

**Wex Capital, Inc. v Bakhchi**

2021 NY Slip Op 31750(U)

May 19, 2021

Supreme Court, New York County

Docket Number: 657573/2019

Judge: Richard G. Latin

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This opinion is uncorrected and not selected for official publication.



Alwex's clients to assist his competing business. Based on these allegations, Alwex asserted causes of action sounding in breach of fiduciary duty, tortious interference, unjust enrichment, violations of New York General Business Law §§ 349 and 350 based on stealing client information to deceive clients to move to Bakhchi's business, violation of the federal Computer Fraud and Abuse Act, breach of contract, conversion, and for an accounting. On or about February 27, 2018, while the parties began a hearing on Alwex's application for a preliminary injunction, the parties resolved the matter through a settlement agreement to discontinue the action. As part of the settlement, Bakhchi was to pay \$600,000 to Alwex over 18 months and provide a confession of judgment for a stipulation of discontinuance and the lifting of all temporary restraining orders. The parties also mutually agreed not to disparage each other. There was no written release or mention of a release in any provided transcript.

Thereafter, on or about May 24, 2018, Bakhchi and his company Sky Coverage Inc. commenced an action against Alwex and others in the Commercial Division, alleging, inter alia, that Alwex made disparaging remarks and, as a result, is in breach of the settlement agreement. That action currently has certain decisions on appeal and is pending a scheduled evidentiary hearing that would ultimately resolve the matter.

Defendant Bakhchi now moves to dismiss this action pursuant to CPLR 3211(a)(1), (4), (5), and (7), or, in the alternative, to consolidate with Index No. 652604/2018. Defendant argues, inter alia, that this action is nothing more than retaliation, and that implicit in the parties' earlier settlement is a release of all claims arising from the parties' employment relationship so that the two sides could then go about their businesses in peace.

A party seeking relief pursuant to CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence may be appropriately granted only where the documentary

evidence utterly refutes the factual allegations and conclusively establishes a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Dixon v 105 W. 75th St. LLC*, 148 Ad3d 623 [1st Dept 2017]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon*, 84 NY2d at 87-88; *Sokol v Leader*, 74 AD3d 1180 [1st Dept 2013]).

A party may move to dismiss a cause of action pursuant to CPLR 3211(a)(4) if “there is another action pending between the same parties for the same cause of action” (CPLR 3211[a][4]). Thus, it is incumbent upon the movant to demonstrate that the relief sought in both actions are “the same or substantially the same” (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90 [1st Dept 1997], quoting *Kent Dev. Co. v Liccione*, 37 NY2d 899 [1975]).

A party may move to dismiss a cause of action pursuant to CPLR 3211(a)(5) if the action cannot be maintained because of the release of the claims (CPLR 3211[a][5]). “[A] valid release constitutes a complete bar to an action on a claim which is the subject of the release” (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269 [2011], quoting *Global Mins. & Metals Corp. v Holme*, 35 Ad3d 93 [1st Dept 2006]). “If ‘the language of a release is clear and unambiguous, the signing of a release is a ‘jural act’ binding on the parties” (*id.*, quoting *Booth v 3669 Delaware*, 92 NY2d 934 [1998][citations omitted]).

As to those branches of the motion pursuant to CPLR 3211(a)(1) and (5), defendant's submission of, inter alia, the settlement agreement and transcript, while constituting documentary evidence, do not unequivocally eliminate plaintiff's causes of action at this juncture or incontrovertibly constitute a release of the subject claims. Here, in the submitted documents there

is no reference to a release, just settlement of the initial underlying action yielding to a stipulation of discontinuance concerning those claims. To the extent that the underlying settlement may have constituted, by inference, a release as to all employment claims between Alwex and Bakhchi as they separated, that cannot yet be determined on this pre-answer motion to dismiss without further inquiry into the intended scope of the settlement (*see Pure Power Boot Camp, Inc. v Fross Zelnick Lehrman & Zissu, P.C.*, 104 AD3d 566 [1st Dept 2013]; *Mangini v McClurg*, 24 NY2d 556 [1969]).

With respect to that branch of the motion pursuant to CPLR 3211(a)(7), in order to prevail on a cause of action for fraud, the plaintiff must demonstrate: (a) a misrepresentation or a material omission of fact; (2) which was false and known to be false by the defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817 [2016]). In order to sustain a cause of action for a violation of New York General Business Law § 349, the plaintiff must demonstrate: (1) that the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3) that the plaintiff was injured as a result of the deceptive act (*see Stuman v Chemical Bank*, 95 NY2d 24 [2000]). Here, plaintiff adequately plead its two claims based on the alleged facts of defendant's misconduct in charging unauthorized fees to plaintiff's client to enhance his commissions. Again, whether the plaintiff can ultimately prevail on these allegations against defendant is not relevant on this pre-answer motion to dismiss.

Likewise, defendant is not entitled to relief sought pursuant to CPLR 3211(a)(4) since this action and the action under Index No. 652604/2018 do not relate to the same or substantially similar causes of action. In the other action before Justice Ostrager in the Commercial Division,

the crux of the matter pertains to potential violations of a stipulation of settlement between competing business entities and conduct that took place after Bakchi and Alwex's business relationship ended. In comparison, this action is solely related to Bakchi's allegedly tortious conduct that took place during the time which he was an employee of Alwex. Inasmuch as the two actions concern distinct subject matter and alleged wrongs, this action should not be dismissed because of a prior action pending (*cf. Shah v RBC Capital Mkts. LLC*, 115 AD3d 444 [1st Dept 2014]). Further, there is no genuine risk of inconsistent rulings between the matters as a finding of Alwex's disparaging conduct, or lack thereof, in the other action has no bearing on whether Bakhchi amplified his commissions through impermissible fees to Alwex's clients.

Additionally, for the reasons stated above, this action should not be consolidated with the action under Index No. 652604/2018. Besides for substantially lacking commonality of facts and law, the other action is at an entirely different procedural posture, which would likely result in undue delay (CPLR 602; *see Abrams v Port Auth. Trans-Hudson Corp.*, 1 Ad3d 118 [1st Dept 2003]).

Moreover, to the extent that defendant asserts that plaintiff is missing a necessary party in Marc B. Inc., the alleged depository of defendant Marc Bakhchi's commissions, the plaintiff is directed to serve supplemental pleadings on defendant Bakhchi and Marc B. Inc., naming Mac B. Inc as such a depository (CPLR 1001).

Further, upon the expiration of defendants' time to answer, the parties are encouraged to reach out to Part 46 in order to schedule a global settlement conference.

Accordingly, defendant's motion to dismiss, or, in the alternative, for consolidation is denied in its entirety, except that, plaintiff shall serve supplemental pleadings on defendant

Bakchi and Marc B. Inc. adding Marc B. Inc. as a party, as the depository of co-defendant’s prior commissions; and it is further

ORDERED that the supplemental pleadings shall be served on defendant and Marc B. Inc. in accordance with the Civil Practice Law and Rules within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

WEX CAPITAL, INC. F/K/A ALWEX, INC.

Plaintiff,

-against-

MARC BAKHCHI AND MARC B. INC.,

Defendants.

And it is further ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)].

This constitutes the decision and order of the Court.

5/19/2021  
DATE

  
RICHARD G. LATIN, J.S.C.

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| <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE: