Owen v Array US, Inc.

2023 NY Slip Op 33056(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651471/2022

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

JASON OWEN,

Plaintiff,

- v -

ARRAY US, INC., MARTIN TOHA

Defendants.

INDEX NO. 651471/2022

MOTION DATE 05/12/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 61, 66, 67, 86, 91, 92 were read on this motion to DISMISS AMENDED COMPLAINT.

In this case, Plaintiff Jason Owen ("Plaintiff") alleges that Defendant Array US, Inc. ("Array") and its Chief Executive Officer Defendant Martin Toha ("Toha") (collectively, "Defendants") breached an oral agreement under which Plaintiff agreed to serve as Array's Chief Strategy Officer in exchange for compensation consisting of a $300,000 annual salary, plus benefits, plus 5% of Array's common stock above a valuation in excess of $100 million based upon Array's most recent round of equity financing (*see* NYSCEF 21). Plaintiff asserts that Defendants reneged on the equity grant portion of his compensation agreement and raises other claims arising out of his termination.

Defendants move to dismiss Plaintiff's complaint on a number of grounds, including that the alleged oral agreement to award Array stock was too indefinite to be binding and is in any event unenforceable under Delaware law which purportedly requires such agreements to be in writing.

For the following reasons, Defendants' motion is **granted** as to Plaintiff's claims for wrongful termination (Second Cause of Action), breach of the implied covenant of good faith and fair dealing (Third Cause of Action), and defamation (Sixth Cause of Action), and as to all claims against Toha in his individual capacity. The motion is **denied** as to Plaintiff's claims against Array for breach of contract (First Cause of Action), unjust enrichment (Fourth Cause of Action), and quantum meruit (Fifth Cause of Action).

On a motion to dismiss, the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining 'only whether the facts as alleged fit within a cognizable legal theory'" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal citation omitted]). In cases involving a claim of breach of contract, "the pleading will be deemed to allege whatever may be implied from its statements by reasonable intention…[and] the moving party 'must convince the court that nothing the plaintiff can reasonably be expected to prove would help'" (*Natixis Real Estate Cap. Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 135-36 [1st Dept 2017] [internal quotations omitted]). When it is alleged that a purported oral agreement was breached, the plaintiff "should set forth all the relevant terms of that oral agreement" (*Bomser v Moyle*, 89 AD2d 202, 205 [1st Dept 1982]).

a. *First Cause of Action – Breach of Contract*

Subject to statutory limitations, "[a]n oral agreement may be enforceable as long as the terms are clear and definite and the conduct of the parties evinces a mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Kramer v Greene*, 142 AD3d 438, 439 [1st Dept 2016] [internal citations omitted]). "Where 'there may exist an objective method for supplying the missing terms needed to calculate the

alleged compensation owed plaintiff, a claimed oral agreement is not as a matter of law unenforceable for indefiniteness'" (*id.* at 440 [internal quotation omitted]). "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1983]).

Here, Plaintiff sufficiently alleges the material terms of an alleged agreement between the parties. Specifically, he alleges that Toha offered Plaintiff a $300,000 salary, and "5% of Array's common stock, upon its issuance and according to a four-year vesting schedule, above a valuation in excess of [] $100 million dollars (NYSCEF 21 ¶57). As alleged, the "valuation [was to be] implied by Array's most recent-in-time equity raise" and Plaintiff "accepted [the] offer, with the understanding that the terms of [his] 5% equity interest would be memorialized in the Company's capitalization table" as Array built out its infrastructure (*id.* at ¶¶ 57-59). The fact that the alleged agreement is not for a fixed sum of shares, but instead supplies a formula for calculating the number of shares, does not render the terms fatally indefinite (*see Cobble Hill*, 74 NY2d at 483 [an agreement "may be sufficiently definite if the [dollar] amount can be determined objectively without the need for new expression by the parties; a method for reducing uncertainty to certainty might, for example, be found…by reference to an extrinsic event, commercial practice or trade usage"]).

Defendants argue that even if the contract is sufficiently definite, the alleged agreement to award Plaintiff Array stock is unenforceable under Delaware law because it was not approved

by the Array board of directors and is not memorialized in writing.[1] In support of that position, Defendants cite *Grimes v. Alteon, Inc*., 804 A2d 256 [Del 2002] for the proposition that Delaware General Corporation Law ("DGCL") § 157 requires agreements with respect to "rights or options in stock" to be in writing and approved by board.

However, in 2014 (twelve years after *Grimes*) Delaware amended the DGCL to authorize the Delaware Court of Chancery to "issue final orders cleaning up important issues involving the governance of a Delaware corporation that were dealt with in a manner that did not meet the statutory requirements for validity" (*In re Numoda Corporation*, 2015 WL 6437252, at *1 [Del 2015]). In *Numoda*, the Delaware Supreme Court observed that then-new "Sections 204 and 205 of the DGCL make it clear that the Court of Chancery may issue binding orders clarifying the capital structure of corporations when it is satisfied that a corporation's board had the authority to, and intended to, authorize and issue stock" (*id.*).[2] The Court noted that "the adoption of these provisions addressed the reality that many corporations—particularly those that are controlled, as here, by family members or friends engaging in start-ups or relatively small businesses—have taken short-cuts in authorizing and issuing stock" (*id.*) The Court also noted these provisions were adopted to address instances "where parties who are complicit in failing to comply with the DGCL's requirements refuse to participate in the validation of their own past intended actions

[1] "In determining questions of the 'incidents of shares,' New York courts generally look to the laws of the state of incorporation," (*Beeck v Costa*, 39 Misc3d 347, 355-56 [Sup. Ct. NY Cnty., Jan. 24, 2013]), which in this case is Delaware.

[2] Although Plaintiff did not initially rely expressly on the amended Delaware statute, he did rely (NYSCEF 33 at 13-14) upon *Knoll Capital Mgmt. LP v Advaxis, Inc*., 2016 WL 381195, at *2 [Del Ch Jan. 29, 2016], which in turn relied upon *Numoda* and thus DGCL 205. This Court thereafter sought supplemental briefing to address the issue in greater detail (NYSCEF 90-92).

because they have come to have personal reasons to wish to disclaim their prior promises and actions" (*id.* at *3).[3]

Giving Plaintiff the benefit of all reasonable inferences, the Court cannot conclude that the alleged agreement is irretrievably defective under Delaware law (*see Knoll Capital Mgmt. LP v Advaxis, Inc.*, 2016 WL 381195, at *2 [Del Ch Jan. 29, 2016] [denying motion to dismiss where defendant "ha[d] not demonstrated that it is not reasonably conceivable that [plaintiff] could obtain relief which it seeks under Section 205"]).[4] Plaintiff alleges that Toha, as the *sole*

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[3] Defendants' argument that this Court does not have jurisdiction to consider the impact of DGCL § 205 on Plaintiff's claims (NYSCEF 91 at 1-2) is unpersuasive. The fact that a Delaware statute "vests exclusive jurisdiction … in the Delaware Court of Chancery" "does not divest New York of its interest in adjudicating this matter" or "mandate that this [claim] be tried in Delaware" (*Sachs v Adeli*, 26 AD3d 52, 55 [1st Dept 2005]; *see also In re Proceeding to Determine the Validity of Claim (SCPA 1809) Against the Estate of Reijane Huai*, 2014 WL 3739579 [Sur Ct, Nassau Cty 2014] [fact that DGCL § 145[k] "confers exclusive jurisdiction upon the Delaware Chancery Court" over indemnification claims "addresses the division of [Delaware] courts intra-state and does not preclude adjudication of the issue of indemnification in another jurisdiction"]; Matthew D. Stachel, Understanding and Mitigating the Risks Involved When Stockholder Books and Records Actions Are Asserted Outside of Delaware, Bus L Today, July 2014, at 1, 2 ["[DGCL] 220(c)'s exclusive jurisdiction provision … appears to have been designed as an intrastate reallocation of subject matter jurisdiction necessitated by Delaware's maintenance of separate courts of law and equity"]; *but cf Transeo S.A.R.L. v Bessemer Venture Partners VI L.P.*, 936 F Supp 2d 376, 405 [SDNY 2013] [dismissing books and records claim under DGCL 220, which provides for exclusive jurisdiction in Delaware Chancery Court, noting that "Plaintiffs do not seem to dispute Defendants' contention that this Court lacks subject matter jurisdiction to adjudicate a Section 220 claim"]). For what it is worth, New York state courts have also adjudicated books and records claims under DGCL 220 (e.g., *Lambrecht v Bank of Am. Corp.*, 85 AD3d 576, 576 [1st Dept 2011]), despite statutory exclusive jurisdiction over such claims in Delaware Chancery Court.

[4] In their post-briefing letter on this issue (NYSCEF 91), Defendants argue among other things that Plaintiff cannot rely upon DGCL 205 because he seeks only monetary relief in his Complaint and DGCL 205 provides an equitable remedy. However, as Plaintiff argues in his letter (NYSCEF 92), Plaintiff's claim essentially seeks reinstatement of his 5% equity stake in the company and the dollar amount that corresponds to that stake. Therefore, giving the pleadings the benefit of all reasonable inferences, the complaint "conceivably falls within Section 205" which is "broad in scope" (*Knoll*, 2016 WL 381195 at *2). Moreover, leave for

director of the company, approved the 5% equity interest but neglected to memorialize the promise in writing (NYSCEF 2 ¶¶ 56-73; *see also* NYSCEF 33 at 13-14). In those circumstances, Plaintiff may be able to establish that the oral agreement is enforceable under Delaware law despite technical non-compliance with DGCL §157.

Accordingly, Defendants' motion to dismiss with respect to Plaintiff's First Cause of Action is **denied**.

b. Second Cause of Action – Wrongful Termination

Next, Plaintiff asserts a claim for Wrongful Termination under New York Labor Law § 740 arguing that dismissal would be improper under both the pre and post January 26, 2022 amendment version of the statute. However, under either version, Plaintiff's claim fails.

Labor Law § 740 "prohibits an employer from taking 'any retaliatory personnel action against an employee' who discloses to a supervisor or public body 'an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety" (*Klein v Metropolitan Child Servs. Inc.*, 100 AD3d 708, 709 [2d Dept 2012] [citing Labor Law § 740]). By comparison, "conduct related mainly to alleged financial improprieties [] does not satisfy the element of a threat to public health and safety and, thus, cannot sustain a cause of action alleging a violation of Labor § 740" (*id.* [internal citations omitted]).

Here, Array's alleged conduct forming the basis for Plaintiff's pre-amendment claims (i.e., before January 26, 2022) constitute purported economic wrongs. Specifically, Plaintiff alleges his termination was a retaliatory act taken by Defendants to prevent others from learning

amending the Complaint in these circumstances, if necessary, would be "freely given upon such terms as may be just" (CPLR 3025).

that Array engaged in "improper and potentially illegal acts" that targeted and exploited financially vulnerable communities (NYSCEF 21 ¶¶ 266-272). As stated above, however, these claims are insufficient to state a claim under the pre-amendment version of § 740.

Likewise, Plaintiff does not state a claim under the amended version of § 740 because he does not allege a "retaliatory action." To allege such an action, one must show the employer "discriminat[ed] against any…former employee [in] exercising his or her rights under [the Labor Law]…including 'actions or threats to take such actions that would adversely impact a former employee's current or future employment" (Labor Law § 740 [eff. 2022]). While the statute was expanded to protect former employees, Plaintiff's reliance on Toha's statements made on the internal company Slack channel, or statements made by Array's counsel in response to this lawsuit (NYSCEF 21 ¶¶ 274-278) fails to allege any conduct that qualifies as retaliatory under the amended statute (*see e.g.*, 2021 NY Senate Bill No. 4934, New York Two Hundred Forty-Fourth Legis. Session [stating an example of retaliatory action would be "to blacklist someone from the industry."]).

Therefore, Plaintiff's Second Cause of Action for Wrongful Termination is dismissed.

c. *Third, Fourth, Fifth Causes of Action – Breach of Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment, Quantum Meruit*

Plaintiff concedes the Third Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing "is duplicative of the breach of contract claim" (NYSCEF 33 at 3 n. 2) and the claim is therefore dismissed.

However, Plaintiff's remaining quasi-contract claims survive dismissal. Where, as here, Defendants contest the existence of an enforceable contract, Plaintiff may plead quasi-contract claims in the alternative. (*see Ellis v Abbey & Ellis*, 294 AD2d 168, 170 [1st Dept 2002]; *see also*

Auguston v Spry, 282 Ad2d 489, 491 [2d Dept 2001] [finding "the causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively"]). Accordingly, Defendants' motion is denied with respect to Plaintiff's Fourth and Fifth Causes of Action.

d. Sixth Cause of Action – Defamation

Plaintiff bases his final cause of action on two statements made by Defendants, one by Toha, and the other by Defendants' counsel in a public news article. Both statements, however, were "[e]xpressions of opinion, as opposed to assertions of fact…[and] cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008]). The question of whether "a particular statement constitutes an opinion or an objective fact is a question of law" (*id.*). In determining whether a statement constitutes opinion or fact, "courts must consider the content of the communication as a whole, as well as its tone and apparent purpose" (*id.*). "[I]n particular [courts] should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts" (*id.*).

Both Toha's statements on the company Slack channel, and counsel's statements in the news article, were made in the context of Plaintiff's allegations of wrongdoing by the company (*see* NYSCEF 21 ¶ 245-46). When taken in this context, these statements reflect Defendants' views concerning the merits of Plaintiff's lawsuit, and the motivation behind filing it, and are therefore unactionable opinions (*see Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 437-38 [1st Dept 2014] [dismissing defamation claim based on statement that plaintiff tried to "extort" money from defendant as "hyperbole and convey[ing] non-actionable opinions about the merits of the lawsuit and motivations of [plaintiff's] attorneys, rather than statements of fact"]; *see also*

El-Amine v Avon Prods., 293 AD2d 283, 283 [1st Dept 2002] [dismissing statement by defendants to media "that plaintiff's claim against it was without merit"]).

Furthermore, Plaintiff does not allege defamation *per se*. Although a "false statement constitutes defamation per se if it, inter alia, 'tends to injure another in his or her trade, business, or profession" (*Davydov v Youssefi*, 205 AD3d 881, 882 [2d Dept 2022]), Plaintiff fails to allege "that these statements were specifically directed at [him] in his professional capacity" (*id.* [dismissing defamation claim where defendant called him a "fraud" and that he "operate[d] as a fake"]). As a result, Plaintiff's Sixth Cause of Action is dismissed.

e. *Toha's Personal Liability*

Finally, Plaintiff's attempt to hold Toha liable in his personal capacity, relegated to a footnote in the First Amended Complaint (NYSCEF 21 at ¶ 11 n.2), fails. "It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually" (*Georgia Malone & Co. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *aff'd sub nom.*, 19 NY3d 511 [2012]). Plaintiff's reliance on *Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151 [4th Dept 1983] is inapposite as Array was not a "nonexistent principal" at the time of the alleged conduct, but a validly incorporated and existing entity. Thus, the claims against Toha in his individual capacity are dismissed.

Accordingly, it is

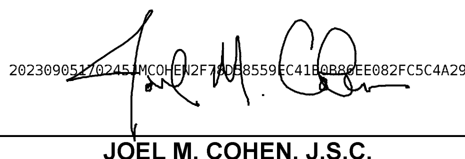
ORDERED that Defendants' motion to dismiss is **granted** as to Plaintiff's Second, Third, and Sixth Causes of Action and as to any claims against Toha in his individual capacity, and is otherwise **denied**; it is further

ORDERED that Defendants file an answer to the remaining claims in the Complaint within 21 days of this Decision and Order; it is further

ORDERED that the parties appear telephonically for a preliminary conference on Tuesday, October 10, 2023, at 10:30 a.m., with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference[5]; and it is further

ORDERED that the parties upload a copy of the transcripts of the proceeding to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.



9/5/2023
DATE

JOEL M. COHEN, 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**

[5] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.