SHORT FORM ORDER

INDEX
NO.: 18419-07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-17-07
SUBMITTED: 11-28-07
MOTION NO.: 002-MOT D

DAVID SCHATTEN,

Plaintiff,

-against-

UNIVERSAL SECURITY SYSTEMS, INC., THEODORE MESHOVER, EDWARD NEWMAN, ALFREDO MOUSSET, and WILLIAM DAHLSTEDT,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion to dismiss ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-13 ; Replying Affidavits and supporting papers 14 ; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint is granted to the extent indicated below:

Construing the complaint in the light most favorable to the plaintiff, deeming all factual allegations therein to be true, and using the affirmation and exhibits submitted by the plaintiff in opposition to the motion to remedy any defects in the complaint (*see*, **Auguston v Spry**, 282 AD2d 489, 490), the court finds that the plaintiff has a viable cause of action against the defendants to recover damages for breach of contract. Accordingly, the motion is denied as to the first cause of action.

A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard. The failure to plead in nonconclusory language facts establishing all of the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the cause of action. It has been observed that, when the pleading has been sustained, the complaint has contained allegations that the acts of the corporate officers were done with the motive for personal gain, as distinguished from gain to the corporation. The general rule is that an officer or director is liable when he acts for his

personal, rather than the corporate, interests. Thus, a pleading must allege that the acts complained of, whether or not beyond the scope of the defendants' corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendants (*see*, **Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp**. 296 AD2d 103, 109-110 [and cases cited therein]). This rule applies when, as here, the thrust of the complaint is that the individual defendants sought to oust the plaintiff from employment and thereby deprive him of the financial benefits of that employment. That is, the pleading must allege that the individual corporate officers were acting for their own personal interests rather than for the corporate interest (*see*, **Petkanas v Kooyman**, 303 AD2d 303, 305, *citing* **Hoag v Chancellor, Inc**., 246 AD2d 224, 229-230).

Here, the plaintiff has not pleaded facts sufficient to meet the heightened standard of showing that the defendants Meshover and Newman, individually, acted outside of their corporate capacity, maliciously, and for personal profit at the plaintiff's expense (*see*, **Zapin, Endlich & Lombardov CBS Coverage Group**, 26 AD3d 231, 232). Although the complaint is replete with allegations of harm to the plaintiff and conclusory allegations of malice by the defendants Meshover and Newman, it fails to allege in nonconclusory terms that they personally benefitted from the termination of the plaintiff's employment and that such was their motivating intent. It also fails to allege that they did not act in the corporate interest. Rather, the plaintiff alleges that his termination allowed the defendants Meshover and Newman to stop making payments to him "during a time when the company's business was suffering." The court is unpersuaded that, simply because the defendants Meshover and Newman were the sole shareholders of the defendant Universal Security Systems, Inc. (hereinafter "Universal"), they were acting for their own personal interests rather than for the corporate interest. In addition, only a stranger to a contract, such as a third party, can be held liable for tortious interference with a contract (*see*, **Koret, Inc. v Christian Dior**, S.A., 161 AD2d 156, 157). As the sole owners and senior officers of Universal, it was Meshover and Newman who hired the plaintiff and who had the authority to terminate his employment. Under these circumstances, it cannot be said that Meshover and Newman were third parties to the plaintiff's employment agreement and that they induced their wholly owned corporation to terminate the plaintiff's employment (*see*, **Longmire v Wyser-Pratte**, US Dist Ct., SD NY, 05 Civ 6725, Stein, J., 2007). Accordingly, the second cause of action is dismissed.

CPLR 3016(b) requires that a cause of action sounding in fraud or misrepresentation state in detail the circumstances constituting the wrong (*see*, **Modell's N.Y. v Noodle Kidoodle**, 242 AD2d 248). At a minimum, CPLR 3016(b) requires the plaintiff to identify the time, place, manner, and content of the alleged misrepresentations with respect to each defendant (*see*, **Murphy v Sheldon**, 13 Misc 3d 1223[A] at *4). The plaintiff's broad, general allegations of fraudulent inducement fail to identify with sufficient particularity exactly what misrepresentations were made, when and where they were made, and by whom they were made. Moreover, the plaintiff has failed to show specific damages resulting from the alleged misrepresentations regarding the financial condition of Universal (*see*, **Gordon v De Laurentis**, 141 AD2d 435, 437) or that such misrepresentations directly caused the loss about which he complains, i.e. his termination for purported sexual harassment (*see*, **Meyercord v Curry**, 38 AD3d 315, 316). Accordingly, the third cause of action is dismissed.

Tortious interference with business relations applies to those situations in which a third party would have entered into or extended a contractual relationship with the plaintiff but for the intentional and wrongful acts of the defendant. The motive for the interference must be solely malicious, and the plaintiff has the burden of proving that fact (*see*, **M..J.& K. Co. v Matthew Bender & Co.**, 220 AD2d 488, 490). The plaintiff's alleges that the purported cause of his termination subjected him to public embarrassment and rendered him damaged in the eyes of current and potential customers and potential future employers who, upon information and belief, learned of his termination. The plaintiff further alleges that, as a result, he has been unable to develop new business or find a new job. The court finds that these allegations do not establish a factual basis for malice or any of the other elements of tortious interference with business relations. Accordingly, the fourth cause of action is dismissed.

CPLR 3016(a) requires that, in a slander action, the particular words complained of be set forth in the complaint, which must also contain the time, manner, and persons to whom the publications were made (*see*, **Vardi v Mutual Life Ins. Co. of New York**, 136 AD2d 453, 456). The plaintiff alleges, upon information and belief, that his current and prospective customers and potential future employers have been informed of the purported cause of his termination by Universal. The plaintiff further alleges that the disclosure of this false information has adversely affected his reputation in the business community and has rendered him unemployable. These allegations are far too general and conclusory to meet the enhanced pleading requirements of CPLR 3016(a). Accordingly, the sixth cause of action is dismissed.

New York does not recognize an independent cause of action for civil conspiracy (*see* **Sokol v Addison**, 293 AD2d 600; **Pappas v Passias**, 271 AD2d 420). A conspiracy claim must be premised upon an underlying established tort and is used to demonstrate the existence of a common scheme (**Ward v City of New York**, 15 AD3d 392). When, as here, the underlying tort claims are dismissed, the conspiracy claim cannot stand (**Sokol v Addison**, *supra*). Accordingly, the fifth cause of action is dismissed.

A cause of action pursuant to a quasi-contract theory only applies in the absence of an express agreement and is not really a contract at all, but a legal obligation imposed in order to prevent a party's unjust enrichment (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 388). When, as here, there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract (*see*, **Alamo Contract Builders v CTF Hotel Co.**, 242 AD2d 643). Accordingly, the seventh cause of action for unjust enrichment is dismissed.

The eighth cause of action is for a judgment declaring that the restrictive covenants contained in the plaintiff's employment agreement are null and void due to Universal's breach of that agreement. The defendants seek dismissal of this cause of action on the ground that any entitlement to declaratory relief is merely part of the plaintiff's breach-of-contract claim. However, declaratory relief may be joined with demands for any other relief to which the plaintiff deems himself entitled. CPLR 3001 allows the declaratory demand whether or not further relief is or

could be claimed. Thus, the demand for declaratory relief can be joined, for example, with a demand for an injunction or with a demand for money damages. The co-existence of a different remedy should not, by itself, preclude a declaratory judgment (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:14). The plaintiff's first cause of action for breach of contract seeks money damages only. Under these circumstances, the court finds that, contrary to the defendants' contentions, the eighth cause of action for declaratory relief is not subsumed in and duplicative of the plaintiff's first cause of action for breach of contract. Accordingly, the motion is denied as to the eighth cause of action.

Finally, the standard for awarding punitive damages is a strict one and available only in a limited number of instances. Punitive damages are not recoverable for an ordinary breach of contract since their purpose is not to remedy private wrongs, but to vindicate public rights. Punitive damages are available when the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available and is sufficiently egregious to warrant the additional imposition of exemplary damages. When the breach of contract involves a fraud evincing a high degree of moral turpitude and conduct demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally. (*see*, **Raconova v Equitable Life Assur. Socy. of U.S.**, 83 NY2d 603, 613, *citing* **Walker v Sheldon**, 10 NY2d 401, 404-405). All of the plaintiff's tort claims have been dismissed. In the absence of a cognizable tort arising out of his contractual relationship with Universal, the plaintiff is unable to demonstrate that the wrong to him rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations and that it was part of a pattern of similar conduct directed at the public generally (**Id.** at 614; *see also*, **Rivas v AmeriMed USA**, 34 AD3d 250, 251). Accordingly, the plaintiff's claim for punitive damages is dismissed.

HON. ELIZABETH HAZLITT EMERSON

DATED: May 20, 2008

J. S.C.