

Poche v Urban Box Off., Inc.

2007 NY Slip Op 30854(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0601181/2006

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: LOWE
Justice

PART 56

WASCAR Packer et al

INDEX NO. 601181/06

MOTION DATE ~~1/9/07~~ 1/9/07

MOTION SEQ. NO. 002

- v -

URBOX Box Office et al

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 ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

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):

MOTION FOR DECISION
WITH
DECISION

FILED
APR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/07

RICHARD B. LOWE II
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----x

WASCAR POCHE and CARLOS ORTIZ

Index No: 601181/06

Plaintiffs

-against-

DECISION AND ORDER

URBAN BOX OFFICE, INC and
CONTEMPORARY HOLDINGS AND
EQUITIES, INC.

Defendants

FILED
APR 23 2007
NEW YORK
COUNTRY CLERK'S OFFICE

RICHARD B. LOWE III, J:

Plaintiffs Wascar Poche ("Poche") and Carlos Ortiz ("Ortiz") (collectively, "the Plaintiffs") bring this action against Urban Box Office, Inc. ("UBO") and Contemporary Holdings and Equities, Inc. ("CH&E") (collectively, "the Defendants") for breach of contract and violations of Section 198 of the New York Labor Law. In the instant motion, the Defendants seek to dismiss the complaint pursuant to CPLR 3211(a)(7). The Plaintiffs cross-move for sanctions under 22 NYCRR § 130.

BACKGROUND

Poche and Ortiz are New York residents. They served as officers and directors of Azucar Entertainment, Inc., a New York corporation engaged in the Latin-Music business. Its principal place of business is in Manhattan. UBO and CH&E are each Delaware Corporations with their principal place of business in New York City.

In late 2005, the Plaintiffs and the Defendants began discussions about the possibility of the former joining the latter as Vice Presidents of the Marketing and Artists and Repertoire Divisions. On December 20, 2005, the parties signed a "Deal Memorandum", which set forth the basic terms of employment. This memorandum contained provisions regarding salary, benefits, and stock options. The Plaintiffs began to fulfill the roles specified in the memorandum on December 26, 2005.

Shortly thereafter, the Plaintiffs contend that the Defendants asked them to give up the day-to-day management activities of Media Services NYC, a division of Azucar Entertainment. They complied.

On January 31, 2006, the Defendants informed the Plaintiffs that they were reviewing the employment relationship. They asked the Plaintiffs to report to an offsite facility for work, rather than their offices, during this period. At a meeting held on February 2, 2006, the Plaintiffs were notified that their employment with the Defendants would change from Vice Presidents to consultants. This revised role resulted in lower compensation for the Plaintiffs.

The Defendants' president, Adam Kidron ("Kidron"), informed the Plaintiffs in an email dated February 2, 2006 that their employment with the company that began on December 26,

2005 was on a “trial basis.” Additionally, he averred that the Deal Memorandum was not a binding employment agreement. Rather, he contended that it was a so-called “agreement to agree”, which simply established the terms of the employment agreement should the parties eventually enter into one. This was not the Plaintiffs’ understanding; they believed the Deal Memorandum was in fact a binding employment contract.

On April 2, 2006, the Plaintiffs commenced the instant action. On May 17, 2006, they moved for a default judgment; the Defendants opposed it. On July 17, 2006, this Court denied that motion. The Defendants now move for the complaint’s dismissal, and the Plaintiffs cross-move for sanctions against defense counsel.

DISCUSSION

I. Defendants’ Motion

a. Dismissal of the Breach of Contract Claim

“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 accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP 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 factual 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].)

[5]

In order to sufficiently plead a cause of action for breach of contract, the Plaintiffs must specify the terms of the contract, the consideration, their performance, and the basis of the Defendants' alleged breach. (*See, 219 Broadway v Alexander's Inc.*, 46 NY2d 506 [1979].)

First, the Plaintiffs allege that

. . .defendants UBO and CH&E and each of them entered into a written executive employment agreement with plaintiffs POCHE and ORTIZ by which it was agreed. . .that the defendants would employ plaintiffs jointly as Senior Vice Presidents Marketing/A&R, reporting directly to the CEO, and responsibility for all of UBO's business activities related to artists & repertoire, artist development, strategy, and implementation of marketing. . .

(*Complaint at page 2, ¶ 5*)

They also allege the Defendants agreed

to hire [them] for One (1) year guaranteed; to [pay] cash compensation during the term of the agreement. . .; to provide. . .health insurance; and to pay [them]. . .all reasonable and customary benefits

(*Id at pages 2-3, ¶ 6-11*)

Furthermore, a copy of the agreement is attached to the complaint. (*Id, Ex A*)

Here, the Plaintiffs have set forth the terms of the agreement upon which liability is predicated. (*See, Sud v Sud*, 227 AD 2d 319 [1st Dept 1996].) They articulate that a contract was formed and executed, and identify those terms that are the subject matter of their claims. Their pleading, to the extent that a contract and its provisions are specified, is sufficient.

Second, the Plaintiffs allege that pursuant to the aforementioned contract

Commencing on or about December 26, 2005 and continuing through and including approximately January 31, 2006, plaintiffs were employed by defendants UBO and CH&E and each of them pursuant to the terms of The Agreement.

(*Complaint at page 4, ¶ 13*)

The Plaintiffs sufficiently plead that consideration was given on both sides in order to formulate the contract. Consideration is deemed adequate in the eyes of the law when something of real value is exchanged. (*See, Apfel v Prudential-Bache Securities, Inc.*, 81 NY2d 470 [1993].) Here, the Plaintiffs allege that the Defendants did something they were not legally obligated to do, which was to hire the Plaintiffs to serve as divisional vice presidents. The Plaintiffs further aver that they accepted the job offer, and served in that role for a little over a month. They too had no legal obligation to enter into this agreement and begin the employment relationship with the Defendants. Accordingly, the Plaintiffs have sufficiently plead that mutual consideration was given with respect to the agreement.

Third, the Plaintiffs plead that they began working for the Defendants on December 26th, 2005 (*See, Complaint at page 4, ¶ 13*) and that they “fully performed all of their duties and obligations required of them pursuant to the agreement.” (*Id. at page 7, ¶ 22 and at page 9, ¶ 29*) Here, they articulate that they upheld their obligations pursuant to the contract by working for the time-period plead. In addition, they incorporate by reference the terms of the contract pertaining to them, and plead that they performed as required.

Finally, the complaint contains allegations that

. . . defendant’s president, Adam Kidron, notified plaintiff of defendants’ position, inter alia, (1) that defendants UBO and CH&E were not bound by the Agreement. . . and (3) that defendants UBO and CH&E had unilaterally determined to employ plaintiffs as outside consultants to defendants in place and stead of their contractual provisions. . .

(*Id at page 5, ¶ 18*)

Furthermore, it is plead that

[7]

By letter dated February 8, 2006, defendants. . .clarified their position. . .that plaintiffs had been terminated, without cause, effective January 31, 2006. . .[and] The Agreement had provided for a “trial” period; and. . .[the defendants] had no obligation to compensate plaintiff pursuant to the terms and conditions of The Agreement.

(*Id at pages 6-7, ¶ 20*)

Here, the Plaintiffs sufficiently plead the basis for their contention that the Defendants breached the agreement. They aver that the Defendants refused to abide by the terms of the contract and ultimately terminated them. Indeed, they identify a contractual provision that states the Plaintiffs are to serve as Vice Presidents, and allege that the Defendants “demoted” them to consultants. They point to a contractual provision that provides for a year’s guaranteed employment, and plead that they were fired approximately a month after commencing said employment.

The Defendants argue that this agreement was not binding, but merely a document that set forth the terms of a potential, long-term agreement. However, when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), the analysis is whether the Plaintiffs sufficiently plead a cause of action, not whether they have stated one.” (*See, ILG Capital LLC v Archipelago LLC*, 36 AD 3d 401 [1st Dept 2007].) The agreement’s validity or the determination of its binding effect is not proper at this juncton; rather this Court was asked to review the Plaintiffs’ pleadings and determine its adequacy. Accordingly, the Plaintiffs have articulated a cognizable breach of contract claim, and the Defendants’ motion to dismiss the First and Second Causes of Action is denied.

b. Dismissal of the Labor Law Claims

The Plaintiffs third and fourth causes of action are for claims under Section 198 of the New York Labor Law. The Defendants seek the dismissal of these as well, arguing that the Plaintiffs fail to sufficiently plead that they are entitle to recovery under any section of that statute.

During oral arguments held on January 9, 2007, Plaintiffs' counsel stated that "the Labor Law claim has no basis. I am withdrawing that." (*Transcript at page16, lines 12-13*) Furthermore, the papers in opposition to this motion do not address the Defendants' contention that the third and fourth causes of action should be dismissed. Accordingly, the third and fourth causes of action are no longer viable.

II Plaintiffs' Cross-Motion

The Plaintiffs cross-move pursuant to 22 NYCRR § 130 seeking the imposition of sanctions upon defense counsel. This statute provides that counsel may be sanctioned due to her/his frivolous behavior in connection with prosecuting or defending an action.

"Once there is a finding of frivolousness, sanction is mandatory." (*Nyitray v New York Athletic Club in the City of New York*, 274 AD 2d 326 [1st Dept 2000].) Here, there is no such finding that defense counsel brought the instant motion frivolously. They articulated in their moving papers their contention that the instant action should be dismissed, which is commonplace for a defendant to do during this stage of the litigation. To be sure, the majority of their averasions went to the substance of the contract in dispute, rather than to the pleading's

sufficiency; this is not the proper standard for a 3211(a)(7) dismissal. Nevertheless, there is a lack of support for the Plaintiffs' contention that this motion was pursued as a delaying tactic or was trivial in nature. Accordingly, the cross-motion is denied.

CONCLUSION


For the foregoing reasons, it is hereby

ORDERED that the Defendants' motion with respect to the first and second causes of action is denied; and it is further

ORDERED that the Plaintiffs' cross motion is denied.

This shall constitute this Court's decision and order.

Dated: April 12, 2007

ENTER: 
RICHARD B. LOWE III

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

FILED
APR 23 2007
NEW YORK
COUNTY CLERK'S OFFICE