Bash v SafeDecisions, L.P.
2007 NY Slip Op 33696(U)
November 13, 2007
Supreme Court, Nassau County
Docket Number: 7286-07/
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

JASON BASH,

Plaintiff,

INDEX NO.: 007286/2007
MOTION DATE: 08/29/2007
MOTION SEQUENCE: 001

-against-

SAFEDECISIONS, L.P., d/b/a SAFEDECISIONS G.P., LLC, INTEGRATED PROPERTY MANAGEMENT, INC., d/b/a INTEGRATED PROPERTIES, INC., HERBERT ZUCKER, BRUCE DEIFIK and KEITH REDMOND,

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Defendants.

The following papers read on this motion:

Paper	No.
Notice of Motion, Affidavit & Exhibits Annexed	1
Memorandum of Law in Support of Defendants' Motion to Dismiss	2
Affirmation in Opposition of Brian Kennedy, Esq. & Exhibits Annexed	3
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss	4
Defendants' Reply Memorandum of Law in Further Support	5

This motion by defendants for an order pursuant to CPLR §§ 3211(a)(7) and (8) and 3016(b) dismissing the complaint is determined as follows.

Plaintiff commenced this action to recover damages from the defendants to whom he sold his business and by whom he was employed. He was the progenitor of a business developed to install electronic safes, initially in college dormitory rooms. Plaintiff was in league with two friends when the idea developed. They were without capital to finance the purchase of safes or

pay marketing or administration costs. After plaintiff engaged a person named William Denberg to raise capital, he, on behalf of plaintiff approached defendant Zucker, a financial consultant at Morgan Stanley, from whom funding was eventually secured, jointly with the other the individual defendants - sometime in 2002 and 2003.

The two initial partners or associates were divorced from the operation as a condition of the investment, Complaint ¶ 41, but not without legal ramification. Fees to defend lawsuits mounted and plaintiff claims that threats of non-allegiance in defending the suits coerced him to agree to things he would not otherwise accept. Complaint ¶ 50. Defendants also insisted that plaintiff indemnify them for any legal costs. The lawsuits continued from 2003 - 2005. Denberg seemingly was the last plaintiff to bring suit.

In or about April of 2003, the parties negotiated terms for running the business going forward using defendants' capital. Complaint ¶ 33. From that time on the individual defendants acted as the defacto managers of the safe business. Complaint ¶ 40. Plaintiff alleges that he was coerced into changing the original distribution agreement he'd had with the manufacturer of the electronic safes as owner of the original company, DormSafe. This was not withstanding that it was the one significant asset of the company.

The gravamen of the complaint is that during this time of April 2003 through October of 2003, during the transition period of capitalization with defendants' investment and restructuring of the company, plaintiff demanded and was promised a divisible 15% interest in the business (to be shared with one Denberg), Complaint ¶ 34, a management position, Complaint ¶ 34, and a salary of $250,000 a year. Complaint ¶ 79. It is the failure of these terms to materialize for which plaintiff seeks damages.

In October of 2003, the defendants as the majority investors and managers, allegedly intimidated plaintiff into entering into an Asset Purchase Agreement. Complaint ¶¶ 58 and 60. The Agreement vested defendant, SafeDecisions L.P., with the domain names, telephone numbers, trademarks, logos and copyrights owned by plaintiff who had been the sole shareholder of DormSafe. He was vested with an 8.5% interest in the company by the limited partnership agreement for SafeDecisions L.P. Complaint ¶ 65, and in paragraph 7.1 (i) of the Asset Purchase Agreement. See also Agreement ¶ 7.2(c). Denberg had seemingly been "eased out," and was

involved in a suit against SafeDecisions and the individual defendants which had retracted his 8.5% equity interest.

Plaintiff was to receive $198,000 for the company's remaining assets, the first $33,000 of which was to pay Notes to the original partners. Plaintiff alleges that he was to pay all legal fees and the settlement of each of their claims. Complaint ¶¶ 67 and 74.

Allegedly plaintiff's salary was by agreement set at $96,000. The salary was later reduced in August 2004 to $36,000 as a draw against commissions, but then on January 15, 2006, the parties entered into an employment agreement for a one year term at a base salary of $75,000 plus commissions, expense reimbursement and benefits. Complaint ¶¶ 84 and 86.

Finally, plaintiff's employment was terminated on December 14, 2006, allegedly with salary, commissions and expense reimbursement due and owing.

The eight causes of action in the complaint seek redress for what plaintiff claims the defendants did to defraud him and threaten and coerce him, breach all of their contractual, quasi contractual and fiduciary duties to him, withhold salary in violation of the Labor Law and through a "devious, complicated, and intricate course of conduct caused Plaintiff to lose the business he founded, his career, his employment compensation, his right to compensation, and further damages." Plaintiff's Memorandum of Law at p. 2. It should be noted that plaintiff was represented by legal counsel during this period of change.

The criterion for dismissal on a CPLR 3211(a)(7) motion 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. Guggenheimer v Ginzberg, 43 N.Y.2d 268 (1977).

In reviewing a motion to dismiss pursuant to CPLR 3211(a)7, the court must afford the pleadings a liberal construction, and the complaint will be construed in the light most favorable to plaintiffs. Id.; see generally Leon v Martinez, 84 N.Y.2d 83 (1994).

Defendants move for dismissal on the basis of the Asset Purchase Agreement and the merger clause. They argue that certain claims are time barred , CPLR 3211(a) 5, and that the fraud claim is not plead with particularity. CPLR § 3016 (b). Defendant also claims that there is no long arm jurisdiction over the individual defendants who do not live in this State, nor do the

partnerships. CPLR § 3211(a) 8.

Plaintiff, conversely, states that his claims are not brought under the Asset Purchase Agreement but on oral agreements made in April and May of 2003.

A determination of the motion sub judice requires an examination of the two written documents that are before the court. Any matter or subject that is resolved by agreement between the parties cannot be the subject of a claim on prior negotiations or a prior contract. Clark Fitzgerald v LI RR, 70 N.Y.2d 382 (1987).

Defendant SafeDecisions, L.P. is a Delaware limited partnership. Plaintiff, Jason Bash, is a class B limited partner with an 8.5% interest. Management of SafeDecisions L.P. is vested in the General Partner SafeDecisions G.P., LLC. Accordingly, there is a writing subscribed by plaintiff stating his ownership interest in the company and no other document has superceded it.

At ¶ 4.7 the Asset Purchase Agreement provides "At closing , Seller and Jason Bash shall, jointly and severally, indemnify and hold Buyer harmless from any Losses incurred by Buyer as a result of the litigation described on Schedule 8."

At ¶ 6.3 Confidentiality. The Asset Purchase Agreement provides: "Buyer and Seller may provide information obtained from the other party to its advisors, agents and employees for the limited purposes of analyzing, negotiating, financing, pursuing and consummating the transactions contemplated by this Agreement."

At ¶ 7.1 (h) Sales/Distribution Agreement. It is provided that Seller shall have fully terminated the Distributor Agreement between Seller and VingCard Elsafe, Inc., dated July 15, 2002, and buyer shall have entered into a new Distributor Agreement with Assa Abloy Hospitality Inc., on terms satisfactory to Buyer in its sole discretion.

Plaintiff's ownership interest in the Limited partnership Agreement of 8.5 % is stated at ¶¶7.1(i) & 7.2 (c).

A merger clause is found at ¶ 9.3 and ¶9.6

The consideration for the Asset Purchase Agreement was $198,000.00 plus the 8.5% interest.

The first cause of action pleads a breach of contract; the second cause of action seeks to recover in quasi contract.

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (Blanchard v Blanchard, 201 NY 134, 138; see also, 66 Am Jur 2d, Restitution and Implied Contracts, § 6, at 949). 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 (Parsa v State of New York, 64 NY2d 143, 148; Farash v Sykes Datatronics, 59 NY2d 500, 504; Bradkin v Leverton, 26 NY2d 192.

The contract that binds these parties is the Asset Purchase Agreement. The sale and purchase of the Distributorship agreement with VingCard Elsafe, Inc. is fully addressed therein. Plaintiff's equity interest in the new company SafeDecisions LLP was stated and assented to by plaintiff. Of plaintiff's complaints qua his future in the business that leaves only his claim of a management position and an annual salary of $250,000.

There is no textual support for this claim about salary and employment, nor is there basis in the complaint for the court to imply such a contract or to enforce an oral one. While it is true that a contract for annual salary and position would not necessarily be in writing, the gravamen of plaintiff's complaint is that it would exist not just for one year but for indefinite years in futuro. Failure to establish the existence of a contract requires dismissal of a contract claim. Caniglia v Chicago Tribune- New York News Syndicate Inc., 204 A.D.2d 233 (1st Dept 1994).

The third cause of action is for breach of fiduciary duty. A fiduciary relationship "only arises when one has reposed trust and confidence in the integrity and fidelity of another who thereby gains influence or assumes control and responsibility. See, Mars v. Diocese of Rochester, 193 Misc. 2d 349 (N.Y. Sup. Ct. 2003). To claim that a business transaction gave rise to a fiduciary relationship, plaintiff must show that defendant had superior expertise or knowledge about some subject and misled plaintiff by false representations concerning that subject." See, Talansky v. Schulman, 2 A.D.3d 355 (1st Dept. 2003).

Plaintiff alleges that he disclosed to defendant Zucker his financial circumstances and that he had a duty to maintain and use the information only for plaintiff's benefit. Again the Asset Purchase Agreement belies the claim. First, it is a normal and predictable practice that an investor would do due diligence and verify the financial circumstances of the company proposed

for his investment. Second, plaintiff commissioned Denberg to search for capital for the fledgling business. Finally he agreed in the Asset Purchase Agreement that matters shared with Zucker it could be disclosed to the investor purchasers. By that time he knew that Zucker was one of the investors and acceded to disclosure despite that circumstance.

Finally, there is no evidence that Zucker was approached in 2003 as a financial manager or consultant. The fact that plaintiff was looking for capital implies that he is without wealth. Plaintiff has not plead any state of facts that would require Zucker to keep a different counsel, notwithstanding that he may have at sometime become an investment advisor.

The fourth cause of action seeks damages on the basis of promissory estoppel. To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (see, Ripple's of Clearview v. Le Havre Assoc., 88 A.D.2d 120, 122, 452 N.Y.S.2d 447). The plaintiffs in this action alleged all of these elements with respect to employment, particularly management position and salary, and at this stage of the proceedings, their allegations could be taken as true (see, Sanders v. Winship, 57 N.Y.2d 391, 394, 456 N.Y.S.2d 720, 442 N.E.2d 1231).

However, there is a problematic aspect of the pleading. The complaint is not verified. There is only the legalese of counsel and a statement of the obvious: plaintiff had an idea of which defendant is now in possession. The court is invited to decide that wrong has been done. The promises made allegedly are seductive, but without an authentic source of origin, they are words in search of a legal remedy. Promissory estoppel is not a substitute for a contract and to accept this unsupported claim where there is no sworn statement by a person with knowledge and no evidence of a concrete promise, the court is not willing to let the pleading stand.

The fifth cause of action states a claim for violating Labor Law §§ 190 & 198. There are inadequate particulars of the salary, commissions and reimbursement which plaintiff is owed to sustain the claim.

The sixth cause of action alleges conversion. "The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the dominion over the thing in

question ...to the exclusion of the plaintiff's rights ...Tangible personal property or *specific money* must be involved." See, Independence Discount Corp. v. Bressner, 47 AD2d 756, 757 (citations omitted; emphasis in original); see also, Firoenti v. Central Emergency Physicians, 305 AD2d 453, 454 (2d Dept 2003).

The sixth causes of action fails pleading muster. Allegedly, "Defendants converted Plaintiff's distribution agreement, ownership interests, and wages to which he is entitled." Complaint ¶ 120. Plaintiff sold his 100% ownership interest and the distribution agreement, albeit in exchange for 8.5% in a richer company. There is no improper retention of property.

The seventh cause of action alleges fraud. Four misrepresentations occupy the pleadings. Foremost concerns "ownership interest, management position, salary and commissions in the safe business." As stated above, ownership interest was consented to by plaintiff in the Asset Purchase Agreement and Limited Partnership Agreement. There can be no deception where plaintiff knew and understood and consented to what was proposed. If he was promised more, it was foreclosed by the merger clause, unless he can show fraud in factum which he has not. Work terms were left out of the Asset Purchase Agreement.

Employment is a different matter; there has been no writing introduced on that subject, save the limited partnership. To satisfy a cause of action for Promissory Estoppel at the pleading stage the promise needs to be alleged not merely identified. Not so for fraud; it must be plead with particularity. Plaintiff states that he did; the court disagrees. There is no statement of the facts by plaintiff. The pleadings allege that in April 2003 he was promised, inter alia, a $250,000 salary and a management position, but in October 2003 his salary was cut and so was his management position. In October 2003 he also signed the Asset Purchase Agreement and without a more particularized statement by plaintiff the court cannot assume that he pleads reliance on the promised salary and position in contracting to sell his interest in DormSafe and the distribution agreement. KNK v Harriman Enterprises , 33 A.D.3d 872 (2d Dept 2006).

The court is constrained to find that plaintiff must state the details of the facts about salary made by which defendant[s], under what circumstances, which at the time they was made was false and known to be false and made only to seduce him into the Asset Purchase Agreement. See Khalid Shahzad v H.J. Meyers & Co., Inc., 1997 U.S.Dist LEXIS 1128 (S.D.N.Y. 1997).

After this is done plaintiff has to show that he reasonably and justifiably relied on those statements. Had they been of paramount importance to plaintiff in accepting defendants capital, he was represented by counsel and could have decided not to proceed knowing that there was no way to enforce a promise that could be forgotten, changed or withdrawn any subsequent time without a writing. Id.

The other representation of concern to plaintiff is the matter of indemnification promised by the defendants. An examination of the Limited Partnership Agreement does not disclose a promise by defendants to indemnify plaintiff for legal costs, including settlements, resulting from the law suits started by the four people who were connected with the business before it became a limited partnership.

There is argument that in 2002 Zucker covenanted to represent plaintiff, abused his position of trust and confided in others with whom he invested. That claim has been dismissed as a breach of fiduciary duty as it must be for fraud. No specific misrepresentation has been alleged; seller's remorse does not mean Zucker lied but did that which he was engaged to do.

The eighth cause of action claims duress. There is no independent cause of action for duress recognized in this state. Delta Corp. N.V. v Gardner, 1995 WL 505643 (S.D.N.Y. Aug. 24, 1995).

In summary, all of the causes of action are deficient in pleading and do not withstand defendants motion to dismiss, and, accordingly, it is

ORDERED that the complaint is dismissed.

The court has not considered the alternative claims for relief argued by defendants.

ENTERED
NOV 15 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: November 13, 2007

J.S.C.

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