

Sanborn v Podcast Go, Inc.

2011 NY Slip Op 33765(U)

May 2, 2011

Supreme Court, New York County

Docket Number: 102402/2010

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK

J.S.C.

PRESENT: _____

PART 29

Justice

Index Number : 102402/2010

SANBORN, STEPHANIE

vs.

PODCAST GO INC

SEQUENCE NUMBER : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Dated: 5/2/11

[Signature]

BARBARA R. KAPNICK

J.S.C.

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: IA PART 39

-----x

STEPHANIE SANBORN,

Plaintiff,

-against-

PODCAST GO, INC., ANDREA MITCHELL,
DOMINICK PORTO, and STEVEN HEARN,

Defendants.

-----x

BARBARA R. KAPNICK, J.:

In or about March 2008, plaintiff Stephanie Sanborn ("Sanborn") and defendants Steven Hearn ("Hearn"), the Chief Executive Officer and President of defendant Podcast Go, Inc. ("Podcast"), and Andrea Mitchell ("Mitchell"), the Chief Mobile Officer and Founder of Podcast, negotiated the terms of an employment agreement for the plaintiff to commence work at Podcast.

By decision and order dated December 14, 2010, this Court granted a motion by defendant Dominick Porto to dismiss plaintiff's Complaint as against him and also granted a motion dismissing plaintiff's causes of action against defendant Mitchell for unjust enrichment, breach of fiduciary duty, and constructive fraud in their entirety; and the cause of action for fraud, with leave to re-plead with greater specificity.

DECISION/ORDER
Index No. 102402/10
Motion Seq. No. 003

Plaintiff filed an Amended Complaint and reasserted her cause of action for fraud against Mitchell. Mitchell now moves to dismiss that cause of action pursuant to CPLR 3211(a)(7).

In her Amended Complaint, Sanborn alleges that during her negotiations with defendants Mitchell and Hearn as to the terms of her employment with Podcast, she advised Hearn that she would be foregoing a bonus of \$150,000.00 with her current employer if she left to work at Podcast. Mitchell and Hearn also allegedly made representations regarding the assets and liabilities of Podcast, including that it had secured \$500,000.00 investment financing from a new investor, which would be used to pay her salary and other compensation in a "key management role." They also represented that several large advertisers were interested in Podcast.

According to plaintiff, Hearn represented that she would receive a 1% equity stake in Podcast, with a vesting period of one year. In the offer letter sent to plaintiff, on or about April 18, 2008, Podcast offered a salary equal to \$160,000.00 per year to be paid bi-weekly with a special monthly supplement of \$7,500.00 of which \$3,500.00 per month was to be deferred for payment at the end of the year. In addition, plaintiff was to be paid a commission of 5% based on sales and was to be reimbursed for business related expenses. She commenced employment on or about May 8, 2008.

In October 2008, Mitchell and Hearn allegedly hired two additional Business Development Directors at a salary of \$115,000.00 per year and a commission of 4%. In November 2008, plaintiff's salary check was returned for insufficient funds, and by the end of 2008 she was owed approximately \$18,000.00 in past due compensation.

In or about December 2008, Hearn made additional representations to plaintiff regarding new investments expected in the new year, and solicited a \$25,000.00 investment from plaintiff as a "place holder for an additional 1% of the equity" in Podcast.

According to the Amended Complaint, throughout the first quarter of 2009, Hearn continued to issue payroll checks to plaintiff and other employees that were returned for insufficient funds. In May 2009, Mitchell demoted Hearn from CEO to a "phantom position" and appointed herself CEO. On May 13, 2009, Mitchell allegedly informed plaintiff that Hearn had been managing the business and banking fraudulently and that Podcast was out of money.

Plaintiff alleges only one cause of action against Mitchell in her Amended Complaint, for fraud, which Mitchell argues is still too vague to satisfy the pleading requirements of CPLR 3013 and

3016(b), both because the allegations as against Mitchell are vague and conclusory, and because it fails to allege the necessary elements of fraud, specifically falsity and justifiable reliance. As a sophisticated business person, Mitchell contends that plaintiff must plead some efforts taken to verify the accuracy of the statements being made or the financial stability of Podcast.

Plaintiff, in opposition, contends that she has adequately re-pled her fraud claim and that the Amended Complaint must only allege the claims in sufficient detail to put the defendant on notice of their substance.

Pursuant to CPLR 3016(b), in any action based upon fraud or misrepresentation, "the circumstances constituting the wrong shall be stated in detail." To state a cause of action for fraud, plaintiff's Amended Complaint "must contain allegations of a representation of material fact, falsity, scienter, reliance and injury (citation omitted)." *Small v Lorillard Tobacco Co. Inc.*, 94 NY2d 43, 57 (1999).

According to plaintiff, Mitchell made material misrepresentations regarding the financial stability of Podcast, both before and during plaintiff's tenure at the company, which were intentionally made to procure plaintiff's employment for which

she was never fully compensated, and a \$25,000.00 loan for which she was never repaid.¹ As a result of Mitchell's misrepresentations, plaintiff argues, she decided to forego a \$150,000.00 bonus and went to work at Podcast.

Accepting the allegations of the Amended Complaint as true as the Court must on a motion to dismiss pursuant to CPLR 3211(a)(7), plaintiff has failed to state a cause of action against Mitchell based in fraud.

The Amended Complaint alleges that during their pre-employment negotiations, Mitchell and Hearn represented to plaintiff that Podcast had recently received a \$500,000.00 investment, which could be used to pay plaintiff's salary and other compensation, and that there were several large advertisers who had expressed interest in the company.

Other than adding these two allegations, plaintiff's Amended Complaint does not materially alter the allegations in the original Complaint as against Mitchell. Nowhere in the Amended Complaint is either statement or representation alleged to be false. Although

¹ It should be noted that there is no allegation in the Amended Complaint that Mitchell was actually involved in procuring the \$25,000.00 loan from plaintiff. Rather, Hearn solicited this loan from plaintiff directly.

plaintiff makes conclusory allegations that Mitchell and Hearn were engaged in a scheme to defraud her, that as part of that scheme, they made materially false and misleading statements and omissions regarding the true nature and status of Podcast's assets, liabilities and clients, and that such statements and omissions were known to be false and intended to deceive, such conclusory allegations are exactly the sort previously dismissed by this Court in its December 14, 2010 decision and order.

Even if the Court were to find, as plaintiff seemed to urge at oral argument, held on the record on April 12, 2011, that it could be reasonably inferred from the totality of the allegations that Mitchell's statements during pre-employment negotiations were false, there are no non-conclusory allegations in the Amended Complaint regarding plaintiff's reasonable reliance on such statements or how these alleged misrepresentations proximately caused plaintiff's injuries some five months later.

Accordingly, this motion by defendant Andrea Mitchell for an order dismissing plaintiff's Amended Complaint as against her is granted with prejudice.

The remaining claims against defendants Podcast Go, Inc. and Steven Hearn are severed and continued.

This constitutes the decision and order of the Court.

Dated: *May 2*, 2011



Hon. Barbara R. Kapnick, J.S.C.

**BARBARA R. KAPNICK
J.S.C.**