

McDonald v McBain

2011 NY Slip Op 30540(U)

March 2, 2011

Supreme Court, New York County

Docket Number: 111814/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 111814/2010
MCDONALD, DIEGO
 vs.
MCBAIN, LOUISE
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. 111814/10
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
12
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/2/11


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 15

-----X
DIEGO McDONALD,

Plaintiff,

Index No.
111814/10

- against -

Mot. Seq. 001
Decision and
Order

LOUISE McBAIN a/k/a LOUISE BLOUIN,

FILED

Defendant.

-----X
MAR 04 2011

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, a Certified Public Accountant, brings this action for, among other things, fraudulent inducement and violation of Labor Law §198(1-a), in connection with plaintiff's employment. Plaintiff entered into an Employment Agreement with "the Private Office of Louise Blouin Media," referred to by plaintiff as "Louise Blouin Media" ("LBM"), to act as its "Finance Director," for a period of one year commencing July 1, 2009. The agreement was signed by plaintiff and Peter Cipriano for "Louise Blouin Media." Plaintiff was to receive \$8,333.33 a month from the period of July 1, 2009 to September 30, 2009, and thereafter he would be paid \$14,583.33 a month, until the end of the term. The agreement also provided for severance if plaintiff was terminated without cause after October 1, 2009. Plaintiff was terminated on November 24, 2009.

Plaintiff alleges that defendant Louise McBain a/k/a Louise Blouin ("Blouin") represented to him that LBM "is a thriving media company," which was duly organized in New York and profitable, and that plaintiff would have an opportunity to advance in the company as it grew. Based upon these representations, plaintiff allegedly agreed to work for LBM for, what he characterizes as, significantly reduced pay. Thereafter, it is alleged that plaintiff discovered that LBM was not "a duly formed entity of any kind," and that LBM has always been operating at a loss, with

no realistic prospect of growth.

During his employment, it is alleged that Blouin instructed plaintiff to make false representations “to various financial institutions regarding the financial condition” of Blouin’s business entities. Plaintiff claims that when he refused to make such representations, he was terminated. Upon plaintiff’s termination, he commenced this action seeking damages for fraudulent inducement and violation of Labor Law §198(1-a), as well as damages related to his claims that he was terminated because he would not misrepresent Blouin’s financial condition.

Blouin now moves to dismiss plaintiff’s complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). Plaintiff opposes. Blouin, in support of her motion, submits: a copy of the complaint; the affidavit of Rachel Rocamora, Human Resource Manager for Louise Blouin Media; and a copy of plaintiff’s employment agreement. Blouin argues that plaintiff fails to state a claim for fraudulent inducement because plaintiff was an at will employee, and therefore cannot establish reasonable reliance, a necessary element of that claim.

Blouin frames plaintiff’s second cause of action as one for relief under Labor Law §740(2)(c) (the “whistleblower statute”), and argues that it must be dismissed because that statute only applies to violations that present a substantial danger to public health and safety. Finally, regarding plaintiff’s claim for wages, as an executive employee, Blouin asserts that plaintiff is not entitled to collect “wages” under Labor Law §198(a-1), and that, even if plaintiff had a claim for severance pay, it must be arbitrated pursuant to the employment agreement.

Plaintiff, in opposition, submits an attorney affirmation and his affidavit. Plaintiff claims that Blouin is not a party to the employment agreement, and thus, cannot rely on it to establish a defense. However, at the same time plaintiff points to the agreement as evidence that he was not an at will employee. Plaintiff claims that Blouin mischaracterizes his second cause of action because he is not asserting that Blouin violated the whistleblower statute. Finally, plaintiff claims that Blouin misrepresents the nature of his employment as that of an “executive.”

On a motion to dismiss pursuant to CPLR 3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318,

324 [2007]) (internal citations omitted). On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." (*Zanett Lombardier v. Maslow*, 29 AD3d 495[1st Dept. 2006]). Here, plaintiff alleges that he relied on Blouin's representations that LBM is a "thriving media company duly organized and operating within the State of New York," in agreeing to become employed for a "pay structure significantly lower than that to which he would otherwise be entitled."

Even taking plaintiff's allegations as true, plaintiff has failed to plead all the requisite elements of fraud. Assuming that plaintiff has alleged facts sufficient to show that Blouin misrepresented material present facts, plaintiff cannot show that he justifiably relied on those representations. Plaintiff is a self-proclaimed CPA with an MBA who "has previously been employed as managing director of a major multinational business corporation." Plaintiff cannot claim justifiable reliance, as he could have discovered the corporate status and profitability of LBM using his "ordinary intelligence or with reasonable investigation." (*Zanett* at 496]).

Nor does plaintiff allege, as he must, an "actual pecuniary loss sustained as the direct result of the wrong." (*Lama Holding Company v. Smith Barney, Inc.*, 88 NY2d 413[1996]). Plaintiff's conclusory statement, that he took the position with LBM at a significantly lower salary than he was entitled to, fails to allege an "actual pecuniary loss sustained as the direct result," of Blouin's alleged misrepresentations, or that plaintiff sustained that loss as the result of "foregone opportunities." (see; *Manas v. VMS Associates, LLC*, 53 AD3d 451[1st Dept. 2008]).

Plaintiff, in his opposition papers, denies that his second cause of action is stating a claim under Labor Law §740(2)(b), or the Whistle blower Statute. Rather, he asserts he has a common law claim to "remedy for the wrongs alleged in this cause of action." Ultimately, it appears to evidence a wrongful termination. Inasmuch as the terms of the employment are embodied in the written agreement (plaintiff concedes as much in his third cause of action), the arbitration clause discussed below

would preclude resolution of the dispute in this forum.

Finally, Labor Law §198(a-1) provides, in relevant part:

In any action instituted in the courts upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.

Labor Law §198 is inapplicable to “any person employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week.” (See Labor Law §190[7] and *Schuit v. Tree Line Management Corp.*, 46 AD3d 405[1st Dept. 2007]). Plaintiff’s employment agreement refers several times to plaintiff as a “key executive” of LBM. Further, there is no dispute that, pursuant to the agreement, plaintiff was paid well in excess of nine hundred dollars a week.

To the extent that plaintiff may seek severance under his employment agreement, Section 12 of the agreement specifically provides that plaintiff agrees to arbitrate “any claim arising out of or in any way related to [the] Agreement, the employment relationship . . . and any disputes upon termination of employment (e.g. . . . compensation or benefits claim . . .).”

FILED


MAR 04 2011

Wherefore, it is hereby

ORDERED that the motion is granted and the complaint is dismissed in its entirety.

NEW YORK
COUNTY CLERK'S OFFICE

DATED: March 2, 2011



EILEEN A. RAKOWER, J.S.C.