Ritorto v Silverstein

2006 NY Slip Op 30126(U)

May 3, 2006

Supreme Court, New York County

Docket Number: 0602088/2004

Judge: Helen E. Freedman

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SCANNED ON 5/8/2006

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

PRESENT: ______________________ PART 39

Justice

JOSEPH RITORTO

INDEX NO. 602088/04

MOTION DATE ______

- v -

MOTION SEQ. NO. 002

LARRY A. Silverstein

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion sequence 002 is consolidated with sequence 003 of index no. 602088/04 and sequence no 001 of Index number 601494/05 and are DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 3, 2006 ______ [signature] J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 39

---X

JOSEPH RITORTO,

Plaintiff, Index No. 602088/04

-against-

LARRY A. SILVERSTEIN and SILVERSTEIN PROPERTIES, INC.,

Defendant.

---X

LARRY A. SILVERSTEIN and SILVERSTEIN DEVELOPMENT CORPORATION,

Plaintiffs, Index No. 601494/05

-against-

JOSEPH RITORTO,

Defendant.

---X

FILED
MAY 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

Helen E. Freedman, J.S.C.

Motions with sequence numbers 002 and 003 with Index No. 602088/04 and sequence number 001 with Index No. 601494/05 are consolidated for joint disposition.

In the first of these companion actions (002 and 003), Joseph Ritorto ("Ritorto") sues Larry A. Silverstein ("Silverstein") and Silverstein Properties, Inc. ("SPI") for breach of contract and New York Labor Law violations in connection with their real estate investment and employment relationship, contending that the defendants failed to pay him amounts referable to his beneficial interests in some of Silverstein's investment properties ("Action 1"). In the second action (001), Silverstein and Silverstein Development Corporation ("SDC") sue Ritorto for breach of contract, claiming that Ritorto failed to pay $2,550,957.50 for his share of the 7 World Trade Center ("7

WTC") reconstruction costs after the September 11, 2001 terrorist attacks ("Action 2").

In motion 001, Ritorto seeks to amend his answer and add a counterclaim in Action 2 for retaliation, contending that Silverstein and SDC brought Action 2 to retaliate for Ritorto's Labor Law claim in Action 1. In motion 002, Ritorto seeks to amend his complaint in Action 1 to add claims for unjust enrichment and fraudulent inducement. In motion 003, Silverstein and SDC move to dismiss the Labor Law claim. Silverstein, SPI, and SDC also oppose the proposed amendments for unjust enrichment, fraudulent inducement, and retaliation, on the ground that they do not state causes of action here.

Background:

Ritorto began his employment with SPI in 1978 as its Executive Vice President and subsequently acquired the titles of Senior Executive Vice President and Chief Operating Officer prior to his retirement in 2001. During Ritorto's employment with SPI, he participated in Silverstein's real estate investments, pursuant to two letter agreements relevant here. The first agreement dated October 10, 1980 (the "1980 Agreement") provided that in consideration for Ritorto's continued employment with SPI, Ritorto would receive "a five percent beneficial interest in [Silverstein's] interests ... in any property acquired or developed or in the process of being acquired or developed during [Ritorto's] employment."

The second letter agreement dated January 1, 1981 concerned Silverstein's wholly owned corporation SDC, the entity that owns an interest in the partnership between the Port Authority of New York and New Jersey (the "Port Authority") and 7 WTC (the "Partnership"). The 1981 Agreement stated that Ritorto would participate in Silverstein's 7 WTC investments in part by contributing to both initial rent payments and subsequent investments in the Partnership. Paragraph

1 of that agreement provides that upon Silverstein's demand, Ritorto "shall pay to SDC, upon demand, ten percent of additional funds that [Silverstein] contribute[s] to SDC for investment in the Partnership." Paragraph 6 of that agreement provides that if Ritorto fails to comply with any of the obligations imposed by the 1981 letter agreement, upon written notice from SDC, Ritorto shall "cease to have any beneficial interest in SDC's interest in the Partnership, and SDC shall have such additional remedies against [Ritorto] as may be provided by law." Paragraph 6 also provides that Silverstein shall contribute such amount on Ritorto's behalf and he "shall be entitled to recover such amounts only from distributions from the Company, as provided above, provided that such contributions are otherwise required to be made by [Ritorto] hereunder within three (3) years from the date of this letter agreement."

On April 26, 2001, Silverstein through an entity he formed, Silverstein WTC Associates LLC ("Silverstein WTC"), signed a contract with the Port Authority giving him long-term 99-year leasehold interests in the office, parking, and related subgrade components of Buildings One, Two, Four and Five World Trade Center. Under this lease, Silverstein owned one third of a holding company for the WTC, and his loan for this acquisition required Silverstein to maintain a minimum level of ownership in the venture. Silverstein sold his remaining interest to other investors including Ritorto, who invested $500,000 under the Limited Liability Company Operating Agreement of Silverstein WTC Associates LLC dated April 8, 2001 (the "Operating Agreement").[1] Section 12.2 of Article XII of the Operating Agreement provided that the Operating Agreement "constitutes the

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[1]Under the WTC lease, the WTC investors could receive payments in two stages. In the first stage, "Promote I," the holding company investors would receive 12.55% on their investment, and after all investors received this payment, future profits would be evenly divided among Silverstein WTC and the holding company investors. In the second stage, "Promote II," Silverstein WTC would pay its own investors twelve percent on their investments, and then Silverstein would split profits evenly with these investors.

entire agreement among the parties with respect to the subject matter herein or therein and supersedes any prior agreement or understanding among the parties hereto." In January 2004, Ritorto received a check representing a return of his capital investment in Silverstein WTC with twelve percent interest through December 23, 2003.

In July 2004, Ritorto filed Action 1, claiming that Silverstein and SPI breached their contract with Ritorto by failing to pay him amounts referable to his beneficial interests in certain investment properties including the 8th Street, Ridgeway Shopping Center, and World Trade Center properties. Ritorto alleges, inter alia, that he agreed to contribute $500,000 to Silverstein WTC because of Silverstein's oral representation that in addition to receiving the payout the other investors would receive under the Operating Agreement, Ritorto would receive a pro rata share of the additional return that Silverstein received from Silverstein WTC on his investment, and he would stand "side by side" with Silverstein. Despite repeated requests, Ritorto received neither documentation of the alleged oral agreement nor a declaration that he owned the beneficial interest that he claims he is entitled to receive under that agreement.

On January 20, 2005, this court dismissed the claim for breach of the oral "side by side" contract because the terms of the alleged agreement were too indefinite, and the executed Operating Agreement superseded any prior oral agreement. Ritorto then amended his complaint to add a claim for wages under New York Labor Law, Article 6, §190 and § 198. The basis for the wage claim is that payouts from his beneficial interests in the 8th Street, Ridgeway Shopping Center, and World Trade Center projects after his retirement from SPI constituted "wages" under the Labor Law because his right to them vested during his employment with SPI.

In April 2005, Ritorto received a letter signed by Michael Levy, SPI's Chief Financial

Officer, ("Levy") that referred to Silverstein's right under the 1981 Agreement to demand a payment in connection with Silverstein's contribution to 7 WTC. The letter stated that Silverstein contributed $51,019,150 to reconstruct the 7 WTC after the terrorist attacks, and therefore Ritorto owed $2,550,957.50. The letter stated that Ritorto had six days to comply with this demand or otherwise forfeit his beneficial interest in 7 WTC. A subsequent letter dated April 21, 2005 from Levy to Ritorto stated that the latter's interest is terminated in 7 WTC, but that he was still liable for $2,550,957.50. Thereafter, Silverstein instituted Action 2 against Ritorto, claiming Ritorto breached the 1981 Agreement by failing to pay $2,550,957.50.

Claims:

Ritorto seeks to amend his Answer and Counterclaims in Action 2 to add a retaliation claim under Labor Law § 215, claiming that Silverstein's 2005 $2,550,957.50 "cash call" was motivated by Ritorto's institution of the Labor Law claim. Ritorto also seeks to amend his complaint in Action 1 a second time to add causes of action for unjust enrichment and fraudulent inducement, contending that his $500,000 investment unjustly enriched Silverstein and that Silverstein fraudulently induced him to invest in Silverstein WTC by making false representations regarding the alleged "side by side agreement."

Silverstein moves for dismissal of the Labor Law claim in Action 1, contending that Ritorto is precluded from recovering under the statute because he was an executive and not an "employee" under the statute, the relief he seeks constitutes investment returns and not "wages," and Silverstein was not Ritorto's employer. Silverstein also opposes Ritorto's proposed amendments contending that they do not state causes of action and merely duplicate the allegations underlying the already dismissed breach of the oral contract claim.

Labor Law Claim:

A wage claim under the New York Labor Law must be brought by an "employee," defined as "any person employed for hire by an employer in any employment." Labor Law § 190(2). Sections 190(6) and (7) and Section192(2) explicitly exclude from the definition of "employee" any "person employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of six hundred dollars a week."

Although Ritorto undoubtedly qualifies as an executive, Ritorto claims that the executive exclusion only applies where the language of the section explicitly excludes executives. Ritorto relies on *Miteva v. Third Point Mgmt. Co. LLC,* 323 F.Supp.2d 573 (S.D.N.Y. 2003), where the plaintiff brought claims under Labor Law § 191(3), 193, 198, and the court found that *Gottlieb v. Laub & Co.*, 82 N.Y.2d 457 (1993), although it denied recovery to an executive, did not resolve the issue of whether executives could be "employees" under certain provisions of the Labor Law. *Miteva v. Third Point Mgmt. Co. LLC, supra,* found that executives could recover under the Labor Law, citing federal district court cases and one Third Department case. However, First Department decisions relying on *Gottlieb, supra,* hold that executives are not "employees" under the Labor Law statute. *See Davidson v. Regan Fund Mgmt. Ltd.*, 13 A.D.3d 117 (1st Dept. 2004); *Sorrentino v. Bohbot Entm't. & Media, Inc.*, 265 A.D.2d 245 (1st Dept. 1999); *Taylor v. Blaylock & Partners, L.P.*, 240 A.D.2d 289 (1st Dept. 1997). Based on the First Department holdings, the Labor Law claim is dismissed.[2]

Unjust Enrichment, Fraudulent Inducement, and Retaliation:

Ritorto seeks to amend his complaint in Action 1 and his answer in Action 2 to add claims

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[2]The Labor Law claim against Silverstein also fails because Silverstein is not Ritorto's employer.

for unjust enrichment, fraudulent inducement, and retaliation. Although leave to amend should be liberally granted (CPLR 3025(b)), the merits of the proposed pleadings must state viable causes of action. *See DiPasquale v. Security Mut. Life Ins. Co. of New York,* 13 A.D.3d 100 (1st Dept. 2004). Here, the proposed amendments do not state meritorious claims.

Ritorto cannot state a cause of action for unjust enrichment because the existence of a valid contract governing the subject matter precludes recovery in quasi contract for events arising out of the same subject matter. *EBC I, Inc. v Goldman, Sachs & Co.,* 5 N.Y.3d 11 (2005). *See also M & A Oasis, Inc. v. MTM Associates, L.P.*, 307 A.D.2d 872 (1st Dept. 2003). Additionally, Ritorto does not actually claim that he conferred a benefit upon Silverstein for which he received no compensation. He invested $500,000 to Silverstein WTC in exchange for a share of profits that may flow from the reconstructed WTC.

To support a fraudulent inducement claim, the plaintiff must show the uttering of a known false representation which was made for the purpose of inducing another to act upon it and that the other justifiably relied upon it and suffered injury or damage. *Clanton v. Vagianelis,* 187 A.D.2d 45 (3rd Dept. 1993). Ritorto fails to properly plead facts demonstrating the elements of the claim.

Ritorto's allegations regarding his repeated discussions with Silverstein and Levy where Silverstein and Levy acknowledged the need to place the oral agreement in writing, and Silverstein's concern about maintaining a minimum ownership interest for securing his loan undermine Ritorto's claim that Silverstein intended to make a false representation to Ritorto at the time of the alleged oral agreement. The allegations suggest that at most the parties had an agreement to come to a future agreement after Silverstein's financial and legal advisors determined proper contract terms that would not harm Silverstein's underlying leasehold interest.

Ritorto alleges that he reasonably relied on Silverstein's representations because of the parties' long term relationship and course of dealing whereby Ritorto held beneficial interests in Silverstein's other investments. Ritorto further avers that he signed the Operating Agreement before obtaining documentation of the oral agreement because Silverstein indicated that he needed to obtain investors as soon as possible in order to secure the WTC deal. The execution of the Operating Agreement that contained a merger clause specifically excluding any prior oral understandings, however, belies Ritorto's claim that he reasonably relied on the earlier representations. *See Citibank v. Plapinger,* 66 N.Y.2d 90 (1985). A conflict between a written contract and a prior alleged oral representation negates a claim of reasonable reliance upon the oral representation. *See Daily News, L.P. v. Rockwell International Corp.*, 256 A.D.2d 13 (1998) .

The fraudulent inducement claim also fails because Ritorto does not adequately plead an injury suffered as a result of the alleged fraud. Ritorto already received a payment representing his capital investment in Silverstein WTC plus twelve percent interest through December 23, 2003. He now seeks a declaration that he is entitled to a 1/28 beneficial interest in Silverstein's interest, which allegedly would equal his interest if the oral "side by side agreement" were enforced. However, the "damages recoverable for being fraudulently induced to enter into a contract which otherwise would not have been made is 'indemnity for [the] loss suffered through that inducement'" *Deerfield Communications Corporation, v. Chesebrough-Ponds, Inc., et al.,* 68 N.Y.2d 954 at 956 (1986) citing *Sager v Friedman,* 270 N.Y. 472 at 481 (1936). The damages are limited to compensation for the actual loss sustained, and may not include potential profit. *See Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413 (1996).

The proposed retaliation claim is also without merit. Under NY Labor Law § 215, an

employee may bring a civil action against an employer who has discharged, penalized, or discriminated against the employee because the employee has complained that the employer violated the Labor Law. Here, Ritorto claims Silvertein penalized him by demanding a forfeiture of his beneficial interest and a contribution of $2,550,957.50 for his alleged share of the 7 WTC reconstruction costs under the January 1, 1981 letter agreement, and demanding that this payment be paid in a manner that would produce unfavorable tax consequences for Ritorto. Exercising a contractual right cannot constitute adverse employer action or retaliation. *See In the Matter of County of Nassau v. State of N. Y. Public Employment Relations Bd.,* 103 A.D.2d 274 (2d Dept. 1984). Additionally, although Ritorto alleges that Silverstein's "cash call" occurred only weeks after he instituted his Labor Law claim, the "cash call" also occurred soon after Silverstein's $51,019,150 contribution to reconstructing 7 WTC, and this reconstruction cost contribution constitutes a reasonable motivation for the cash call. Ritorto may have valid arguments regarding the extent of the relief that Silverstein seeks in Action 2. However, these arguments would support Ritorto's defenses to the breach of contract claim, but not a separate retaliation claim under the Labor Law statute.

Accordingly, it is

ORDERED that Silverstein's motion to dismiss the eighth cause of action is granted and the Labor Law claim is dismissed and Ritorto's complaint otherwise remains, and it is further

ORDERED that Ritorto's motion to amend his complaint is denied, and it is further

ORDERED that Ritorto's motion to amend his answer in Action 2 is denied, and it is further

[* 11]

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: May 3, 2006

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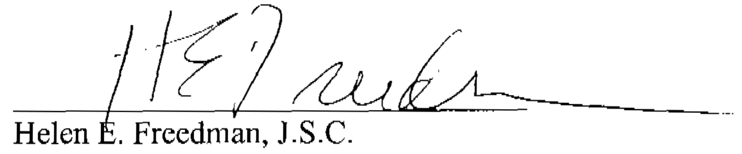

Helen E. Freedman, J.S.C.

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