

Giuffre v DiLeo

2007 NY Slip Op 30365(U)

March 6, 2007

Supreme Court, Suffolk County

Docket Number: 0011532

Judge: William B. Rebolini

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SUPREME COURT - STATE OF NEW YORK

L.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

COM

Louis F. Giuffre,

Plaintiff

-against-

Mike DiLeo,
and Pocket Solutions, Inc.
also d/b/a www.ThePocketSolution.com,
Defendants

Motion date: 7/25/06, 8/23/06
Submitted: 1/10/07
Motion Sequence No.: 001 Mot D
002 Mot D
Index No.: 11532-06

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Upon the following papers numbering 1 to 7 read upon this motion and cross motion:

Notice of Motion and supporting papers 1 - 3;
Notice of Cross Motion and supporting papers 4 - 5;
Reply Affidavits and supporting papers 6 - 7;
it is

ORDERED that this pre-answer motion by defendants for an order pursuant to CPLR 3211(a)(1), (3), (7) and (10) dismissing the complaint is denied. In the alternative certain causes of action, more specifically set forth below, are dismissed; and it is further

ORDERED that this cross motion by plaintiff for leave to serve an amended complaint is granted to the extent indicated.

Plaintiff, Louis Giuffre ("plaintiff") commenced this action against defendants Mike DiLeo and Pocket Solutions, Inc., also d/b/a www.thepocketsolution.com, setting forth nine causes of action sounding in inter alia breach of contract, fraud, unjust enrichment, breach of fiduciary duty and wrongful termination of employment. Plaintiff further seeks corporate

dissolution. Defendants now move to dismiss and plaintiff cross moves to amend the complaint.

Pocket Solutions, Inc. is a New York corporation founded by defendant Mike DiLeo in June 2002. At that time 100 shares of the 200 corporate shares were issued to DiLeo, who was the sole member of the Board of Directors. According to the plaintiff's complaint, the parties entered into a business venture which involved setting up a website and business entity to sell technology products related to personal digital assistants (PDAs) and other computer related goods. Plaintiff further alleges that in November 2002, the parties entered into a formal "Stock Assignment Agreement" wherein plaintiff received 25 percent or 50 of the 200 hundred shares of Pocket Solutions, Inc. also d/b/a www.thepocketsolution.com. Plaintiff claims that he was also appointed a corporate officer of Pocket Solutions, Inc., also d/b/a www.thepocketsolution.com, and held title of president. Plaintiff claims that up until June 2003, the plaintiff and DiLeo each shared an equal salary or compensation from the business and that plaintiff had full access to the corporation's credit card, accounts and records and was fully authorized to conduct business for the corporation. However, in June 2003, plaintiff alleges that DiLeo began to act hostile toward him and began to conduct the business of the corporation in secret. In essence, plaintiff complains DiLeo froze him out of the business.

Initially, the court notes that DiLeo denies that the corporate defendant ever conducted business as www.thepocketsolution.com or that plaintiff was ever a shareholder, elected officer or director of defendant corporation. He further claims that no employment agreement exists between the parties. Defendant's motion to dismiss the complaint is based, in part on plaintiff's inartful pleading. In response, plaintiff moves to amend the complaint, with the proposed amended pleading annexed to the cross motion. The court grants the motion to serve such amended complaint and deems the same served upon defendants. The court addresses the motion to dismiss to this amended pleading.

The First Cause of Action is dismissed for failure to separately state and number the causes of action set forth therein. More specifically, plaintiff alleges that defendants breached its fiduciary obligation to plaintiff by removing plaintiff as a signatory and authorized user of the corporate bank accounts credit cards and in the same cause of action alleges that defendant DiLeo converted corporate property for his own use. Such pleading violates the requirements of CPLR 3014 and is therefore dismissed without prejudice (see Gerena v. New York State Division of Parole, 266 AD2d 761, 698 NYS2d 750 [3d Dept. 1999]). Similarly the Second Cause of Action, which seeks damages for wrongful termination of employment as well as damages for a myriad of other alleged wrongs including misappropriation, breach of fiduciary duties, fraudulent and oppressive conduct as shareholder and director of the defendant corporation is also defective and dismissed without prejudice.

The Third Cause of Action seeks damages for breach of contract. Defendants seek dismissal of this cause of action based upon documentary evidence (CPLR 3211 [a] and for failure to state a cause of action (CPLR 3211[a][7]). "A motion made pursuant to CPLR 3211 (a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual

allegations, thereby conclusively establishing a defense as a matter of law” (Mendelovitz v. Cohen, ___ AD3d ___, 2007 WL 533354 [2d Dept. Feb. 7, 2007]). Here, defendant’s documentary evidence establishes only that at the time the defendant corporation was formed, he was the sole shareholder and director. It does not refute plaintiff’s claim that the parties subsequently entered into a contract. “Moreover, a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman, ___ AD3d ___, 827 NYS2d 231 [2d Dept. 2006]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery 3211 motion to dismiss” (Id.) Under these rules the court finds that plaintiff has sufficiently alleged a cause of action for breach of contract to survive a motion to dismiss.

Plaintiffs’ fourth cause of actions sounds in quasi contract and/or unjust enrichment. Defendants seek dismissal of this cause of action on the ground that it is duplicative of plaintiff’s breach of contract cause of action. “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for an event arising out of the same subject matter. A ‘quasi contract’ only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment” (Clark-Fitzpatrick, 70 NY2d 382, 521 NYS2d 653 [1987]). While plaintiff alleges the existence of a stock transfer agreement, he also alleges the existence of various other agreements, which are apparently not written. In fact, defendants deny the existence of any written agreement. At this pre-answer, pre-discovery posture of the litigation, it is not clear whether a contract exists that would preclude this cause of action. Accordingly, with respect to plaintiff’s fourth cause of action, the motion to dismiss this cause of action sounding in quasi contract on the ground that it is duplicative is denied without prejudice to any summary judgment motion. Moreover, plaintiff has sufficiently pleaded a cause of action for unjust enrichment to survive a motion to dismiss. “The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will look to see if a benefit has been conferred in the defendant under mistake of fact or law, if the benefit remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant’s conduct was tortious or fraudulent” (Paramount Film Distributing Corp. v. State of New York, 30 NY2d 415, 334 NYS2d 388 [2d Dept. 388 [1972] [citations omitted]) . The complaint adequately states a cause of action for unjust enrichment. Whether plaintiff in fact can prove such cause of action is not addressed herein.

Plaintiff’s fifth cause of action seeks damages for fraud. “A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud” (Wit Holding Corp. V. Klein, 282 AD2d 527, 724 NYS2d 66 [2d Dept. 2001]). Again, it is not clear from the record, what, if any contract, governs the

relationship between the parties. Accordingly, the motion to dismiss the Fifth Cause of Action is denied without prejudice.

Defendants' motion to dismiss the Sixth, Seventh and Eight Causes of Action are denied. While defendant denies that plaintiff's owns any shares in the defendant corporation, plaintiff produces an agreement that indicates that defendants agreed to transfer 25 percent of the stock to plaintiff. Accordingly, the motion to dismiss on the ground that plaintiff lacks capacity to commence a corporate dissolution action is denied without prejudice. Moreover, defendants' argument that the Seventh and Eighth Causes of Action should be dismissed because they were brought in plaintiff's individual capacity and not in the name of the corporation is denied as the court has granted plaintiff leave to serve a supplemental summons and amended complaint which, in part, adds the corporation as a named plaintiff.

Defendants' motion to dismiss plaintiff's claim for attorneys fees is denied without prejudice since the disputed agreement does contain a provision providing for attorneys fees. That part of defendants' motion to dismiss plaintiff's claims for punitive damages is granted as the complaint does not allege conduct " * * * evincing a 'high degree of moral turpitude' or 'such wanton dishonesty as to imply a criminal indifference to civil obligations (Varveis v. Hermitage Ins. Co., 24 AD3d 537, 806 NYS2d 688 [2d Dept. 2005]).

Counsel for both parties shall appear for a Preliminary Conference on April 25, 2007 at 9:30a.m. at the office of Differentiated Case Management, Suffolk County Supreme Court, One Court Street, Riverhead, New York.

Plaintiff's amended complaint in the form annexed to the cross motion shall be deemed served upon service of a copy of this order. The First and Second Causes of Action are dismissed with leave to re-plead and the plaintiff's claims for punitive damages are dismissed. Defendants are directed to answer the Amended Complaint within 20 days of service of a copy of this order.

Plaintiff is directed to serve a copy of this order upon defendants and the calendar department no later than March 21, 2007.

Dated: March 6, 2007


HON. WILLIAM B. REBOLINI, J.S.C.