Seely v Tuzman
2006 NY Slip Op 30618(U)
October 18, 2006
Sup Ct, NY County
Docket Number: 108746/05
Judge: Edward H. Lehner
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SCANNED ON 10/20/2006

[* 1]

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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 108746/2005

SEELY, CHARLES

VS

TUZMAN, KALEIL D. ISAZA

Sequence Number : 003

DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

motion is decided in accordance with accompanying memorandum decision

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: OCT 18 2006

_____ J.S.C.

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

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 19

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CHARLES SEELY,

Plaintiff,

INDEX NO.
108746/05

- against -

KALEIL D. ISAZA TUZMAN, RECOGNITION GROUP, LLC, a Delaware limited liability corporation, and KIT CAPITAL LLC, a Delaware limited liability corporation,

Defendants.

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FILED
OCT 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

EDWARD H. LEHNER, J.;

Before the court is a motion by Kaleil D. Isaza Tuzman ("Tuzman"), Recognition Group LLC ("RG") and KIT Capital LLC ("KIT") (collectively "Defendants") to dismiss the amended complaint pursuant to CPLR 3211(a)(7).

The amended complaint sets forth six causes of action: i) breach of Labor Law §190, et seq; ii) fraudulent inducement; iii) breach of obligation to pay profits; iv) quantum meruit; v) unjust enrichment; and vi) defamation.

Plaintiff contends that: he became an employee of RG in March 2002; that he "was responsible for generating new business ... provided advice and counseling to ... clients on issues such as restructurings, reorganizations, liquidations and turnarounds" (amended complaint ¶10); that in March 2003 he "assumed increasing responsibility for securing new engagements (and he was promised) an increase in

(his) annual compensation from $82,500 to $102,000" (Id. ¶11, 12); that in March 2003 he was induced to accept this by Tuzman's "falsely stating that $102,000 was all that the business could afford, that this was the same amount that Tuzman was paying himself, and that (plaintiff) would share in future profits as an equity holder" (Id. ¶13); that Tuzman, the President and Managing Partner of KIT, was actually paid more than plaintiff and he used KIT funds to cover personal expenses (Id. ¶8, 14, 15); that in June 2003 Tuzman "entered into an oral contract with plaintiff, making (him) a partner in (KIT) and giving plaintiff an equity interest of 15%, with 2.5% vested immediately and the remainder vesting in equal portions over six years" (Id. ¶18); and in June 2004 plaintiff resigned his employment (Id. ¶21).

RG "no longer operates as a corporate entity. In or around June of 2002, Tuzman dissolved RG and moved all its operations to KIT" (Id. ¶6). Plaintiff has alleged wrongful conduct occurring in March 2003 (Id. ¶¶12-14), June 2003 (Id. ¶¶18, 19). Since this conduct occurred after June 2002 when RG was allegedly dissolved, the complaint against it is dismissed and the Clerk shall enter judgment accordingly, severing the remaining claims.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... (The court must) accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and

determine only whether the facts as alleged fit within any cognizable legal theory" [Leon v. Martinez, 84 NY2d 83, 87-88 (1994)]

In his first cause of action, defendant seeks "$22,199.55 in wrongfully-withheld wages ... in violation of the New York Labor Law §190 et seq" (complaint ¶23, 24). Labor Law §198 provides in relevant part:

> "1-a. 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 wages ... was wilful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due"

"Except for manual workers, all other categories of employees entitled to protection under Labor Law §191 are limited by definitional exclusions of one form or another for employees serving in an executive, managerial or administrative capacity" [Gottlieb v. Kenneth D. Laub & Company, Inc., 82 NY2d 457, 461 (1993)]. Put another way, "the statute does not apply to common-law contractual remuneration claims by an executive" [Sorrentino v. Bohbot Entertainment and Media, Inc., 265 AD2d 245, 246 (1st Dept. 1999)]. See also, Davidson v. Regan Fund Management Ltd., 13 AD3d 117 (1st Dept. 2004); Conticommodity Services, Inc. v. Haltmier, 67 AD2d 480, 482 (2nd Dept. 1979).

A corporate officer who was a member of the Board of Directors and who "had authority to sign checks and contracts on behalf of (the company) and could bind (the

company) to deals with customers ... was in a bona fide 'executive, administrative, or professional capacity'" [Cohen v. ACM Medical Laboratory, Inc., 178 Misc. 2d 130, 135-136 (Sup. Ct., Monroe Co.), affd. for reasons stated 265 AD2d 839 (4th Dept. 1999)] . Plaintiff contends he "was not an 'executive' (and that Tuzman) was ... the only 'officer' of (KIT) ... (and) the only individual who had the ability to sign checks or disburse company funds" (plaintiff affidavit, ¶3, 4). From the papers, Defendants have not established as a matter of law that plaintiff was employed in an executive capacity. Accordingly, the application to dismiss the first cause of action based on Labor Law §198 is denied. Moreover, plaintiff's first cause of action also implicitly alleges a breach of contract for "$22,199.55 in wrongfully-withheld wages."

Plaintiff also seeks to hold Tuzman individually liable for his actions as President of KIT. KIT is alleged to be "a Delaware limited liability corporation" (complaint, caption). Limited Liability Company Law §801(a) provides that "the laws of the jurisdiction under which a foreign limited liability company is formed govern ... the liability of its members and managers." Delaware Limited Liability Company Act §18-303 provides:

> "(a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manger of the limited liability company."

"As with a corporation, a member of a limited liability company may not be held liable for the debts, obligations and liabilities of the company" [Thomas v. Hobbs, 2005 WL 1653947 (Del. Super.). Thus, Tuzman would not be personally liable merely by virtue of his position as a member or manager of KIT.

Plaintiff contends that Tuzman is personally liable for unpaid wages under Business Corporation Law §630, which provides that the "ten largest shareholders" of a non-public corporation "shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees ... for services performed by them for such corporation." But, KIT is a limited liability company, not a corporation. Hence it is not governed by B.C.L. §630. See, Artigas v. Renewal Arts Realty Corp., 22 AD3d 327 (1st Dept. 2005).

However, "the doctrine of piercing the corporate veil ... applies to limited liability companies" [Retropolis, Inc. v. 14th Street Development LLC, 17 AD3d 209, 210 (1st Dept. (2005)]. "Generally, ... piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" [Morris v. New York State Department of Taxation and Finance, 82 NY2d 135, 141 (1993)]. See also, Trustees of the Village of Arden v. Unity Construction Company, 2000 WL 130627 (Del. Ch.). Plaintiff asserts that Tuzman used KIT bank accounts "to cover his own

personal expenses ... over $140,000 in credit card charges for non-business expenses and more than $205,000 of (KIT funds) to cover other non-business expenses ... (and as a result he withheld) monies from (plaintiff's) pay allegedly in order to meet (KIT's) pressing overhead and operational expenses" (amended complaint ¶15, 16). This adequately alleges that "(t)he owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" [Morris v. New York State Department of Taxation and Finance, 82 NY2d supra at p. 142].

Plaintiff's second cause of action is based upon Tuzman and his "respective compensation levels" (amended complaint ¶28). It is alleged that: "In or around March 2003 ... Tuzman agreed to ... increase (plaintiff's) annual compensation from $82,500 to $102,000 ... (stating) that this was the same amount that Tuzman was paying himself ... (but that) Tuzman paid himself ... much more than $102,000" (Id. ¶¶12-14). (Plaintiff's) "fraudulent inducement claim requires (him) to allege and prove that (he) reasonably relied on a material misrepresentation by defendant and that (he) suffered an injury as a result of that reliance" [Skillgames, LLC v. Brody, 1 AD3d 247, 250 (1st Dept. 2003)]. Plaintiff could not have reasonably relied upon Tuzman's representation as to "their respective compensation levels ... in June 2002" (amended complaint ¶28), when the complaint alleges that it was not until March 2003 that Tuzman allegedly agreed to pay plaintiff the same amount that he was

paying himself (Id. ¶¶12, 13). However, "the facts as alleged (do) fit within any cognizable legal theory" [Leon v. Martinez, 84 NY2d supra at p. 88]. "(A) claim should not be dismissed 'when a cause of action may be discerned no matter how poorly stated'" [L. Magarian & Co., Inc. v. Timberland Company, 245 AD2d 69 (1st Dept. 1997)]. Plaintiff's allegations support the claim of a breach of a contractual obligation wherein plaintiff agreed to continue working for KIT and Defendants agreed to pay him at the same amount that Tuzman was being paid.

Plaintiff's third cause of action is for "profits commensurate with plaintiff's vested equity interest" (amended complaint ¶34). However, plaintiff has not alleged that there were any profits that were distributed and therefore the third cause of action is dismissed.

"The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services: [Freedman v. Pearlman, 271 AD2d 301, 304 (1st Dept. 2000)]. According to plaintiff, in June 2003 the "oral contract (made him) a partner in (KIT) ... (with) an equity interest of 15% with 2.5% vested immediately and the remainder vesting in equal portions over six years" (amended complaint ¶18).

> "The statute of frauds, as incorporated in section 5-701(a)(1) of the General Obligations Law, provides that an agreement is void if it is not in writing and 'subscribed by the party to be charged therewith' when the agreement '(b)y its terms is not to be performed within one year from

> the making thereof.' The statute of frauds was intended to prevent 'fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury'."

[Sheehy v. Clifford Chance Rogers & Wells LLP, 3 NY3d 554, 559-560 (2004)]. The alleged oral agreement for an equity interest in KIT cannot by its terms be completed within a year since it purportedly vests 15% interest in KIT over a six year period. "Since the alleged agreement is void by reason of the Statute of Frauds, plaintiff cannot use the same alleged promise as a basis for a cause of action sounding in quantum meruit" [Wings Associates, Inc. v. Warnaco, Inc., 269 AD2d 183, 184 (1st Dept. 2000)]. See also, American-European Art Associates, Inc. v. Trend Galleries, Inc., 227 AD2d 170 (1st Dept. 1996)]. Hence, plaintiff's claim for an equity interest in KIT is dismissed.

However, plaintiff also alleges under the fourth cause of action that Defendants were not "adequately compensating him" (amended complaint ¶38), and he seeks the "value of the services (he) provided" (Id. ¶39). "Where, as here, there is a bona fide dispute as to the existence of a contract ... a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies" [Zuccarini v. Ziff-Davis Media, Inc., 306 AD2d 404, 405 (2nd Dept. 2003)]. See also, Hochman v. LaRea, 14 AD3d 653 (2nd Dept. 2005).

Plaintiff's fifth cause of action for unjust enrichment is dismissed as duplicative of the fourth cause of action since "(t)he theory of unjust enrichment lies

as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement" [Goldman v. Metropolitan Life Insurance Company, 5 NY3d, 561, 570 (2005)].

Plaintiff's sixth cause of action alleges that Tuzman defamed him by stating: he "sued (Tuzman) for presumptive 'compensation' he is clearly not owed ..." ; (that plaintiff) "threatened to speak ill of (Tuzman)"; (that plaintiff) "is engaging in extortion"; (that plaintiff) was "erratic" (and that Tuzman) "took (plaintiff) into (KIT) when (plaintiff) was down on his luck" (amended complaint ¶47). Penal Law §155.05(2)(e) provides in part:

> "A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:
> (i) Cause physical injury to some person in the future; or
> (ii) Cause damage to property; or
> (iii) Engage in other conduct constituting a crime; or
> (iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or
> (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
> (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
> (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
> (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
> (ix) Perform any other act which would not in itself materially benefit

> the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships."

"(Tuzman's) use of the word 'extortion,' which is defined as a felony in Penal Law §155.05(2)(e), does not necessarily make his remarks actionable statements of fact .... Depending upon the context in which it is used, such an accusation can be understood as mere 'rhetorical hyperbole' or a 'vigorous epithet,' which is not actionable" [Trustco Bank of New York v. Capital Newspaper Division of the Hearst Corporation, 213 AD2d 940, 942 (3rd Dept. 1995)](internal citation omitted). "Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation. In making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole" [Armstrong v. Simon & Schuster, Inc., 85 NY2d 373, 380 (1995)] (internal citations omitted). "An expression of pure opinion is not actionable ... no matter how vituperative or unreasonable it may be" [Steinhilber v. Alphonse, 68 NY2d 283, 289 (1986)]. See also, Locke v. Aston, 1 AD3d 160 (1st Dept. 2003); J.C. Klein, Inc. v. Forzley, 289 AD2d 79 (1st Dept. 2001). "[I]n distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court 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 about the libel plaintiff'" [Brian v. Richardson, 87 NY2d 46, 51 (1995)], quoting Immuno AG. v. Moor-Jankowski, 77 NY2d 235, 254 (1991). Where "(n)o reasonable person would conclude that ... actual criminality is charged by the epithets 'thieves' and 'false do-gooders' ... (t)he statements were (held to be) pure opinion" [Polish American Immigration Relief Committee, Inc. v. Relax, 189 AD2d 370, 374 (1st Dept. 1993)]. See also, Zysk v. Fidelity Title Insurance Company of New York, 14 AD3d 609 (2nd Dept. 2005); McGill v. Parker, 179 AD2d 98 (1st Dept. 1992).

Reading the attached e-mail which was sent "to an untolled number of third parties, including former, current and prospective business colleagues of (plaintiff)" (amended complaint ¶45), Tuzman identifies plaintiff as his "former employee" who "has sued (him)." The reasonable reader viewing it in that context would not understand the assertion of extortion as instilling fear of physical injury, injury to property or other criminal activity, but rather rhetorical excess that constitutes non-actionable opinion. The remaining purported statements are not reasonably susceptible of a defamatory connotation. Therefore, plaintiff's sixth cause of action is dismissed.

This decision constitutes the order of the court.

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Dated: October 18, 2006

J.S.C.