

McGoldrick v Metropolitan Hous. Partners, L.L.C.
2007 NY Slip Op 30379(U)
March 20, 2007
Supreme Court, New York County
Docket Number: 0108485
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT -
Index Number : 108485/2006

PART 56

MCGOLDRICK, MICHAEL F.

vs
METROPOLITAN HOUSING PARTNERS

INDEX NO. 108485/06

MOTION DATE 2/6/07

Sequence Number : 003

MOTION SEQ. NO. 003

DISMISS

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

[Faint handwritten text]

FILE

[Handwritten signature]
CLERK'S OFFICE

Dated: 3/20/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----x
MICHAEL F. McGOLDRICK

Index No: 108485/06

Plaintiff

-against-

DECISION AND ORDER

METROPOLITAN HOUSING PARTNERS, LLC;
URBAN RESIDENTIAL, LLC; CHRISTOPHER H.
MARTORELLA; and JANE GLADSTEIN

Defendants

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----x
RICHARD B. LOWE III, J:

Motion Sequences 003 and 004 are consolidated for disposition.

Plaintiff Michael F. McGoldrick ("McGoldrick") brings the instant action against defendants Metropolitan Housing Partners LLC ("MHP"), Urban Residential, LLC ("Urban Residential"), Christopher H. Martorella ("Martorella"), and Jane Gladstein ("Gladstein") (collectively, "the defendants") for breach of contract, fraud, fraudulent transfer, sexual harassment, and breach of contract as a third party beneficiary.

In Motion Sequence 003, Defendants MHP, Urban Residential, and Martorella move to dismiss pursuant to CPLR 3211(a)(7). In Motion Sequence 004, Defendant Gladstein moves to

dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). In the alternative, she seeks summary judgment under CPLR 3212.

BACKGROUND

McGoldrick is a New York resident and domiciliary. On or about September 11, 2004, he entered into an employment contract with MHP, a New York Limited-Liability Company. Martorella and Gladstein were members of MHP, jointly owning 100% of the company's membership interests.

Pursuant to the employment agreement, McGoldrick would serve as MHP's Chief Financial Officer. He was also to receive a performance-based bonus based upon MHP's profits. Furthermore, the contract provided that if McGoldrick was terminated he would receive, as severance, his base salary for a maximum period of nine weeks. The severance payments would end if McGoldrick secured employment prior to the nine weeks' completion. However, if his new salary was less than that which he earned at MHP, he would receive severance for the full nine weeks.

Prior to and after the employment-contract's formation, Martorella made certain representations to McGoldrick regarding MHP's expected profitability. Based upon MHP's anticipated profits, Martorella told McGoldrick that he would be entitled to a \$350,000.00 bonus.

Beginning in or about 2008, McGoldrick's supervisor, Gladstein, began to make inappropriate sexual advances to him. This included verbal and written comments, and physical contact. McGoldrick avers that this behavior made him uncomfortable, but he never voiced opposition to it.

During the end of 2005 and the beginning of 2006, Martorella and Gladstein agreed to disband MIIP. Pursuant to an agreement between Martorella and Gladstein, the latter agreed to indemnify the former for 45% of any claims brought against MIIP by its then-current employees.

Martorella decided to create a new company named Urban Residential. McGoldrick alleges that certain MIIP projects located outside of New York City were sold to it. (*McGoldrick Aff'd at page 3, paragraph 6*). The Defendants dispute the aversion that these assets were sold. (*MHP, Martorella, and Urban Residential Memo at page 7, Note 1*)

On March 31, 2006, McGoldrick's employment with MHP ended. McGoldrick was never paid the bonus. On July 19, 2006, he commenced the instant action against the Defendants. On August 11, 2006, the Defendants filed motions to dismiss. McGoldrick then amended his complaint, and the Defendants withdraw their motions. The Defendants now seek to dismiss the amended complaint.

DISCUSSION

Dismissal Pursuant to CPLR 3211

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . . ." (*CPLR 3211(a)(7)*) In a motion to dismiss, the court takes the facts as alleged in the complaint as true and construes them in light of every possible favorable inference to the non-movant. (*See, e.g., Manning v. Manning Partners, LLP v. State Street Bank and Trust Co.*, 5 NY 3d 582 [2005]) "The sole criterion is whether the pleading states a cause of action, and if from its four corners actual allegations are discerned which taken together manifest any cause of action cognizable at law, a

motion for dismissal will fail.” (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993].)

Second Cause of Action: Fraud

Defendants Martorella, MHP, and Gladstein argue that the fraud claim should be dismissed against them because it is a) not plead with the requisite specificity and b) is duplicative of the breach of contract claim.

a. Pleading with Specificity

In order to sustain a claim for fraud, “there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury.” (*Sokolow, Dinaud, Mercadier & Carreras LLP v Lacher*, 299 AD 2d 64 [1st Dept 2003].) Furthermore, “each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail.” (*Bramex Associates, Inc v CBI Agencies, Ltd*, 149 AD 2d 383 [1st Dept 1989].)

Here, McGoldrick pleads that:

During 2004, prior to the time that Plaintiff entered into the contract . . . with MHP, Defendants Martorella and Gladstein, both on behalf of MHP and in their individual capacities, made certain representations to Plaintiff in order to induce Plaintiff to take employment with MHP.

(*Complaint*, ¶22) Indeed, this identifies the time, place, and when the alleged fraudulent statements were made and who made them. Furthermore, McGoldrick specifies what he avers were material-fact misrepresentations:

MHP and its affiliates were very profitable and would continue to be very profitable . . .

[McGoldrick] would receive an annual performance bonus based on the anticipated profitability. . . the performance based bonus would be based on 50% of the expected share in the profits. . . [and] Plaintiff would receive severance [if] MIIP were to terminate Plaintiff's employment

(*Id.*, ¶ 23-25).

While McGoldrick articulates those assertions he avers were fraudulent, he fails to meet the heightened-pleading requirement that they were *knowingly false* when made. Rather, he merely concludes that they were, but contradicts that aversion and offers no support for it. (*Id.*, ¶ 26)

First, McGoldrick alleges elsewhere in the complaint that MIIP was profitable for year ending December 2005, thereby entitling him to a bonus. (*Id.*, ¶ 11) It is contradictory to allege that the representations concerning MIIP's expected profitability were false only to aver that the company is indeed profitable. Second, while he alleges that Gladstein informed him in September 2005 that Martorella "told Landis [a MIIP investor] that Plaintiff would not be paid any bonuses nor any severance", this statement's context is not amplified. (*Id.*, ¶ 27) This simply alleges that *at some point* prior to September 2005, Martorella determined that McGoldrick would not get paid a bonus in contravention of the contract's terms. This *is not* an allegation that Martorella and Gladstein knowingly told McGoldrick that he would get paid a bonus and get severance when it was never their intention to do so.

McGoldrick fails to meet his burden of pleading fraud with particularity. Accordingly, this claim must be dismissed.

b. Duplicative of the Breach of Contract Claim

“To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.” (*Krantz v Chateau Stores of Canada*, 256 AD 2d 186 [1st Dept 1998].) “No cause of action for fraud is stated or exists where the only fraud charged relates to a breach of an employment contract.” (*Dalton v Union Bank of Switzerland*, 134 AD 2d 174 [1st Dept 1987].) “The mere addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud.” (*Devlin v 645 First Ave. Manhattan Co.*, 229 AD 2d 343 [1st Dept 1996].)

Here, McGoldrick’s fraud claim does not contain any allegations beyond the breach-of-employment-contract claim. To be sure, both claims allege that he did not receive his bonus, nor was he paid severance. (*Complaint*, ¶ 16, 17, and 21) The fraud claim does contain the additional contention that Martorella and Gladstein “made certain representation” in order to induce McGoldrick to enter into the employment relationship. (*Id.*, ¶ 22-23) But this aversion reverts back to the breach-of-employment-contract claim because it is this alleged fraud that lead to the contract’s formation. Moreover, the fraud claim merely contains the additional allegation that MHP, Martorella, and Gladstein did not intend to honor their contractual obligations.

Therefore, it is insufficient to repackage the breach of contract claim as a fraud claim. (see *Devlin, supra*) since the fraud claim is identical with that for breach of the employment contract, it must be dismissed.

Third Cause of Action: Fraudulent Transfer

The Defendants argue that the fraudulent transfer claim should be dismissed because McGoldrick fails to meet the specificity requirements under NY Debtor & Creditor Law § 274 and 276. McGoldrick argues that his claim gives rise to an inference that these Defendants intended to hinder, delay, and defraud him by siphoning assets away from MHO, and therefore should not be dismissed.

a. NY Debtor & Creditor Law § 274

“Every conveyance made without fair consideration when the person making it is engaged or is about to be engaged in business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors. . . without regard to his actual intent” (*NYDCL § 274*).

Here, McGoldrick alleges that:

upon information and belief. . . MHP and/or Martorella and/or Gladstein caused the transfer of assets from MHP to Urban Residential in violation of New York Debtor and Creditor Law 274, in that the conveyances were made without fair consideration and/or property remaining in the hands of MHP after the conveyances constituted unreasonably small capital. Upon information and belief, MHP or Martorella retained elements of control over the transferred assets subsequent to the conveyances.

(*Complaint at page 7, ¶ 35*)

Furthermore, he enumerates three properties/assets that were transferred to a party that is not Urban Residential: Amsterdam 18, 1200 Arch, 212 Stuart, Carroll Gardens II, and 317 North Ave.

(*Id at page 8, ¶ 38*)

Here, McGoldrick identifies the parties who were allegedly involved in the transfer and the property that is the subject of it. However, the pleadings are bereft of allegations that the consideration paid for these assets was less than fair value, and that MHP was left with an unreasonably small-capital amount after said transfer. Moreover, McGoldrick does not plead particulars regarding the assets involved: namely, the value of the assets sold, the amount they were sold for below fair value, and MHP's financial health prior to and after the asset transfer. Instead, he reaches "bare legal conclusions" that are insufficient to state a claim. (*See Kliebert v McKeon*, 228 AD 2d 232 [1st Dept 1998].)

b. New York Debtor & Creditor Law § 276

"Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." (*NYDCL § 276*) "Due to the difficulty of proving actual intent to hinder, . . .the pleader is allowed to rely on 'badges of fraud' to support his case. . .these 'badges of fraud' may include: a close relationship between the parties. . .a questionable transfer not in the usual course of business; inadequacy of consideration; and retention of control of the property by the transfer after the conveyance. . ." (*In Re Sharp International Corp.*, 403 F 3d 43 [2nd Cir 2005], *applying New York law*)

Here, the claim is alleged that:

On information and belief, at times prior to and or subsequent the execution of the Gladstein-Martorella Agreement, Defendants MHP and/or Martorella and/or Gladstein caused the transfer of assets from MHP to Urban Residential in violation of New York Debtor and Creditor Law § 276 in that said conveyances were made with actual intent to hinder, delay, or defraud present or future creditors.

(*Complaint at page 7, ¶36*)

McGoldrick relies on what he avers are “Badges of Fraud” to support his contention that the alleged asset sale was fraudulent. (*Memo in Opp’n at pages 4-5*) The question of fraudulent intent is indeed one of fact rather than law, and proving it can be difficult. Badges of Fraud as circumstantial evidence, if sufficiently plead, can assist a plaintiff in overcoming a motion to dismiss. (*See, Altman v Frankel, 268 AD 666 [1st Dept 1945].*)

Here, the parties to this alleged transaction were closely connected. Indeed, Martorella and Gladstein were partners in MHP, and Urban Residential is Martorella’s new business venture. But this is where McGoldrick’s sufficient, circumstantial-evidence pleading begins and ends.

First, as discussed *supra*, McGoldrick’s pleading does not contain any specificity that the consideration for this alleged transfer was less than fair value. Second, there is no allegation that this supposed asset sale was conducted outside the normal course of business. McGoldrick attests that Martorella and Gladstein decided to end their partnership in MHP and that Martorella intended to form Urban Residential and purchase some MHP assets. (*McGoldrick Aff’d at pages 2-3, paragraph 6*) Indeed, there is nothing abnormal about selling assets of a company whose ownership status was changing. Third, he only surmises that MHP retained control over these assets after the sale; he fails to allege facts to support this assertion.

Finally, while there is an allegation that “the eventual profits [from the transferred assets] were to be distributed in the computation of Plaintiff’s bonus”, the pleadings do not articulate facts that his bonus was indeed to derive itself from said assets. (*Complaint at page 7, ¶ 37*) The purpose of the New York Debtor-Creditor law is to enable a creditor to obtain his due despite

efforts on the part of the debtor to elude payment.” (See, *Hearn 45 St. Corp v Jano*, 283 NY 139 [1940].) McGoldrick fails to plead that he suffered any damages and did not get what was owed to him because of the alleged fraudulent transfer.

c. CPLR 3211(d)

In addition, McGoldrick avers that many of the facts that are in existence to justify his fraudulent transfer claim are in the Defendant’s possession, and that they have blocked his access to that information. (*McGoldrick Aff’d*, page 13, ¶ 40). He relies on CPLR 3211(d), which provides that:

Should it appear from affidavits submitted in opposition to a motion made under subdivisions (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in its responsive pleading, if any, or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Here, the sole affidavit offered in opposition to the instant motion is McGoldrick’s. As with his moving papers, he fails to present to this Court any facts that would justify denying the motion. The only attestation is that the Defendants failed to respond to his document demands. (*Id* at page 13, ¶ 40) But this is insufficient to warrant the invocation of CPLR 3211(d). The plaintiff’s burden is to convince this court that facts may exist to defeat the motion. (See *Peterson v Syvartan Industries Inc.*, 33 NY 2d 463 [1974].) Here, McGoldrick fails to identify the facts behind his rationale for commencing a fraudulent transfer claim against the Defendant. Furthermore, with the failure to identify facts is the lack of specificity as to where they may exist.

The general assertion that the Defendants possess that which McGoldrick cannot even articulate is insufficient to deny the motion pursuant to CPLR 3211(d).

McGoldrick has not adequately plead a cause of action for a fraudulent transfer against the Defendants. Nor has he satisfied his burden under CPLR 3211(d) to deny the Defendants' motion. Accordingly, this cause of action is dismissed.

Fourth and Fifth Causes of Action: Sexual Harassment

Defendants MHP and Gladstein seek dismissal of the sexual harassment claims brought against them under the New York Human Rights Law and the New York City Administrative Code, averring that McGoldrick fails to sufficiently plead it and that documentary evidence refutes it.

a. Hostile Work Environment

To establish a sexual harassment claim under both the New York Human Rights Law and the New York City Administrative Code, the plaintiff must show that he 1) belongs to a protected class; 2) was subject to unwelcome sexual advances; and 3) the harassment complained about was based on sex. (*McKinney's Executive Law* § 296; *New York City Administrative Code* § 8-107) The standards for recovery under New York are identical to that of the federal standards under Title VII of the Civil Rights Act of 1964. *Forrest v. Washburn & Co., Inc.*, 3 NY 3d 295 (2007). "A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of

the victim's employment and create an abusive working environment." (*Beharry v Guzman*, 33 AD 742 [2nd Dept 2006].) "The discriminatory conduct at issue, therefore, must be more than episodic; rather it must be sufficiently continuous. . ." (*Concord Limousine, Inc v Orezzaoli*, 7 Misc 3d 1026(A) [Kings County 2005].)

In his complaint, McGoldrick alleges that

On or about April 2005, Defendant Gladstein commenced a continuous course of conduct vis-a-vis Plaintiff that continued through March 2006, including, but not limited to the making of sexual innuendo, calling Plaintiff "Sweetie", "Luv", and "Honey", . . . by asking for "hugs" which Plaintiff would attempt to reject. . . and Defendant Gladstein would hug Plaintiff and press her body and her breasts up against him. . . and would use inappropriate verbal and written sexual language in her communications with Plaintiff. . . [which] created an uncomfortable, humiliating, demeaning, and hostile work environment. . . [and] similarly situated female employees [were not treated in the same manner]

(*Complaint at page 9, ¶ 41 - 43*)

Here, McGoldrick pleads that Gladstein treated him distinctively different from his female co-workers, which alleges that her behavior was based on sex. Moreover, he alleges that Gladstein continued this behavior for the eleven months prior to his departure from MIIP; it was not simply sporadic occurrences. Finally, he asserts that this pattern of conduct was not welcomed, and embarrassed him.

When examining the reasonableness of office conduct, "the inquiry requires careful attention to the social context in which particular behavior occurs and is experienced by a target." (*Oncale v Sundowner Offshore Services*, 523 U.S. 75 [1996].) Both the objective and subjective standards should be used. (See, *Wahlstrom v Metro North Commuter RR Co.* 89 F. Supp 2d 506 [SDNY 2000].)

Objectively, the terms “Sweetie”, “Luv”, and “Honey” are ones of affection, endearment, and casual banter. These alone are insufficient for McGoldrick to satisfy his pleading requirement that the comments were overtly-sexual in nature. (*See, Constantine v Kay*, 6 Misc 3d 927 (Kings County 2004).) Moreover, while McGoldrick alleges there was “inappropriate verbal and written sexual language”, he fails to articulate what these communications were aside from the previously-mentioned, non-sexually suggestive comments. Rather, he concludes that sexually-charged comments were made but does not offer factual assertions to support his allegation.

In support of her contention that her relationship with McGoldrick was such that the alleged comments could not be deemed sexual harassment, Gladstein proffers a copy of an email correspondence between her and McGoldrick. In it McGoldrick writes:

. . .there is not a sole I would feel good about doing this with except you. You have so many traits that I admire and appreciate. Your smarts and love for the business fundamentals are what drew me to you, your compassion and soul as a person is what gives me great comfort looking forward. . .

(*Gladstein Aff'd, Ex 12*)

This email was written in August 2005, which is roughly in the middle of the period McGoldrick alleges Gladstein sexually harassed him. This email does not objectively demonstrate a relationship where Gladstein is a harasser; rather it indicates that she and McGoldrick admitted one another professionally and personally. (*See, Gladstein (1/1/12)*). Furthermore, McGoldrick does not dispute this email, or its objective *indicia*, in his opposition.

Moreover, Gladstein’s physical contact with McGoldrick – “hugs” – cannot reasonably be plead as sexually-suggestive. (*See, Id.*) While arguably a reasonable person may find this conduct

annoying or even offensive, it fails to rise to the level of pervasive behavior. (See, *Spina v Our Lady of Mercy Medical Center*, 2003 WL 22434141 [SDNY 2003].) Therefore, from the objective vantage, this conduct is not actionable. (See, *Quinn v Green Tree Credit Report*, 159 F3d 759 [2nd Cir 1998].)

But this inquiry must also take into account McGoldrick's subjective impressions regarding the alleged behavior. (See *Wahlstrom, supra*) He pleads that Gladstein's conduct made him uncomfortable. (*Complaint at page 9, ¶ 43*) But MHP and Gladstein argue that he failed to take advantage of any "preventative or corrective opportunities provided" by MHP. (See, *Burlington Industries v Ellerth*, 524 US 742 [1998].) To be sure, the complaint is void of any reference to this.

If a complaint is found to be insufficient, "affidavits that contain sufficient detail, which are submitted in opposition, may cure any defects found in the complaint." (See *Leiderman v Gilbert*, 176 AD 2d 525 [1st Dept 1991].) Here, McGoldrick attests that

...there was no Human Resources Department at MHP and, accordingly, my only potential avenues of complaint were to Gladstein or Martorella. In the case of Gladstein, complaints would have been futile. . . With respect to Martorella. . . [he] was not responding to my concerns since he had moved across the street to focus on his new firm. . . Nonetheless, I did speak to a number of persons at MHP. . .

(*McGoldrick Aff'd at pages 14-15, ¶42*)

Here McGoldrick's plead that he complained to other MHP employees. But he fails to allege that these individuals were MHP employees who possessed the authority to rectify the situation. Furthermore, at the same time he avers this conduct occurred, he was negotiating with

Gladstein the possibility of joining her in her new business venture. (*Gladstein Aff'd at page 9, ¶ 29*) McGoldrick justifies his failure to directly complain to Gladstein because it would have “been contrary to [his] financial interests.” (*McGoldrick Aff'd at page 15, ¶ 43*) However, his pleading fails to adequately justify his failure to complain. Indeed, he avers that Gladstein’s conduct made him “uncomfortable”, yet he refused to complain. Instead, he sent her an email expressing his admiration of her. (*Gladstein Aff'd, supra*) If McGoldrick was subjectively offended by Gladstein’s behavior, the moving papers indicate McGoldrick could indeed have approached her without worry of retribution.

The reasonable person could not find Gladstein’s behavior hostile or abusive. (*See, San Juan v Leach, 278 AD 2d 299 [2nd Dept 2000]*). Indeed, Gladstein’s words and actions cannot be labeled sexually deviant or appalling by an objective standard. Since McGoldrick fails to plead such severe behavior, the claim for this form of sexual harassment is dismissed.

b. Quid Pro Quo Sexual Harassment

In addition, McGoldrick alleges that Gladstein “engaged in a *quid pro quo* sexual harassment.” (*Complaint at page 10, ¶ 48*) “In order to sufficiently plead a cause of action for this form of sexual harassment, a plaintiff must present evidence that he or she was subjected to unwelcomed sexual conduct and that the reaction to the conduct was then used as a basis for [exercise] of [a]n actual or threatened [affecting] compensation, terms, conditions, or privilege of employment.” (*Mauro v Orville, 259 AD 2d 89 [3rd Dept 1999]*.)

McGoldrick pleads that

[Gladstein] assure[d] Plaintiff that if he were to agree to align himself with

Gladstein in [her] contemplated disengagement with Martorella with respect to their membership interests in MHP, Plaintiff would benefit. . .sexually.
(Complaint at page 9, ¶45)

Here, while McGoldrick pleads that embedded in Gladstein's employment offer were sexual benefits, he fails to allege the ramification of his rejecting her advances. While McGoldrick does contend that he was terminated from MIIP, he does not link his termination as retribution for spurring Gladstein's advances. He therefore does not sufficiently plead a *quid pro quo* sexual harassment claim, and the motion to dismiss this harassment form accordingly is granted.

Punitive Damages Claim

The Defendants oppose McGoldrick's request for punitive damages in his fraud, fraudulent transfer, and sexual harassment claims. Since these four causes of action were dismissed, the Defendants' opposition need not be addressed.

Sixth Cause of Action: Breach of Contract/Third Party Beneficiary

Defendant Gladstein argues that McGoldrick has no standing to bring the breach of contract/third-party beneficiary claim against her.¹ In order to have standing to assert a breach of contract claim as an intended third-party beneficiary if

recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary or b) the circumstances indicate that the promise intends to give the beneficiary the

¹ Defendants MHP, Martorella, and Urban Residential also move to dismiss McGoldrick's Sixth Cause of Action. But since this claim is only brought against Gladstein, they have no standing to move for its dismissal.

benefit of the promised performance. An incidental beneficiary is . . . not an intended beneficiary.

(*La Salle National Bank v Ernst & Young LLP*, 285 AD 2d 101 [1st Dept 2001].)

McGoldrick alleges that

Upon information and belief, as part of the Gladstein/Martorella Agreement, Defendant Gladstein, individually, agreed to be responsible for 45% of any claims that Plaintiff successfully asserts against Defendant MHP and/or Defendant Martorella. . . . Plaintiff was and is an intended third-party beneficiary. . . Defendant Gladstein is by contract individually liable to Plaintiff to the extent of 45% of any claims. . .

(*Complaint at page 12, ¶¶ 60-62*)

Here, McGoldrick identifies the contract and Gladstein's obligations under it. He further concludes that he is the intended beneficiary of Gladstein's 45% indemnification, but fails to proffer allegations to support this. He does not plead, nor specify the contractual provision, that the Gladstein/Martorella agreement was created in any way to satisfy McGoldrick's purported right to a bonus and severance-payment under his employment agreement.

The Gladstein/Martorella agreement provides in relevant part that

In the event any of the Employees asserts any claim for compensation against [Martorella or MHP] or any of its affiliates and is successful in connection with any such claim or any such claim is settled or compromised, [Gladstein] acknowledges and agrees that she shall be responsible for forty-five percent (45%) of the amount paid or payable to such person and [Gladstein] shall pay such amount to [Martorella] within ten (10) days of demand therefor.

Defendants MHP and Gladstein advised the Court that the Gladstein/Martorella Agreement contained confidential information. They were instructed to provide a redacted copy of the agreement that contained the relevant provisions for inclusion in the record, and a full copy for an *in camera* review.

(Gladstein/Martorella Agreement at page 8, §(f))

Where “the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language.” (*R/S Assoc. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002].) “When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” (*Id.*) This agreement clearly provides that if any claims are *successfully* brought against MHP, Gladstein would be liable to *Martorella and MHP* for 45% of said claim. It does not grant McGoldrick the right to seek redress directly against Gladstein. Nor does it give him any direct benefit whatsoever against Gladstein or MHP. Rather, if McGoldrick is successful in his breach of contract claim against MHP, it is Martorella who can seek indemnification from Gladstein in order to satisfy the judgment. Since McGoldrick fails to plead that he is an intended third-party beneficiary to this agreement, and the documentary evidence supports that he is in fact not so, the motion to dismiss this claim is granted.³

Summary Judgment Pursuant to CPLR 3212

In her Notice of Motion, Defendant Gladstein moves this Court for summary judgment pursuant to CPLR 3212 as an alternative to her CPLR 3211(a)(1) and (a)(7) motions to dismiss.

Under the agreement, the sole cause of Action, Breach of Contract, third Party Beneficiary claim, remains against McGoldrick, as he asserts that his claim for severance and the 2009 bonus against Gladstein should remain. *McGoldrick's Memorandum of Law at pages 12-14*. No direct claims remain against Gladstein. McGoldrick's first cause of Action for Breach of Contract, which was not a subject of the instant motion, is plead against MHP and remains viable. If McGoldrick succeeds under that claim, it would be against MHP, the defendant whom he plead it against. Gladstein's liability in that scenario would be to MHP, as discussed *supra*.

Since all claims against her were dismissed under CPLR 3211, this Court need not address her summary judgment motion.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motions to dismiss the second, third, fourth, fifth, and sixth causes of action are granted, and the Clerk of the court is directed to enter judgment in favor of the Defendants, dismissing these claims against them, with costs and disbursements to Plaintiff as taxed by the Clerk; and it is further

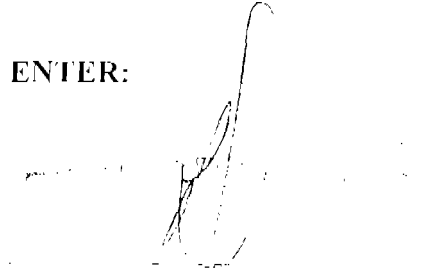
ORDERED that Gladstein's motion for summary judgment is denied as moot.

This shall constitute this Court's decision and order.

Dated: March 20, 2007

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK

ENTER:


RICHARD B. LOWE, III, J.S.C.