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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 57

Mark Berkowitz

- v -

Chris Ventura

INDEX NO. 602824/07

MOTION DATE 5/15/08

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 14 2008

COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 11/5/08

J.S.C.

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

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

MARK BERKOWITZ,

Plaintiff,

Index No.
602824/07

-against-

CLUB VENTURES INVESTMENTS LLC d/b/a DAVID BARTON GYM, DAVID BARTON and JOHN HOWARD,

Defendants.

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Hon. Richard B. Lowe, III:

In motion sequence 004, defendant John Howard (Howard) moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the amended complaint in its entirety as against him. In motion sequence 005, defendants Club Ventures Investments LLC d/b/a David Barton Gym (CVI) and David Barton (Barton) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the amended complaint in its entirety as against them.

Background

On June 11, 2004, Barton and Howard entered into CVI's Limited Liability Company Agreement (the CVI Agreement) as the initial members of CVI, a Delaware limited liability corporation that operates health clubs and provides personal training services. On November 18, 2005, CVI, Barton, Howard, plaintiff Mark Berkowitz (Berkowitz), and another company entered into the Second Amendment to the CVI Agreement (Second Amendment). Pursuant to the Second Amendment, Berkowitz was granted 2.9 Class B Membership Units in CVI (the Class B Units), which represented 2.76% of the outstanding equity of CVI, on a fully diluted basis. The CVI Agreement

and the Second Amendment provide that they are to be governed by Delaware law.

On November 18, 2005, Berkowitz also entered into an employment letter agreement with CVI (the Letter Agreement), pursuant to which he became CVI's Chief Financial Officer. The Second Amendment refers to the Letter Agreement as "the Employment Agreement." In the complaint, by contrast, Berkowitz uses the term "the Employment Agreement" to collectively describe the CVI Agreement, the Second Amendment and the Letter Agreement. For the sake of clarity, these three documents, when collectively referred to, will be called "the Agreements" in the instant decision.

According to Berkowitz, the instant action involves a multi-million dollar dispute between him and the other two members of CVI - Barton and Howard. He explains that the legal claims in the complaint are largely based on the Agreements.

Berkowitz states that, although he was to receive bonuses and guaranteed compensation as CFO, the largest incentive was the potential increase in value of the Class B Units. Berkowtiz maintains that CVI grew into a multi-million dollar venture primarily due to his efforts. He asserts that, in April 2007, CVI was preparing to sell as much as $50 million of its equity to an outside investor by early August.

Berkowitz states that, in the course of performing due diligence for the $50 million financing, he discovered a number of serious problems with CVI's financial and accounting statements and reports, many of them caused by Barton. Berkowitz contends that, when he raised the need to disclose and/or fix these issues, Barton verbally and physically threatened him and told him not to get involved. Berkowitz further maintains that Barton refused to pay him incentive compensation and other benefits to which he was entitled under the Letter Agreement.

Berkowitz states that, in a June 5, 2007 letter, he resigned as CVI's CFO, effective July 5, 2007. In the letter, he claims that his resignation was for "Good Reason," as that term is defined in the Letter Agreement. Berkowitz explains that the Letter Agreement provides for accelerated vesting of the Class B Units if he is terminated as CFO without cause, or if he terminates his employment for "Good Reason." He asserts that, by a June 13, 2007 letter, Barton advised Berkowitz that his termination of employment was not for "Good Reason," and stated that his termination was effective as of June 13, 2007. Berkowitz contends that he attempted to contact Howard several times thereafter, but that Howard refused to return his calls or to speak with him.

The complaint contains seven causes of action, the first five of which are brought as against all three defendants. The first cause of action alleges breach of the Agreements, including the implied covenant of good faith and fair dealing. The second cause of action claims breach of Berkowitz's oral consulting agreements regarding services he rendered to defendants before becoming CFO of CVI.

The third cause of action alleges retaliatory denial of compensation and other emoluments in violation of public policy and applicable law. The fourth cause of action sounds in tortious interference with the Agreements. The fifth cause of action is for failure of defendants to pay compensation and other emoluments in violation of Delaware labor law, and seeks liquidated damages.

The sixth cause of action, brought against Barton and Howard, sounds in breach of fiduciary duty in their capacity as the controlling members of CVI. The seventh cause of action, brought against CVI only, seeks to enforce provisions of the CVI Agreement that allegedly require Berkowitz to be indemnified and paid for expenses he incurs due to

CVI's counterclaims against him.

Discussion

Oral argument was held on the instant motions on May 15, 2008. CVI and Barton stated that the largest claim in this case is Berkowitz's alleged entitlement to the Class B Units, and they explained that their chief contention was that his claim to the Class B Units was barred by the terms of Second Amendment.

At oral argument, this court denied that part of Barton and CVI's motion that argued that Berkowitz's breach of contract claim is barred by the terms of the Second Amendment. The court held that the documentary evidence was not clear on its face in support of Barton and CVI's contention, and that, therefore, dismissal of the first cause of action as against them, pursuant to CPLR 3211 (a) (1), was not warranted. Thus, that part of CVI and Barton's motion has been resolved and need not be further discussed.

The other part of the instant motions that seeks dismissal on the basis of documentary evidence is that part of CVI and Barton's motion that seeks dismissal of the first and second causes of action as against them, based on Berkowitz's alleged breach of the November 18, 2005 confidentiality agreement that he entered into with CVI (the Confidentiality Agreement).

They assert that the remedy for such a breach is the forfeiture of any amounts that Berkowitz might otherwise have been entitled to upon the termination of his employment, including his claim to the Class B Units. They contend, therefore, that his claim to those units in the first cause of action should be dismissed.

Paragraph 1(b) of the Confidentiality Agreement states that, promptly upon his termination from CVI for any reason, Berkowitz "agrees to deliver to [CVI] all property

and materials within [his] possession or control which belong to [CVI] or which contain Confidential Information."

Pursuant to paragraph 6(a)(iv), in the event that Berkowitz breaches the Confidentiality Agreement, CVI is entitled to "cessation of, and repayment by [Berkowitz] to [CVI] of, any severance benefits payable or paid to [Berkowitz] pursuant to any agreement with [CVI], including pursuant to any employment, stock repurchase, severance or benefit agreement, plan or program of [CVI] or between [Berkowitz] and [CVI]."

CVI and Barton state that Berkowitz retained thousands of pages of confidential information after his termination in June 2007. They contend that, in response to a document request in the instant action, Berkowitz produced reams of financial and other proprietary information marked "confidential" or "highly confidential" and he admits to retaining a laptop computer with thousands of CVI-related e-mails in it.

Berkowitz argues, however, that the term "severance benefits" is undefined and ambiguous, and its applicability to his damages cannot be conclusively established as a matter of law pursuant to CPLR 3211 (a) (1). He further contends that defendants have not shown, as a matter of law, that the information complained of is confidential or that he used confidential information for any unauthorized purpose.

This court finds that, at this early stage in the action, CVI and Barton have not established, as a matter of law, that Berkowitz breached the Confidentiality Agreement. Furthermore, even if Berkowitz did breach the Confidentiality Agreement, CVI and Barton have not established that the meaning of the term "severance benefits" is unambiguous on its face. Thus, that part of motion sequence 005 that seeks dismissal of

the first and second causes of action on the basis of Berkowitz's alleged breach of the Confidentiality Agreement, is denied.

The remaining arguments for dismissal by the defendants are based upon failure to state a claim under CPLR 3211 (a) (7).

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court is obliged, inter alia, to accept each of the plaintiff's factual allegations as true, to make all reasonable inferences therefrom and not evaluate the ultimate merits of the case, to construe the complaint liberally in favor of the plaintiff, and to deny dismissal if a cause of action is at all discernible from the factual allegations of the complaint." (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 438 [1st Dept 1995]).

The first cause of action alleges breach of the Agreements. Both Howard, in motion sequence 004, and Barton, in motion sequence 005, seek dismissal of the first cause of action as against them, on the basis that Berkowitz does not state a claim against them in their individual capacities. Howard asserts that, although he is a member of CVI, he is not, and has never been, the majority owner and controlling member of CVI. As set forth in the Agreements, Barton is CVI's managing member. Howard is not a signatory to the Letter Agreement, which was signed by Barton, on behalf of CVI, in his capacity as CVI's managing member.

Although Berkowitz alleges breach of the Agreements, the damages he seeks in the first cause of action are based on the terms of the Letter Agreement, which was entered into by Berkowitz and CVI. All of the parties, including Berkowitz in his June 5, 2007 resignation letter, have previously referred to the Letter Agreement as his employment agreement. Howard was not a signatory to the Letter Agreement, and

Barton signed it in his capacity as managing member of CVI, not in his individual capacity. "It is a general principle of contract law that only a party to a contract may be sued for breach of that contract. Indeed, Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually." *(Wallace v Wood*, 752 A2d 1175, 1180 [Del Ch 1999]). Therefore, the first cause of action is dismissed as against Barton and Howard.

Berkowitz's second cause of action is for breach of an alleged oral agreement between him and CVI, Barton and Howard for consulting services rendered prior to his becoming CFO and prior to the execution of the Second Amendment and the Letter Agreement.

The oral consulting agreement on which the second cause of action is based is alleged to have been with CVI and also with Howard and Barton directly, involving services to them directly and personally. Berkowitz states that his allegations must be assumed to be true for the purposes of the instant motions to dismiss.

Barton argues that the second cause of action does not state a claim against him individually, as the contracts at issue are with CVI, and not with him. Howard asserts that he was never a party to any such alleged agreements, such that he cannot be liable individually.

The second cause of action, based on alleged oral agreements pursuant to which Berkowitz performed consulting services for all of the defendants, survives the instant motions to dismiss. At this stage in the action, the pleadings are sufficient to state a cause of action for breach of oral agreements, including against the individual defendants.

The third cause of action seeks damages for retaliatory denial of compensation under Delaware Labor Law, 19 Del C §§ 1701-1704, known as the Whistleblowers' Protection Act. Berkowitz alleges that defendants breached the Letter Agreement and refused to pay him the amount to which he was entitled, in retaliation for his raising alleged accounting improprieties.

Howard seeks dismissal of this claim as against him, and states that Berkowitz alleges that he only raised these purported improprieties with Barton, and not with Howard, and that Barton refused to discuss the issue with Howard. Howard points out that, according to the complaint, Berkowitz did not bring these issues to Howard's attention until after Berkowitz terminated his employment.

CVI and Barton maintain that the third cause of action for retaliation under Delaware law is invalid. They argue that there is no claim against Barton individually, because he is not the "employer" as that term is defined in the Delaware statute. They further assert that there is no basis for applying Delaware law to the employment relationship between Berkowitz and CVI, such that, to the extent that the third cause of action is brought under Delaware law, it should be dismissed.

Berkowitz maintains that he has alleged facts supporting acts of retaliation. He argues that he has sufficiently alleged willful misconduct by Howard after he tendered his June 5, 2007 termination letter. Berkowitz also asserts that, under the applicable statute, Barton is personally liable to him for his unpaid compensation.

Berkowitz contends that Delaware law applies to the Letter Agreement. While the Second Amendment and the CVI Agreement are expressly governed by Delaware law, the Letter Agreement is silent as to which law applies. Berkowitz alleges, however,

that Delaware law was intended to apply to the Letter Agreement. He states that CVI did not formally register to do business in New York, although it was aware that it would have had to do so if Berkowitz was to be considered a New York employee. Berkowitz explains that CVI did not register because he and the defendants intended him to be a Delaware employee. (Cmplt, ¶¶ 41-42).

Berkowitz argues that, pursuant to the Whistleblowers' Protection Act, employees can report illegal and unethical accounting and other financial conduct without fear of retaliation.

This court finds that, accepting the allegations in the complaint as true, as it must on a motion to dismiss, the parties intended Delaware law to apply to the Letter Agreement. The allegations of retaliation are sufficient to state a cause of action under the Whistleblowers' Protection Act as against CVI, which was indisputably Berkowitz's employer. Neither Barton nor Howard was Berkowitz's employer, however.

Pursuant to 19 Del C § 1702 (2), an employer is one who employs another, meaning that "services are performed for wages or under any contract of hire, written or oral, express or implied." The Letter Agreement, setting forth the terms of Berkowitz's employment, was entered into by CVI, and not by the individual defendants in their individual capacities. Thus they are not his employers pursuant to the applicable statute, and the third cause of action is dismissed as against Barton and Howard.

The fourth cause of action sounds in tortious interference with contract. The elements of such a claim are: "'(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.'" (*Aspen Advisors LLC v United Artists*

Theatre Co., 861 A2d 1251, 1265-66 [Del 2004], quoting *Irwin & Leighton, Inc. v W.M. Anderson Co.*, 532 A2d 983, 992 [Del Ch 1987]).

Berkowitz contends that Howard and Barton interfered with the Letter Agreement and that CVI interfered with the Second Amendment. Clearly, none of the defendants breached any contract that that defendant entered into, because "[i]t is rudimentary that a party to a contract cannot be liable both for breach of that contract and for inducing that breach." (*Shearin v E.F. Hutton Group, Inc.*, 652 A2d 578, 590 [Del Ch 1994]).

Berkowitz does not set forth any allegations as to how CVI interfered with the Second Amendment, leading to its breach by the other defendants. Thus, the fourth cause of action is dismissed as against CVI. The allegations against Howard discuss his behavior after Berkowitz's resignation. There are no specific allegations of an act by Howard that led CVI to breach of the Letter Agreement. Thus, the fourth cause of action is dismissed as against Howard.

As to Barton, generally officers of a company cannot be held liable for tortious interference with their own company's contract. There is an exception, however, if the officers "exceeded the scope of their authority." *(Wallace v Wood*, 752 A2d at 1182). At this stage in the action, given the allegations that Barton committed financial improprieties, and threatened Berkowitz when he brought them to Barton's attention, the possibility that Barton exceeded the scope of his authority has been sufficiently set forth to survive the instant motion to dismiss on the fourth cause of action as against him.

The fifth cause of action alleges a failure by defendants to timely pay compensation and other emoluments to Berkowitz. He asserts that defendants are liable for CVI's alleged breach of contract, pursuant to Delaware Labor Law, 19 Del C § 1102,

which provides procedures for employers to pay their employees' wages, plus liquidated damages, when there has been a failure to timely pay their compensation.

Howard argues that this statute does not place personal liability on members of a limited liability company or shareholders or owners of a corporation. Thus, he contends that, as a member of CVI, he is not personally liable for CVI's alleged violations, and that the fifth cause of action should be dismissed as against him.

CVI and Barton further argue that Delaware law is inapplicable to the terms of the Letter Agreement. As discussed above, however, Berkowitz has set forth allegations indicating that Delaware law was intended to apply to the Letter Agreement, as it explicitly applied to the CVI Agreement and the Second Amendment.

Berkowitz states that defendants' failure to pay him the amounts to which he was entitled on a timely basis violates Delaware Labor Law, 19 Del C §§ 1101-1103 and 1105. He argues that, pursuant to the statute, in addition to the payment of the compensation itself, he is entitled to liquidated damages equal to the amount of unpaid compensation.

Section 1105 deals with the responsibility of prime contractors, and is inapplicable to the instant action. The other sections indicated by Berkowitz, however, are applicable to the instant action. Section 1103 (b) states, in part, that "[i]f an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages" pursuant to a formula set forth in the statute.

Berkowitz has stated a claim on the fifth cause of action as against CVI, who was his employer. The claim also survives as against Barton, based on section 1101 (b) of the

statute, which states that "[f]or the purpose of this chapter the officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation." Berkowitz alleges that Barton knowingly caused CVI to violate the statute by failing to pay him wages due to him. Therefore, at this stage in the action, the fifth cause of action survives as against Barton.

As to Howard, however, the fifth cause of action is dismissed, because the complaint does not set forth allegations indicating that he knowingly caused CVI to breach the Letter Agreement by failing to pay Berkowitz wages allegedly due to him.

The sixth cause of action sounds in breach of fiduciary duty. The scope of duties of a member or manager of a limited liability company, including his or her fiduciary duties, can be expanded or limited by provisions of the limited liability company agreement. (*Metro Communication Corp. BVI v Advanced Mobilecomm Tech. Inc.*, 854 A2d 121, 157, n 83 [Del Ch 2004]), quoting 6 Del C § 18-1101 (c). Section 4.3 of the CVI Agreement provides that the Managing Member and officers of CVI "shall have a fiduciary duty of loyalty and care similar to that of directors and officers" of Delaware corporations.

Howard is neither the managing member nor an officer of CVI. There is no allegation that sets forth a fiduciary duty by Howard to Berkowitz or that, if such a duty existed, Howard breached any such duty. The actions Berkowitz complains of by Howard took place after Berkowitz submitted his termination letter on June 5, 2007 and do not set forth any type of fiduciary duty by Howard in his role as a member of CVI.

Barton argues that the sixth cause of action fails to state a claim for breach of

fiduciary duty because Berkowitz has not pleaded any grounds on which a fiduciary relationship can be found. As the managing member of CVI, however, Barton owed the other members, including Berkowitz, a duty of loyalty and care. At this stage in the action, Berkowitz's allegations of Barton's actions, related to financial improprieties and otherwise, are sufficient to state a cause of action for breach of fiduciary duty.

In the seventh cause of action, brought as against CVI, Berkowitz seeks a declaration that any liability in connection with counterclaims asserted by CVI against him is subject to indemnification under section 10.2.1 of the CVI Agreement. CVI argues that this claim is frivolous and should be dismissed. Given the procedural posture of the instant action, this court does not find, as a matter of law, that Berkowitz has no claim for indemnification under any circumstances. Thus, the seventh cause of action survives the instant motion to dismiss.

Berkowitz raises a procedural matter that, he argues, requires denial of the motion as to CVI. Berkowitz contends that, because CVI interposed an answer to the original complaint, CVI is required under CPLR 3025 (d) to answer rather than move to dismiss the amended complaint. Berkowitz does not offer any support for his argument that a defendant should be prevented from moving to dismiss, pursuant to CPLR 3211 (a) (1) or (a) (7), in response to an amended complaint. Furthermore, there is evidence, in the form of correspondence between the parties, that Berkowitz was aware that all defendants planned to submit motions to dismiss the amended complaint.

Finally, Berkowitz states that he should be given leave to amend the complaint, regardless of the outcome of the motions. He contends that he has not yet asserted a claim for fraud in the inducement, but that defendants' attempt to avoid the accelerated

vesting provision of the Letter Agreement based on Second Amendment would support such a claim. Berkowitz further argues that he should be given an opportunity to cure factual deficiencies, if any, identified by the court in connection with the motions.

This court denies Berkowitz such leave to amend, given that he does not attach a copy of the proposed amended complaint. *(Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639 [2d Dept 1960]).

Accordingly, it is

ORDERED that the motion to dismiss of defendant John Howard, motion sequence 004, is granted in part, to the extent of dismissing the 1st, 3rd, 4th, 5th and 6th causes of action of the complaint as against him, and the motion is otherwise denied; and it is further

ORDERED that the motion to dismiss of defendants Club Ventures Investments LLC and David Barton, motion sequence 005, is granted in part, to the extent of dismissing the 1st and 3rd causes of action of the complaint as against David Barton, and dismissing the 4th cause of action of the complaint as against CVI, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve answers to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: November 5, 2008

ENTER:

HON. RICHARD B. LOWE

J.S.C.