

Nick v Timston Corp.
2008 NY Slip Op 32602(U)
September 16, 2008
Supreme Court, New York County
Docket Number: 0104957/2008
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN, J.S.C.**

PART 57

Justice

Index Number : 104957/2008

NICK, EVELYN

VS.

TIMSTON CORPORATION

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 104957-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on this motion to dismiss

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion
are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

SEP 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/16/08

Marcy S. Friedman
MARCY S. FRIEDMAN, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

EVELYN NICK,
Plaintiff(s),

Index No.: 104957/08

- against -

TIMSTON CORPORATION, GERAL
CORPORATION, RURADAN CORPORATION,
RALPH ELYACHAR, and DANIEL ELYACHAR,

DECISION/ORDER

Defendant(s).

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff sues for breach of a termination agreement and a pension agreement. The complaint names as defendants Timston Corporation, Geral Corporation, and Ruradan Corporation (“corporate defendants”), and Ralph Elyachar and Daniel Elyachar (“individual defendants”), former principals of the corporate defendants. The individual defendants move to dismiss the complaint against them. Plaintiff cross-moves to dismiss the corporate defendants’ counterclaims against her.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable

based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Amav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

The complaint asserts three claims against the individual defendants arising out of the pension agreement: breach of contract (third cause of action); specific performance (fourth cause of action); and unjust enrichment (fifth cause of action). In moving to dismiss, the individual defendants assert that the pension agreement was only between plaintiff and the corporate defendants and that they have no individual liability to plaintiff under that agreement.

It is well settled that “an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal.” (Savoy v Cardinal Export Corp., 15 NY2d 1, 4 [internal [1964] [internal citation and quotation marks omitted].) Moreover, “an individual stockholder or officer is not liable for his corporation’s engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual.” (Salzman Sign Co. v Beck, 10 NY2d 63, 67 [1961]. See also American Media Concepts, Inc., 179 AD2d 446 [1st Dept 1992]; Yellow Book of NY, LP v DePante, 309 AD2d 859 [2d Dept 2003].)

As to Daniel Elyachar, there is nothing in the pension agreement demonstrating an intent to assume personal liability for the corporate defendants’ obligations. He did not sign the

contract more than once. The body of the agreement states that it is a “Pension Agreement Between Timston/Gerel/Ruradan Corps. and Ralph Elyachar and [plaintiff] Evelyn Nick.” (Complaint, Ex. B.) In the absence of any other provision in the agreement evidencing an explicit intent on the part of Daniel Elyachar to be bound individually, plaintiff’s claims against him should be dismissed.

In contrast, a triable issue of fact exists as to Ralph Elyachar’s individual liability under these circumstances in which the pension agreement expressly identifies him as a party. (See American Media Concepts, Inc., 179 AD2d 446, supra.) Accordingly, the claims against him are sufficiently pleaded.

As to the cross-motion, plaintiff seeks dismissal of corporate defendants’ counterclaims against her for breach of fiduciary duty, misappropriation of corporate funds, fraud, negligence, and rescission of the termination and pension agreements. In so moving, plaintiff alleges that all of the claims are pleaded with insufficient particularity.

A claim of breach of fiduciary duty or fraud must be pleaded with particularity. (See CPLR 3016[b].)¹ Defendants’ counterclaims are adequately pleaded, given that they allege particular acts of wrongdoing by plaintiff that are within plaintiff’s exclusive knowledge. (See Parsons & Whittemore, Inc. v Abady Luttati Kaiser Saurborn & Mair, P.C., 309 AD2d 665 [1st Dept 2003]; Yatter v William Morris Agency, Inc., 256 AD2d 260 [1st Dept 1998].)

CPLR 3016(b) is not applicable to defendants’ misappropriation and negligence counterclaims. Moreover, the court rejects plaintiff’s assertion these claims are based on wholly conclusory assertions and are thus insufficiently pleaded. The misappropriation counterclaim

¹ Although denominated a claim for breach of loyalty, the claim in effect alleges breach of fiduciary duty, which is subject to the particularity requirements of CPLR 3016[b]. (See Hyman v New York Stock Exch., Inc., 46 AD3d 335 [1st Dept 2007].)

cites specific acts in which plaintiff allegedly misappropriated corporate funds. The negligence counterclaim is based on specific allegations as to plaintiff's negligent performance with respect to such matters as installation of water meters at defendants' premises and billing of water charges to defendants' tenants.

Defendants' rescission counterclaim alleges that plaintiff fraudulently induced defendants to enter into the pension agreement. As a pleading matter, it states a claim for rescission. (See Babylon Assocs. v County of Suffolk, 101 AD2d 207 [2d Dept 1984].)

Finally, as to defendants' claim for punitive damages, it is well settled that "[p]unitive damages are available where 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 [under the Walker standard] to warrant the additional imposition of exemplary damages." (Rocanova v Equitable Life Assur. Soc., 83 NY2d 603 [1994].) As defendants plead tort as well as breach of contract claims, defendants' claim for punitive damages will stand at this juncture. (See New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Acquista v New York Life Ins. Co., 285 AD2d 73 [1st Dept 2001].)

It is accordingly hereby ORDERED that the motion of defendants Ralph Elyachar and Daniel Elyachar is granted only to the extent of dismissing the complaint as against defendant Daniel Elyachar, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
September 16, 2008

FILED
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NEW YORK

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NEW YORK

MARY
MARC FRIEDMAN, J.S.C.