

Tesser v Allboro Equipment Company

2002 NY Slip Op 30038(U)

March 26, 2002

Supreme Court, Queens County

Docket Number: 0005897/5897

Judge: William T. Glover

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE WILLIAM T. GLOVER IA Part 23
Justice

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EDWARD TESSER		Number <u>5897</u>	2001
- against -		Motion	
		Date <u>November 7, 2001</u>	
ALLBORO EQUIPMENT COMPANY, et al.		Motion	
	x	Cal. Number <u>22</u>	

The following papers numbered 1 to 12 read on this motion by (i) defendants Allboro Equipment Co. ("Allboro"), Irving Vichinsky and Neal Vichinsky to dismiss the first, second, third, fourth and fifth causes of action; (ii) defendant Linda Tesser to dismiss the complaint in its entirety; and cross motion by plaintiff (i) for summary judgment on the first five causes of action in the complaint; (ii) dismissing the counterclaims; and (iii) dismissing the affirmative defenses asserted by defendants.

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Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

The branch of the motion to dismiss the first cause of action which alleges wrongful termination of plaintiff's services, is granted. It is well settled that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party. (Matter of De Petris v Union Settlement Assn., 86 NY2d 406, 410; Sabetay v Sterling Drug, Inc., 69 NY2d 329, 333; Hutchinson v Zurich Scudder Investments, Inc., ___ AD2d ___, 737 NYS2d 25, 26.) Indeed, New York does not recognize the tort of wrongful discharge. (Lobasco v New York Tel. Co./NYNEX, 96 NY2d 312, 316.) In the matter at hand, plaintiff did not have a contract for a fixed employment term with defendants. Under the terms of the Partnership Agreement at issue, plaintiff's rights would not mature until the deaths of both of his in-laws, provided he was still working for the company and

provided that defendants Neal Vichinsky and Linda Tesser still leased out the properties. Plaintiff was not a signatory to this agreement, and in any event, his in-laws are still alive, and, thus, the conditions of the agreement have not been met. The agreement clearly did not provide that plaintiff would work for a specific term. Thus, the first cause of action must fall.

The branch of the motion to dismiss the second cause of action for breach of contract is granted. As discussed above, plaintiff was not a signatory to the partnership agreement, and his rights under the agreement have not yet matured. Thus, plaintiff has no valid claim for breach of contract. (See, Dalton v Union Bank of Switzerland, 134 AD2d 174, 176.)

Plaintiff fails to state a claim in the third cause of action. In the third cause of action, plaintiff alleges that he performed certain services with an expectation that he would be compensated for such services. There was no agreement, however, between the parties pertaining to any compensation. Indeed, the third cause of action fails to allege any type of contract in which the terms of compensation were stated.

The fourth cause of action which alleges a breach of the implied covenant of good faith and fair dealing must be dismissed. It is well settled that a covenant of good faith and fair dealing is implied in every contract. (D'Agnesse v Spinelli, ___ AD2d ___, 737 NYS2d 301; Miller v Almquist, 241 AD2d 181, 184.) The implied covenant of good faith, however, may not be used as a substitute for a nonviable claim of breach of contract. (Sheth v New York Life Ins. Co., 273 AD2d 72.) Indeed, in an at-will employment relationship "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination." (Sheth v New York Life Ins. Co., *supra*, at 73 [quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304-305].) In any event, as noted above, plaintiff was not a signatory to any contract between the parties and, thus, the implied covenant of good faith is inapplicable.

The branch of the motion to dismiss the fifth cause of action, which alleges a claim for unjust enrichment, is denied. The essence of a claim for unjust enrichment is that one party has received money or a benefit at the expense of another. (Wolf v National Council of Young Israel, 264 AD2d 416, 417.) Plaintiff has stated a valid claim for unjust enrichment. Plaintiff alleges that for 17 years he ran the entire business at issue and never received any compensation for his services. This claim is valid on its face.

The branch of the motion to dismiss the complaint against defendant Linda Tesser on the ground of interspousal immunity must be denied as the common law principle of interspousal immunity has

been abolished in New York, except for automobile cases. (See, Love v Luft, 150 Misc 2d 732, 733.)

The branch of the cross motion for summary judgment on the issue of liability, for the first four causes of action in the complaint, must be denied as these causes of action have been dismissed as set forth in this decision. The branch of the cross motion for summary judgment on the fifth cause of action for unjust enrichment is denied as there are issues of fact with regard to whether plaintiff received compensation for the services he performed. (Zuckerman v City of New York, 49 NY2d 557, 562.) Indeed, defendants maintain that plaintiff received generous cash gifts and expense payments as compensation.

The branch of the cross motion to dismiss the first counterclaim, which apparently seeks counsel fees, is granted. In the absence of any agreement, statute or court rule authorizing the award of attorney's fees, such an award is improper. (Matter of A.C. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5.) The branch of the cross motion to dismiss the second counterclaim is denied. Plaintiffs on the counterclaim have stated a claim which, when liberally construed, is valid on its face. (Shields v Hofstra Univ. School of Law, 77 AD2d 867.)

The branch of the cross motion to dismiss the first affirmative defense of lack of personal jurisdiction is denied. Plaintiff's contention that defendant failed to timely make a motion on the ground of lack of personal jurisdiction is without merit. There is no indication that defendants will be moving solely on the ground that service of process was improper, in which case the motion must be made within 60 days after serving the answer. (CPLR 3211[e].) The branch of the cross motion to dismiss the second affirmative defense for lack of subject matter jurisdiction is granted as the Supreme Court is a court of general jurisdiction and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed. (NY Const Art VI, § 7; Thrasher v United States Liab. Ins. Co., 19 NY2d 159, 166.) The branch of the cross motion to dismiss the third and fourth affirmative defenses is granted. The statute of limitations on the surviving causes of action has not expired, and the complaint states a valid cause of action on the remaining causes of action.

The branch of the cross motion to dismiss the fifth affirmative defense alleging accord and satisfaction is granted. Plaintiff was not a party to the earlier settlement agreement under these circumstances, and such agreement cannot constitute an accord and satisfaction. The branch of the cross motion to dismiss the sixth affirmative defense, which alleges that plaintiff was an employee at will, is denied. As discussed above, plaintiff was an at-will employee and, thus, cannot maintain a cause of action for wrongful termination. The branch of the cross motion to dismiss

the seventh affirmative defense of interspousal immunity is granted as interspousal immunity is not a cognizable defense in these types of cases.

The branch of the cross motion to dismiss the eighth affirmative defense of waiver, estoppel and laches is granted. Plaintiff did not unduly delay in bringing this action. The branch of the cross motion to dismiss the ninth affirmative defense of lack of privity is granted. There was no written contract between the parties, and plaintiff was merely an employee at will. The branch of the cross motion to dismiss the tenth affirmative defense of unclean hands is granted as this defense is an equitable defense and not available in actions for monetary damages.

Accordingly, the motion by defendants is granted to the extent that the first, second, third and fourth causes of action are dismissed. The branch of the motion to dismiss the complaint as against defendant Linda Tesser on the ground of interspousal immunity is denied. The branch of the cross motion for summary judgment on the first five causes of action is denied. The branch of the cross motion to dismiss the first counterclaim is granted. The branch of the cross motion to dismiss the second counterclaim is denied. The branch of the cross motion to dismiss the affirmative defenses is granted to the extent that the second, third, fourth, fifth, seventh, eighth, ninth and tenth affirmative defenses are dismissed.

Dated: March 26, 2002



U.S.C.