

**A.B. Watley Group, Inc. v Administaff Companies II,
L.P.**

2007 NY Slip Op 34337(U)

December 18, 2007

Supreme Court, New York County

Docket Number: 0600871/2007

Judge: Richard B. Lowe

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

-----X
A.B. WATLEY GROUP, INC.,

Plaintiff,

- against -

ADMINISTAFF COMPANIES II, L.P.,

Defendant.
-----X

Index No. 600871/07

FILED

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HON. RICHARD B. LOWE III, J.:

Defendant, Administaff Companies II, L.P. ("Administaff"), moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the First Amended Complaint.

BACKGROUND

Administaff, a Professional Employer Organization ("PEO"), contracted with plaintiff, A.B. Watley Group, Inc. ("A.B. Watley") to provide offsite human resources services. Specifically, on March 15, 2003, the parties entered into a Client Services Agreement and an Employment Agreement, creating a co-employment arrangement under which A.B. Watley and Administaff became co-employers of A.B. Watley's employees. The co-employment arrangement, *inter alia*, enabled Administaff to provide A.B. Watley with employment administration relief and to share many employer liabilities through Administaff's employer liabilities management services.

Paragraph 6.2(a) of the Client Service Agreement required Administaff to provide coverage for A.B. Watley under the Administaff Employment Practices Liability Insurance Policy ("EPLI Policy"), provided that A.B. Watley provides Administaff with written notice within five days of becoming aware of any charge that could give rise to a claim under the EPLI. Administaff procured from Lexington Insurance Company a standard EPLI Policy, Policy No.

1321815, covering it and A.B. Watley from April 1, 2003 through April 1, 2004. for employment related claims arising from its employer liabilities management services.

A.B. Watley commenced this action seeking, *inter alia*, to recover damages from Administraff for, *inter alia*, allegedly failing to inform A.B. Watley of the existence of the coverage under the EPLI Policy. The First Amended Complaint includes the following factual allegations. From 2003 to 2006, A.B. Watley became embroiled in a series of lawsuits arising out of the misconduct of several of its officers and employees. For example, in June 2003, a sexual harassment claim was brought against John Amore, A.B. Watley's Chief Executive Officer. Also in June 2003, employment problems arose concerning James Fellus, another Watley employee. In addition, in 2006, an action entitled *United States v Mahaffy*, US Dist Ct, ED NY, Cr. No. 05-613 (S-1)(ILG), was brought against several key employees of A.B. Watley. To date, A.B. Watley has spent more than \$2 million defending and settling these actions.

A.B. Watley claims that it notified Administraff of these actions, and that Administraff has even participated on certain matters pertaining to them, including the decision to terminate John Amore. However, A.B. Watley asserts that Administraff never disclosed to it the existence of the EPLI Policy covering it for employee-related lawsuits.

By letter, dated December 16, 2003, A.B. Watley notified Administraff that it was terminating the parties' contractual relationship effective December 31, 2003. A.B. Watley asserts that it learned of the existence of the EPLI Policy from an Administraff advertisement in March 2006, and that subsequent requests for reimbursement of its litigation costs under the EPLI Policy were denied.

The first cause of action alleges that Administraff violated § 349(a) of New York General Business Law by concealing the facts of the EPLI Policy from A.B. Watley. The second cause of

action alleges that Administaff engaged in fraud, deceit, and concealment by failing to disclose the existence of the EPLI Policy. In the third cause of action, sounding in unjust enrichment, quasi contract, and quantum meruit, A.B. Watley alleges that Administaff was unjustly enriched by the business relationship of the parties. The fourth cause of action alleges that Administaff breached the terms of the parties' Client Services Agreement by failing to afford A.B. Watley the benefits of the EPLI Policy. The fifth cause of action alleges that Administaff breached a fiduciary duty to A.B. Watley by failing to disclose the existence of the EPLI Policy. In the sixth cause of action, A.B. Watley seeks an accounting of the money that Administaff received from it during the parties' contractual relationship. A.B. Watley also seeks to recover punitive damages from Administaff.

Administaff now seeks to dismiss the causes of action in the First Amended Complaint.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, the first cause of action alleges that Administaff violated § 349 of the General Business Law. Section 349(a) declares unlawful “[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” Section 349 is directed at wrongs against the consuming public (*Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24 [1995]). Thus, as a threshold matter, a plaintiff claiming the benefit of § 349 must allege that the defendant engaged in conduct that is consumer-oriented (*id.* at 25). In addition, the plaintiff must allege that the defendant’s conduct was deceptive or misleading in a material way, resulting in injury to the plaintiff (*id.* at 25).

Here, the pleading alleges that Administaff violated § 349 when it concealed the facts of the EPLI from A.B. Watley. However, since the alleged conduct arose out of a contractual relationship between the parties, and there is no allegation that Administaff engaged in deceptive acts or practices directed toward consuming public, the cause of action for violation of § 349 of the General Business Law must be dismissed.

The second cause of action, alleging fraud, deceit, and concealment based on the alleged failure of Administaff to disclose the existence of the EPLI Policy to A.B. Watley, is clearly refuted by competent documentary evidence. As stated, paragraph 6.2(a) of the parties’ Client Service Agreement required Administaff to provide coverage for A.B. Watley under the EPLI Policy, and required A.B. Watley to give written notice of any charge that could give rise to a claim under the EPLI within five days of becoming aware of such charge. Absent fraud or other wrongful act on the part of the other contracting party, an individual who signs or accepts a written contract is conclusively presumed to know its contents and to assent to them (*British West Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]). The existence of the parties’ Client Service Agreement, *inter alia*, requiring Administaff

to procure and maintain an EPLI Policy covering A.B. Watley is fatal to a claim for fraud, deceit, and concealment based on Administaff's failure to disclose the existence of the policy. Thus, the second cause of action must also be dismissed.

The third cause of action alleging unjust enrichment, quasi-contract, and quantum meruit must also fail since the relationship of the parties is governed by the Client Services Agreement. A theory of 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, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]). The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter (*id.*).

The fourth cause of action alleges breach of contract. In order to state a cause of action for breach of contract, the plaintiff must allege the existence of a valid agreement between the parties, performance by the plaintiff, failure of performance by the defendant, and damages (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Here, the claim for breach of contract must be dismissed since documentary evidence conclusively demonstrates that Administaff complied with the requirement of the Client Service Agreement to procure and maintain an EPLI Policy covering A.B. Watley, and A.B. Watley fails to allege any facts that it complied with the notice requirement in the agreement, a condition precedent to invoking coverage under the policy (*see National Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co.*, 28 AD2d 1169, 1170 [4th Dept 2000]).

The fifth cause of action alleging breach of fiduciary duty must also be dismissed. In order to state a cause of action for breach of fiduciary duty, the pleading must allege the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused

by the defendant's misconduct (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Furthermore, the circumstances constituting the alleged misconduct must be stated in detail (CPLR 3016[b]).

Here, A.B. Watley alleges that the Client Service Agreement and the Employment Agreement between the parties created a co-employer relationship that gave rise to a fiduciary duty that each owed to the other. However, as discussed, the allegation of misconduct by Administaff, namely that Administaff fraudulently and deceitfully concealed the existence of the EPLI Policy covering A.B. Watley is refuted by competent documentary evidence. Thus, the cause of action for breach of fiduciary duty must also be dismissed.

Furthermore, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]). In light of the documentary evidence refuting A.B. Watley's claim for breach of fiduciary duty against Administaff, the cause of action for an accounting must be dismissed.

The request for punitive damages must also fail since punitive damages are not available to redress a private wrong (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]).


Accordingly, it is

ORDERED that the motion to dismiss is granted and the First Amended Complaint is dismissed with cost and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 18, 2007

ENTER:



J. S. C.

HON. RICHARD B. LOVE, III

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