Noto v Planck, LLC

2024 NY Slip Op 31562(U)

March 14, 2024

Supreme Court, New York County

Docket Number: Index No. 155149/2022

Judge: Dakota D. Ramseur

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** 34M

Justice

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DAMIAN NOTO,

INDEX NO. 155149/2022

Plaintiff,

- v -

DECISION AFTER HEARING

PLANCK, LLC, DMEP CORPORATION, HAWKING LLC

Defendant.

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In June 2022, plaintiff Damian Noto commenced this employment action against Planck, LLC (d/b/a Patch Media), DMEP Corporation (d/b/a Hale Global), and Hawking LLC (d/b/a Market New International, or "MNI"). By Decision and Order dated September 14, 2023 (hereinafter, the "September 2023 Decision"), the Court granted defendants' motion for an evidentiary hearing (mot. seq. 004) to determine whether plaintiff should be sanctioned for willfully and knowingly deceiving the Court when it was resolving defendants' motion to dismiss (mot. seq. 001) pursuant to CPLR 3211. The Court conducted said evidentiary hearing over two days—on November 13 and December 1, 2023—during which the Court heard testimony from Noto, Sochieta Moth (Patch's "Head of Finance"), William Figueroa (a Patch employee), Angela Mapili (Patch's previous "Director of Finance" and current CFO), and Warren St. John (Patch's former CEO). The only remaining issue is whether, through clear and convincing evidence, defendants have demonstrated that plaintiff committed a fraud on the Court such that dismissal of his complaint is warranted.

FINDINGS OF FACT

In this action, Noto asserts six causes—for breach of contract, violations of New York Labor Law, retaliation, and *quantum meruit*—related to three purported agreements between plaintiff and defendants and/or their executives. The hearings, however, concerned only his allegations that defendants agreed to pay him a ten-percent commission on the gross revenue Patch received from his "then existing and future sales and revenue partnerships he personally generated." According to Noto, Warren St. John agreed to this commission plan after becoming Patch's CEO in 2016, yet Patch never provided written confirmation of this oral agreement. (*See* NYSCEF doc. no. 1 at ¶ 9-11.) On their motion to dismiss pursuant to CPLR 3211 (a) (5) under the statute of frauds, defendants argued that New York General Obligations Law § 5-701 (a) (1) (otherwise known as the State of Frauds) required this agreement to be in writing for it to be enforceable.

OTHER ORDER – NON-MOTION

In opposition to the motion, Noto executed a supplemental affidavit that the Court, in its September 2023 Decision, found to be less than truthful. Therein, he asserted that "Patch's agreement to pay [him] ten percent commissions as part of [his] total compensation was *reflected* in a series of documents," suggesting to the Court that the agreement was memorialized in such a way that the statute of frauds would not apply. (NYSCEF doc. no. 17 at ¶ 3, Noto mot. seq. 001 affidavit [emphasis added].) The affidavit attached three exhibits—A, B, and I—all of which, in some way, obscured relevant information from the Court. He describes Exhibit A as "a Patch Commission Plan *sent to me* from the Patch Head of Finance Team" on December 10, 2020. (*Id*. at ¶4.) Plaintiff asserted that the plan was designed to "increase revenue targets," for which he would be compensated at a rate of "10% of gross revenues for achieving a target of 12x my salary annually." (*Id*. at ¶4.) Exhibit B, which Noto frames as "Part 2 of the same Patch Commission Plan *sent to me* from Patch's Head of Finance which *memorializes* my ten (10%) commission entitlement," is a three-column spreadsheet, one of which shows an across-the-board commission rate of 10%, irrespective of the percentage by which he increases his sales. (NYSCEF doc. no. 19.) However, the original plan Patch sent in December 2020 reveals a tiered commission plan that assigned a rate between 1% and 9% depending on the amount of sales Noto brought to the company. (*See* NYSCEF doc. no. 57, google spreadsheet.) Additionally, the plan contained an intentionally omitted fourth column, entitled "cumulative commission," that confirms the use of a tiered commission rate. (*Id*.)

It is now clear that (1) Noto failed to inform the Court that neither Exhibits A and B were accurate representations of the Patch plan as sent by Sochieta Moth; (2) he edited one column in Exhibit B to reflect the flat 10% rate and omitted another when it contradicted his allegations; and (3) there are no plans or exhibits that "memorialize" the agreement to which Noto alleges. Only in his affidavit in opposition to sanctions did Noto explain the origins of these two exhibits: that Sochieta Moth allegedly provided him with an editable version and directed him to "edit it to be consistent with [his] understanding of the terms [he] had negotiated with former CEO Warren St. John." He explained that the edits to the spreadsheet were made in line with this conversation with Moth. (NYSCEF doc. no. 92 at ¶ 2, Noto mot. seq. 004 affidavit ["Hence, *following our call*, I did as she asked and edited the document, including changing the 'commission rate'"] [emphasis added]; Transcript 11/13/23 at 84, Noto direct [plaintiff admitting Patch did not send Exhibit B].)

However, even this averment appears to be, in part, untruthful: the original Excel spreadsheet, in keeping track of edits, demonstrates that Noto made edits to the plan not in December 2020, like he insinuates, but in April 2022, in advance of a mediation session with Patch (and only four months before commencing this action). (*See* Transcript 11/13/23 at 71, 122 Noto direct [plaintiff admitting editing template in April 2022]; Def. exhibit 20 (a), "Changes to 'Copy of Copy of 2021 BD Rev" ["4V changed 1% to 10%; 5V-11V changed 7% to 10%"].) In his post-hearing memorandum of law, Noto fails to address why his affidavit (which he ostensibly submitted to correct his previous affidavit) differs from his testimony by more than a year and how Exhibits A and B can be considered memorializations given that the edits were made in advance of litigation. Further still, Noto's contentions are undermined by the fact that Moth sent a subsequent plan to plaintiff containing inflated, though still tiered, commission rates (def. exhibit 20) and explained in a Slack communication that "this is not your commission doc—this is the budget. When you have a draft of your commission doc, my suggestion is that

you ensure that document incorporates the partners you believe should fall under your revenue bucket." (Def. Exhibit 22.)

In paragraph 14 of his affidavit, Noto describes Exhibit I as "examples of some of my Patch paystubs reflecting commission payment made to me. Patch did, in part, honor my commissions agreement by paying me certain commissions during the course of my Patch employment." As the Court found in its previous decision, for Noto to say that the commissions reflected in his pay stubs represent "Patch [], in part, honor[ing] my commission agreement" is, at the very least, disingenuous and obfuscates essential facts that the Court should know. The commissions to which Noto refers were earned by Warren St. John in forming a lucrative business partnership between Patch and another company; the only reason why Noto received those commissions is because St. John chose to give him a percentage point. (NYSCEF doc. no. 53 at ¶ 15, St. John affidavit; Exhibit 31, Damian Noto commissions; Hearing Transcript 12/1/13 at 55-56 [St. John's testimony] ["I said: 'Hey guys we got this big windfall. Huge win for the company. I'm going to get a large commission…I am going to share my commission and give two percent of, my two points of my nine points to Will and one point to Damian.' So I voluntarily offered to give away a third of my commission to two colleagues... I asked finance to just send it directly to them."]) Noto's argument that paragraph 14 is "entirely true" and that it "merely confirms that he received sales commissions" is entirely unconvincing. (NYSCEF doc. no. 118 at 7- 10, plaintiff memo of law.) Noto's affidavit makes clear that he was attempting to establish that *he* was on a commission agreement and that Patch paid him as part of his ten-percent plan. In this light, Noto's concealment of the relevant background and who earned the Patch commission in his pay stubs appears necessary to advance this partial performance argument.

Lastly, it strains credulity that the averments in Noto's affidavit—Exhibit A is a commission plan "sent to me"; Exhibit B "memorializes" my ten-percent commission plan; Exhibit I reflects Patch "honoring" my agreement—are simply the product of inartful drafting or honest mistakes, as he argues. Without the edits and the appearance of a ten-percent plan, Exhibits A and B have no evidentiary value to plaintiff in defeating defendants' CPLR 3211 (a) (5) motion; without concealing the fact that he did not receive those commissions from work he specifically performed, the paystubs do not advance his position that Patch partly honored said ten-percent commissions agreement. Moreover, as defendants argue, Noto and his counsel received an opportunity to correct the record through their opposition to defendants' motion for sanctions. Nonetheless, Noto's testimony concerning when and under what circumstances he edited the December 2020 plan revealed that he knowingly made false statements to the Court in said affidavit.

FINDINGS OF LAW

Fraud on the court involves "willful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial process 'so serious that it undermines the integrity of the proceeding.'" (*Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012] [internal citations omitted].) The offending party must have "acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and adversary's defense of the action." (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 320 [2014].) Further, the Court must be

persuaded, that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents, concerns "issues that are central to the truth-finding process." (*Id*. at 420-421.) As such, sanctions are inappropriate where the alleged conduct touches matters collateral to the issues at hand. (*See e.g.*, *Paslogix Inc. v 2FA Tech*., LLC, 708 F Supp 2d 378, 401 [SDNY 2010].) In sum, fraud on the court requires a showing, by clear and convincing evidence:

> "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." (*CDR Creances*, 23 NY3d at 321.)

While a finding on the court may warrant termination of the proceeding," dismissal is an extreme remedy that must be exercised with restraint." (*Id*. citing *Chambers v NASCO, Inc.*, 501 US 32, 44 [1991].) Dismissal is most appropriate where the offending party's conduct is particularly egregious, characterized by lies and fabrications in furtherance of a scheme designed to conceal critical matters from the court, and perpetrated repeatedly and willfully. (*CDR Creances*, 23 NY3d at 321.) In contrast, case dispositive sanctions are inappropriate where the court is presented with an "isolated instance of perjury" or where the conduct does not affect matters central to the substantive issues of the case. In these instances, the court may instead impose other remedies, including awarding attorneys' fees and other reasonable costs incurred. (*Id*.)

The Court's recitation of its factual findings demonstrates that Noto's conduct constitutes a fraud on the court. Through clear and convincing evidence, defendants have demonstrated that Noto willfully submitted three exhibits as evidence for propositions he knew to be less than truthful and that he did so with the willful intent to avoid dismissal of his complaint in mot. seq. 001. Noto's attempt to limit the extent of the damage of his first affidavit by falsely describing the circumstances in which he edited Exhibits A and B in his second affidavit only further underscores the willfulness of his conduct. That said, the Court may dismiss actions only where the conduct is particularly egregious and, here, Noto's conduct does not rise to that level. Several factors are important to emphasize. First, unlike in *CDR Creances*, where several defendants engaged in an extensive, organized scheme designed to undermine the plaintiff's ability to pursue their claim (*id*. at 322-323), defendants here were not similarly prejudiced by Noto's conduct. His conduct only concerned one document, which defendants, after all, sent and instructed him to edit, and several pay stubs, each of which was verifiable through defendants' records. As such, their ability to defend against Noto's breach of contract and Labor Law claims was not affected in the same way or to the same degree as in *CDR Creances*. (*See also John Quealy Irrevocable Life Ins. Trust v AXA Equit. Life Ins. Co.*, 206 AD3d 580, 581 [1st Dept 2022] [finding dismissal warranted where a trustee fabricated evidence to further a scheme designed to conceal his role in procuring the life insurance policy at issue and then attempted to recover the death benefits thereunder by employing a straw person.])

Second, while the Court partially denied defendants' motion to dismiss his breach of contract, New York Labor Law § 191, and *quantum meruit* claims under CPLR 3211 (a) (5) and

(a) (7), it's holding did not specifically rely on the Exhibits A, B, or I. In concluding that N.Y. Gen. Oblig. Law § 5-701 (a) (1) did not prevent Noto from seeking commissions owed on the ten-percent plan during his employment at Patch, the Court made no reference to Exhibits A and B. (*See* NYSCEF doc. no. 40 at 3-6, Decision and Order dated 3/20/2023.) Concerning Exhibit I and its allegation of partial performance, the Court rejected Noto's argument that the document was "sufficient to remove the entire agreement from within the statute of frauds. (*Id*. at 5-6) Put differently, whether the ten-percent plan was in writing or memorialized some other way was immaterial to the Court in holding that plaintiff is not precluded from recovering commissions owed during his tenure with Patch. Because the exhibits, while material, were not central to the Court's determination, the Court is guided by the approach taken by the Southern District of New York in *Rezende v Citigroup Global Mkts., Inc.* (2011 US Dist. LEXIS 45475 at * 15-16 [SDNY 2011].) There, the plaintiff, Rezende, submitted an affidavit from another person with knowledge that its contents were fabricated and/or intended to mislead the court and made various other false statements under oath to a Magistrate Judge, going to far as to "persist[ ] in [conduct] he could not have believed in good faith to be truthful" even after countervailing evidence came to light. (*Id*.) The Southern District, in awarding attorneys' fees and reasonable costs, noted that dismissal would have been appropriate had the fraud "related to a matter more central to the dispute." (*Id.* at 17-18.) Accordingly, an award of attorneys' fees and reasonable costs is appropriate.

Lastly, the Court declines defendants' invitation to hold that the testimony adduced at the hearing conclusively demonstrates that Patch did not make an oral agreement (and thus, Noto fabricated the entire action). The purpose of the hearing, as laid out in its September 2023 Decision, was solely to address the issue of Noto's alleged fraud on the Court. Had defendants so chosen, they could have moved for leave to renew and/or reargue the March 2023 Decision in light of Noto's affidavit. That they did not suggests to the Court that it properly adjudicated the motion to dismiss. Furthermore, defendants will have an opportunity to move for summary judgment pursuant to CPLR 3212 and, if they so choose, to use testimony from the hearing. The Court cannot use the hearing to make summary judgment determinations without proper briefing beforehand.

Accordingly, for the foregoing reasons, it is hereby

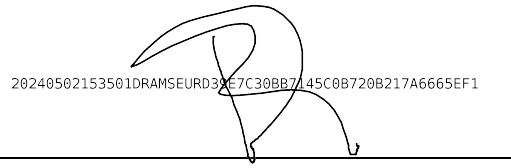
ORDERED that defendants Planck, LLC, DMEP Corporation, and Hawking LLC's motion for sanctions against plaintiff Damian Noto for his fraud on the court is granted; and it is further

ORDERED that defendants are entitled to an award of reasonable attorneys' fees and actual expenses in bringing motion sequence 004 and conducting the hearings on November 12 and December 1, 2023; and it is further

ORDERED that the matter of calculating defendants' award of attorneys' fees and costs is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on

the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.



DATE: 3/14/2024 **DAKOTA D. RAMSEUR, JSC**

Check One: ☐ **Case Disposed** ☒ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**