

Zito v Fischbein Badillo Wagner Harding

2005 NY Slip Op 30258(U)

February 21, 2005

Supreme Court, New York County

Docket Number: 0602308/2004

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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ROBERT J.A. ZITO,

Index No. 602308/04

Plaintiff,

- against -

FISCHBEIN BADILLO WAGNER HARDING,

Defendant.

-----X

CAHN, J.:

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

In Motion Sequence 003, defendant Fischbein Badillo Wagner Harding moves (1) to dismiss the second and third causes of action in the amended complaint CPLR 3211; and (2) for the imposition of costs and sanctions, including attorney's fees, against plaintiff Robert J.A. Zito and his counsel for allegedly engaging in frivolous conduct by filing an amended complaint that is without merit.

In Motion Sequence 004, plaintiff moves to reargue the decision of this court dated February 28, 2005, and the order dated March 24, 2005 that dismissed plaintiff's second cause of action for unjust enrichment, and upon reargument, for reinstatement of that cause of action.

The facts underlying the action were set forth in the Prior Decision. Summarized, from August 1998 through March 2003, plaintiff was an attorney at the law firm of defendant Fischbein Badillo Wagner Harding. Plaintiff alleges that he performed legal services at the defendant law firm pursuant to an agreement that provided that defendant would compensate him in an amount that includes (1) the sums that defendant collects from clients that plaintiff introduced to the firm, and (2) the sums for services that plaintiff performed on matters for

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clients whom he did not introduce to the firm, less his proportionate share of the firm's overhead. Plaintiff claims that defendant failed to compensate him in the agreed-upon manner.

Defendant contends that plaintiff was an at-will, salaried employee, and not a partner of the firm, although he was allowed to use the title "contract partner." Defendant withheld taxes on plaintiff's pay, and at the end of the year, provided him with an IRS employee compensation Form W-2 that reflected his yearly salary, thus confirming his status as an employee. Moreover, defendant asserts, plaintiff was never a party to any firm partnership agreement, never guaranteed nor agreed to be responsible for any of defendant's debts, did not share in defendant's losses, never received an IRS Form K-1 (partnership form) from defendant, and never had an equity interest in defendant.

Defendant asserts that plaintiff was originally hired at a stated annual salary, plus a bonus equal to 10% of the fees that defendant collected for matters that plaintiff brought to defendant, the terms of said employment being reflected in an internal document. In recognition of his contributions to the firm, plaintiff's salary steadily increased throughout the term of his employment.

The original complaint contained two causes of action for (1) breach of contract and (2) unjust enrichment (quantum meruit). In the Prior Decision and Order, the court dismissed the unjust enrichment cause of action, but denied the motion to dismiss the cause of action for breach of contract.

In Motion Sequence 004, plaintiff moves to reargue the Prior Decision and Order to the extent that they dismissed the second cause of action, and upon reargument, for reinstatement of that cause of action.

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The Prior Decision and Order dismissed the second cause of action for unjust enrichment on the grounds that (1) a valid and enforceable contract governs the parties' rights and obligations, albeit there is a dispute as to the terms of that contract (*Tradewinds Fin. Corp. v Refco Sec.*, 5 AD3d 229 [1st Dept 2004]; *Golub Assoc. v Lincolnshire Mgt.*, 1 AD3d 237 [1st Dept 2003]), and (2) none of the services that plaintiff claims to have performed were so distinct from the duties of his employment that it would be unreasonable for the employer to assume that plaintiff rendered them without expectation of further pay (*Freedman v Pearlman*, 271 AD2d 301 [1st Dept 2000]). Plaintiff has not demonstrated that, in making its decisions, the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (*Spinale v 10 West 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]).

Plaintiff argues that where there is a dispute over the existence, scope, or enforceability of a contract, a plaintiff need not elect his remedies. Although there is a dispute as to the terms of plaintiff's compensation, it is undisputed that the parties had an agreement that covered the compensation sought, and thus, there is no dispute as to the existence or application of a contract (*Wilmoth v Sandor*, 259 AD2d 254 [1st Dept 1999]). Since there is no dispute that the terms of the compensation is covered by an agreement, plaintiff cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter (*MJM Adv. v Panasonic Indus. Co.*, 294 AD2d 265 [1st Dept 2002]). Therefore, the motion to reargue is denied.

In Motion Sequence 003, defendant moves (1) to dismiss the second and third causes of action in the amended complaint, pursuant to CPLR 3211, and (2) for the imposition of costs and

5] sanctions, including attorney's fees, against plaintiff and his counsel for engaging in frivolous conduct by filing an amended complaint that is without merit.

The motion to dismiss the second cause of action for unjust enrichment, is granted. That cause of action had already been dismissed by Motion Sequence Number 001, and, as set forth above, the motion for its reinstatement (Motion Sequence Number 004 herein) has been denied.

The third cause of action of the amended complaint alleges that defendant's failure to compensate him in the agreed-upon manner, by refusing to pay wages, bonuses, and benefits due and owing, constitutes a violation of the Labor Law, and seeks damages pursuant to Labor Law § 198.

Labor Law § 198 (1-a) provides:

"In any action instituted upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due."

The attorney's fees remedy provided in Labor Law § 198 is limited to wage claims based upon violations of one or more of the substantive provisions of Labor Law article 6 (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457 [1993], *rearg denied* 83 NY2d 801 [1994]; *Scheer v Kahn*, 221 AD2d 515 [2d Dept 1995]). In *Gottlieb v Kenneth D. Laub & Co.*, *supra*, the Court of Appeals stated:

"Plaintiff did not allege a violation of any of the substantive provisions of article 6 of the Labor Law, but only a common-law contract cause of action and a second cause of action for a 'violation of Labor Law section 198', the costs and remedies provision of article 6, in which he demanded attorney's fees and liquidated damages thereunder."

(82 NY2d at 460). A similar situation is presented here. The first and second causes of action are for breach of contract and unjust enrichment, respectively. Although the third cause of action

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contains a vague statement that defendant's failure to pay wages, bonuses, and benefits constitutes a violation of the Labor Law, it does not allege a violation of any of the substantive provisions of the Labor Law, and thus, the claim for recovery under Labor Law § 198 is not validly stated and must be dismissed (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, *supra*; *Scheer v Kahn*, 221 AD2d 515, *supra*). Thus, plaintiff's extensive discussion about why he should be deemed an "employee" under article 6 of the Labor Law is inconsequential.

In essence, plaintiff's vague statement, that defendant's "willful failure and refusal to pay Mr. Zito's wages, bonuses, and/or benefits due and owing to Mr. Zito is a violation of the New York Labor Law," merely restates his breach of contract claim, because it provides no meaningful notice of how such alleged failure violates article 6 of the Labor Law (*see Lynch v The Upper Crust*, 294 AD2d 237 [1st Dept 2002] [cause of action under Labor Law dismissed because the vague and conclusory allegations fail to give proper notice of the transactions and occurrences intended to be proved]). Examples of the substantive provisions of article 6 of the Labor Law include "Frequency of payments" (§ 191); "Contracts with sales representatives" (§ 191-b); "Payment of sales commission" (§ 191-c); "Cash payment of wages" (§ 192); "Deductions from wages" (§ 193); "Differential in rate of pay because of sex prohibited" (§ 194); and "Gratuities" (§ 196-d).

As stated by the Court of Appeals:

"An expansive interpretation of Labor Law §198 (1-a) to permit recovery of attorney's fees on a common-law contractual remuneration claim would not only violate the foregoing canons of statutory construction, but would afford a windfall remedy to litigants whom the Legislature consciously chose *not* to afford the protections and benefits of the wage payment regulatory provisions of the Labor Law." (emphasis in original)

(*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d at 465).

Defendant's request for sanctions is denied. Defendant has not established that the motion for reargument is without merit sufficiently to warrant the granting of sanctions, or that the inclusion of the Labor Law claim to the amended complaint should be characterized as frivolous.

Accordingly, it is

ORDERED that defendant's motion (Sequence Number 003) is granted to the extent of dismissing the second and third causes of action of the amended complaint; and it is further

ORDERED that plaintiff's motion (Sequence Number 004) for reargument is denied.

Dated: September 21, 2005

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J.S.C.

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