages, because a demand for punitive damages does not amount to a separate cause of action for pleading purposes"). This is because "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]).

Demands for punitive damages usually arise in the context of intentional torts such as fraud, libel, or malicious prosecution, and therefore the availability of punitive damages is often discussed in terms of conduct that is intentional, malicious, and done in bad faith. Here, there are no allegations that Plaintiff has committed fraud; and there are no allegations that Plaintiff engaged in any conduct evidencing a high degree of moral culpability. Indeed, the only conduct by Plaintiff relied upon by Defendants is that Plaintiff filed the instant lawsuit.

Moreover, punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future (*Walker v Sheldon*, 10 NY2d 401, 404 [1961]; *see Krohn v New York City Police Dept.*, 2 NY3d 329, 335 [2004]; *Sharapata v Town of Islip*, 56 NY2d 332, 335 [1982]). "Compensatory damages are intended to have the wrongdoer make the victim whole to assure that the victim receive fair and just compensation commensurate with the injury sustained" (*Ross v Louise Wise Services, Inc.,* 8 NY3d 478,515-516 [2007], citing *Walker v Sheldon,* 10 NY2d 401, 404 [1961]). Subjecting a wrongdoer to punitive damages serves to deter future reprehensible conduct. Accordingly, the branch of the motion which seeks to dismiss the counterclaim for punitive damages is granted.

Accordingly, the motion to dismiss defendant's two counterclaims is granted.

Dated: 1/22/21

MARGUERITE A. GRAYS
J.S.C.

FILED & RECORDED
1/25/2021
9:33 AM
COUNTY CLERK
QUEENS COUNTY