

Agbo v Constantin Assoc., LLP

2021 NY Slip Op 32420(U)

November 22, 2021

Supreme Court, New York County

Docket Number: 653803/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH **PART** **14**

Justice

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ADRIANA AGBO,

Plaintiff,

- v -

CONSTANTIN ASSOCIATES, LLP, JEAN-FRANCOIS
SERVAL IN HIS CAPACITY AS A PARTNER OF
CONSTANTIN ASSOCIATES, LLP

Defendants.

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INDEX NO. 653803/2020

MOTION DATE 11/19/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS PURSUANT TO CPLR 7601.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for AMEND PLEADINGS.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) to dismiss and for an order requiring the appointment of an expert to conduct a valuation pursuant to plaintiff's employment agreement is denied. The motion (M003) by plaintiff to amend her complaint is granted.

Background

Plaintiff is a certified public accountant and used to work for defendant Constantin Associates, LLP ("Constantin) as a partner. Plaintiff contends that she worked for Constantin under an employment agreement and was given a 65% interest in Constantin; 50% was to be in trust and the remaining 15% was an ownership interest. She contends that this agreement

contemplated that the parties were going to enter into a partnership agreement but that this never happened.

Plaintiff claims that she left Constantin effective on December 31, 2020. She argues that her departure was precipitated by disciplinary charges brought against her for work she did not perform. Plaintiff alleges that she received discipline from the applicable organization of accountants because she was the only licensed certified public accountant at the firm, and therefore was the only person who could be subject to discipline. Purportedly, the firm faced discipline relating to 401K audits performed without meeting peer review requirements.

Plaintiff maintains that she gave defendants notice about her departure on November 26, 2019 and set a resignation date for the end of 2020. She contends she did this so Constantin would have more than a year to prepare and to properly compensate her in accordance with the agreement.

MS002

Defendants now move pursuant to CPLR 7503(a) and 7601 to enforce the third-party valuation provision in the agreement with plaintiff. They admit that the agreement provided for the appointment of a nationally-recognized firm to determine the fair market value of Constantin if plaintiff ceased to be a partner after three years (plaintiff was at the firm for more than a decade).

Defendants contend that there is no dispute that plaintiff voluntarily left Constantin as of December 31, 2020 and that the agreement requires a third-party to value what she is owed. They ask the Court to simply enforce the terms of the agreement.

In opposition, plaintiff characterizes this motion as a tactical maneuver designed to waste time. She observes that she has a pending motion (MS003) to amend that adds a breach of

contract for the agreement at issue. Plaintiff emphasizes that there are issues beyond the mere valuation that must be decided. She points out that although the agreement calls for the appointment of the third party, it is silent with respect to how this third party is to be appointed (except that both sides have to agree) and how this party would be compensated for the valuation.

In reply, defendants question why plaintiff is not amendable to resolving this case with the alternative dispute resolution prescribed in the parties' agreement. They argue that an experienced valuation expert will conclude that it is impossible for plaintiff to have a 65% interest in Constantin where eleven years of tax returns shows that defendant Serval has an 85% interest. Defendants insist plaintiff is limited to recover only 15% of Constantin's value.

CPLR 7601 provides that "A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter. Where there is a defense which would require dismissal of an action for breach of the agreement, the proceeding shall be dismissed."

"CPLR 7601 permits, but does not require, the commencement of a special proceeding to enforce a valuation agreement" (*Rad v IAC/InterActiveCorp*, 183 AD3d 508, 508, 125 NYS3d 78 [1st Dept 2020] [finding that plaintiff properly commenced a plenary action despite the fact that the action included a dispute over the valuation process]).

Here, the Court declines to grant defendants' relief sought under CPLR 7601. The instant dispute certainly involves an agreement that mentions a valuation process, but it also includes other disputes that fall outside the purview of a valuation expert. As *defendants* even admit,

there are issues concerning how to pick a valuation expert. Plus, the agreement is silent about who is supposed to pay for the valuation.

“It is evident from our prior decisions that there is no need to confirm the award in the typical case where valuation represents only part of a dispute or serves as a condition precedent to the exercise of other contractual rights which may also be in dispute. Indeed to require or permit a party to commence a special proceeding for the confirmation of a valuation determination when there are other issues to be resolved at a plenary trial, would only lead to additional litigation and delay, thus defeating the primary objective of the appraisal agreement” (*Penn Cent. Corp. v Consol. Rail Corp.*, 56 NY2d 120, 130, 451 NYS2d 62 [1982]).

The valuation at this stage of the dispute would only lead to more litigation and delay. Defendants argue that plaintiff is limited to a 15% interest while plaintiff claims she is owed up to 65%. Plaintiff also seeks a bonus payment for an amount to be determined. The Court cannot resolve these disputes at this stage of the litigation and therefore relief under CPLR 7601 is inappropriate. And plaintiff also seeks (in her proposed amended complaint) various causes of action outside the valuation. In other words, there are issues to be resolved that compel the Court to deny the motion as the dispute cannot be wholly resolved by a valuation. This is not a situation where the parties' dispute is limited to the valuation.

MS003

Plaintiff moves to amend to add causes of action for breach of contract, breach of fiduciary duty, constructive trust and accounting, and the breach of the covenant of good faith and fair dealing.

In opposition, defendants argue that the proposed amended complaint does not clearly identify the changes she seeks to make. Defendants also claim that plaintiff fails to state cognizable causes of action sufficient to support the motion for leave to amend.

In reply, plaintiff attaches a red-lined copy of the proposed amended complaint. She also emphasizes that defendants took no steps to facilitate plaintiff's receipt of her fair share throughout 2020 despite the fact that she told defendants of her plan to leave Constantin. Plaintiff insists she has a valid cause of action for breach of contract where defendants have demonstrated no interest in actually reaching a resolution as to how much she is owed.

The Court grants the motion. As an initial matter, plaintiff made clear what additional causes of action she seeks. In any event, she submitted a red-lined version (albeit in reply). More importantly, as plaintiff points out, defendants' position makes little sense. Only when confronted by this lawsuit have defendants tried to find a valuation expert. There is nothing on this motion that shows that they suggested such an expert and that it was plaintiff who refused to cooperate. Plus, this Court views the valuation portion of the agreement to be a damages issue. It does not resolve all of plaintiff's claims.

Pursuant to CPLR 3025(b), leave to amend "shall be freely given." Here, plaintiff has stated cognizable causes of action. She adequately alleged that defendants breached the contract by not paying her what she is owed (including a bonus payment) and that defendants breached the implied duty of good faith and fair dealing by misrepresenting the nature of the investigation that resulted in her receiving discipline for the alleged actions of others. Plaintiff also stated a cause of action for an accounting based on her status as a partner of Constantin as well as breach of fiduciary duty by not maintaining the funds of Constantin.

Summary

The Court views the basis for defendants’ motion to dismiss as inapplicable to the circumstances here. CPLR 7601 contemplates a scenario where all that’s in dispute is a valuation. Here, the parties dispute many issues—plaintiff claims she is entitled to a bonus (at an amount that is undetermined), that she is entitled to a greater percentage interest of the firm as part of her withdrawal than what defendant contends, and seeks redress based on alleged misrepresentations about an investigation.

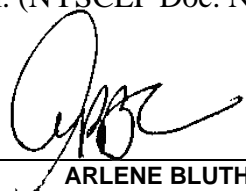
Plaintiff is entitled to seek leave to amend. Of course, defendants will have an opportunity to answer or otherwise respond, but this Court finds that plaintiff met her burden to state cognizable causes of action.

Accordingly, it is hereby

ORDERED that the motion by defendants (MS002) to dismiss is denied; and it is further

ORDERED that the motion by plaintiff (MS003) for leave to amend is granted and plaintiff shall upload the proposed amended pleading (now uploaded as NYSCEF Doc. No. 39) as a separately efiled document and defendants shall answer or otherwise respond pursuant to the CPLR.

Remote Conference: December 16, 2021 at 12:30 p.m. (NYSCEF Doc. No. 19).

<u>11/22/2021</u> DATE			 _____ ARLENE BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE