

**Loriggio v Steve Sabba and Taxpro Fin. Network,
Inc.**

2012 NY Slip Op 30126(U)

January 11, 2012

Sup Ct, NY County

Docket Number: 602632/05

Judge: Debra A. James

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SCANNED ON 1/18/2012

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

JOSEPH A. LORIGGIO,
Plaintiff,

Index No.: 602632/05

Motion Date: 10/18/11

- v -

Motion Seq. No.: 06

STEVE SABBA and TAXPRO FINANCIAL NETWORK,
INC.,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

PAPERS NUMBERED

1, 2

Answering Affidavits - Exhibits _____

3, 4

Replying Affidavits - Exhibits _____

5, 6

FILED

Cross-Motion: Yes No

JAN 18 2012

Upon the foregoing papers,

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Joseph A. Loriggio moves, pursuant to CPLR 3212, for summary judgment on his first cause of action for breach of contract, entering judgment in his favor in the amount of \$66,876.95, plus interest from September 28, 2004, and dismissing the counterclaims asserted against him.

This is the sixth motion filed by the parties in this action and the facts of the case have been previously stated, so the facts will only be reiterated herein as necessary.

Briefly, pursuant to a shareholder's agreement executed

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

between plaintiff and individual defendant Steve Sabba (Sabba), plaintiff became an employee of corporate defendant TaxPro Financial Network, Inc. (TaxPro), and acquired a 10% equity interest in TaxPro, by paying Sabba \$100,000.00 in cash and assuming an obligation to pay an additional \$100,000.00, financed in five semiannual installments with interest computed at 7/5%. The agreement gave plaintiff the right to rescind at any time, to sell his shares to Sabba for the original purchase price, and receive any accrued profits up to the effective date of the rescission. Plaintiff rescinded the agreement, and Sabba returned his \$100,000.00 payment, but has refused to pay him the accrued profit.

Originally, this court dismissed plaintiff's first cause of action for breach of contract for the accrued profit, but that decision was subsequently reversed by the Appellate Division in LoRiggio v Sabba (69 AD3d 446 [1st Dept 2010]). Plaintiff has estimated the amount of those accrued profits to be \$66,876.95 through July 20, 2004 (based on 10% of the income allegedly reported by TaxPro), the date when he exercised his option to rescind the agreement.

In their answer, defendants assert six counterclaims against plaintiff: (1) breach of contract; (2) breach of employee responsibility and fiduciary obligations; (3) harassment, malicious prosecution and abuse of process for seeking

unemployment benefits; (4) libel; (5) interference with contractual relations; and (6) fraud and fraudulent misrepresentation.

Plaintiff contends that, pursuant to the Appellate Division's decision, he is entitled to summary judgment on the issue of liability on his first cause of action for breach of contract and, therefore, is entitled to be awarded the profits that accrued up to the date of his rescission of the shareholder's agreement. Pursuant to an order of this court, dated November 10, 2010, TaxPro's profits, as of July 20, 2004, were deemed to be the same profits as reported to plaintiff for the period ending June 30, 2004. Plaintiff contends that the sum of those profits is \$668,769.50, 10% of which he claims he is due as the owner of 10% of TaxPro's shares. It is noted, however, that the same decision of this court stated that "defendant reserves the right to make legal argument as to the calculation of shares." Id.

Plaintiff's position with respect to the counterclaims is that: (1) pursuant to the Appellate Division's decision, he did not breach the contract, so the first counterclaim should be dismissed; (2) the second counterclaim should be dismissed because there is no allegation that he owed defendants any duty of care independent of his obligations as an employee of TaxPro, and the damages alleged are purely speculative; (3) the third

counterclaim should be dismissed because New York does not recognize a common-law action for harassment and there is no allegation that he sought unemployment benefits out of malice; (4) the fifth counterclaim fails to allege the elements of a cause of action for tortious interference with contractual relations; and (5) the sixth counterclaim does not meet the requisite particularity for a claim of fraud.

Although not specifically argued, plaintiff has provided the affirmation of Erik W. Centner, Esq., who avers that the fourth counterclaim for libel was withdrawn by defendants at a preliminary conference.

In opposition to the instant motion, defendants state that there are material questions of fact as to the calculation of the amount of accrued profits and which defendant is liable for what portion of those profits. The court notes that the shareholder's agreement, which forms the basis of plaintiff's cause of action for breach of contract, is only between plaintiff and Sabba, who signed in his individual capacity; TaxPro was not a party thereto. However, Sabba argues that he signed the shareholder's agreement as the disclosed agent of TaxPro, the principal. Further, defendants point out that the "total income per books" for TaxPro for the period ending June 30, 2004, was \$668,796.50, which represents total income, not net profits as claimed by plaintiff.

In the opposition, Sabba's affidavit challenges plaintiff's motion only with respect to the third counterclaim for harassment, malicious prosecution and abuse of process, based on plaintiff seeking unemployment benefits after his withdrawal from TaxPro and appealing the decisions rendered against those claims. Defendants claim that plaintiff issued a check to TaxPro with insufficient funds, which was a fraud on the company, that plaintiff was grossly incompetent in handling various matters and that plaintiff engaged in unspecified gross and willful misconduct.

In reply, plaintiff asserts that defendants provided the information regarding the profits in an e-mail dated July 15, 2004; however, the court notes that this e-mail indicates a "semi-annual payout" of \$468,000.00, not the \$668,769.50 claimed by plaintiff. Further, though plaintiff contends that at his examination before trial Saba admitted that he paid himself \$330,000 as his share of profits, the pages of the deposition transcript that he references were omitted from the record before the court.

Plaintiff also argues that the Appellate Division, in reversing this court's decision dismissing plaintiff's breach of contract claim, consistently referred to defendants in the plural, meaning that both defendants are obligated for the lost profits, and Sabba cannot shirk this responsibility. Moreover,

plaintiff avers that, if there is any ambiguity in the shareholder's agreement as to who is to pay the profit distribution, that ambiguity must be resolved in plaintiff's favor because Sabba drafted the agreement.

Plaintiff also contends that the second counterclaim is for his alleged breach of duty as an employee, not as a shareholder, and, as such, must be dismissed. Additionally, plaintiff reiterates his arguments with respect to the other counterclaims asserted against him.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

That branch of plaintiff's motion seeking summary judgment on his first cause of action and judgment in his favor in the

amount of \$66,876.95, plus interest from September 28, 2004, shall be denied.

The Appellate Division did not grant plaintiff summary judgment on his first cause of action as argued by plaintiff; rather, the Appellate Division merely reinstated plaintiff's claim for breach of contract, but did grant plaintiff summary judgment with respect to liability on his second cause of action, which is not part of the instant motion. Therefore, the issue of liability on his breach of contract cause of action remains to be adjudicated. Plaintiff fails to address whether he fulfilled his obligations under the shareholder's agreement, which might entitle him to summary judgment. Consequently, plaintiff has failed to meet his burden of proof with respect to defendants' liability.

Further, the documentary evidence provided by plaintiff does not substantiate the amount of profits that he is claiming. In addition, by prior order of this court, defendants were granted the opportunity to present legal arguments, at a later date, concerning the percentage ownership of TaxPro's shares to which plaintiff is entitled. Plaintiff does not submit any prima facie evidence of the number of shares he purchased prior to rescission. Under the shareholder's agreement, as of the date of rescission the amount due plaintiff amounts to price of such shares that plaintiff sells back to Sabba plus any accrued

profits thereon, which is unresolved in the papers before the court.

That branch of plaintiff's motion seeking to dismiss the counterclaims asserted against him shall be denied in part and granted in part.

Defendants' first counterclaim for breach of contract concerns a check in the amount of \$23,366,83 that plaintiff tendered to defendants on July 15, 2004, as the first semi-annual installment due under the terms of the shareholder's agreement. Plaintiff asked defendants not to deposit the check until July 19, 2004. On July 19, 2004, plaintiff then asked defendants not to deposit that check at all because he was rescinding his obligations, pursuant to the shareholder's agreement. Defendants are asserting that this check, made payable to them with insufficient funds, constituted a breach of contract.

Although, as stated by the Appellate Division, plaintiff had the right to rescind his agreement at any time, the dishonored check was presented to defendants prior to plaintiff's rescission and, consequently, may constitute a breach of the shareholder's agreement. Whether plaintiff's delivery of a check that could not be covered by sufficient funds is a material breach relieving defendants of their contractual obligations, prior to plaintiff's rescission, raises a question of fact that precludes granting summary judgment dismissing this counterclaim. See Awards.com v

Kinko's, Inc., 42 AD3d 178 (1st Dept 2007), affd 14 NY3d 791 (2010); see Pramco III, LLC v Partners Trust Bank, 52 AD3d 1224 (4th Dept 2008).

Based on the foregoing, the portion of plaintiff's motion seeking to dismiss defendants' first counterclaim is denied.

Defendants' second counterclaim for breach of employee responsibilities and fiduciary obligations shall be dismissed. Defendants' allegations concern plaintiff's performance as an employee, in which defendants allege that plaintiff mishandled various tasks to which he was assigned.

An employee owes a fiduciary duty to his employer as a matter of law and is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." Lamdin v Broadway Surface Advertising Corp., 272 NY 133, 138 (1936); Feiger v Iral Jewelry, Ltd., 41 NY2d 928 (1977); see William Floyd Union Free School District v Wright, 61 AD3d 856 (2d Dept 2009). However, the counterclaim asserted by defendants fails to allege a breach of trust or loyalty, merely a general mishandling of matters. Therefore, defendants have failed to assert a cause of action for breach of fiduciary obligations.

In addition, the court has been unable to find a legal basis for a cause of action for "breach of employee obligations," other

than in a regular breach of contract claim (which is not alleged for the acts stated in this counterclaim), and defendants' only legal support for maintaining this counterclaim is Littman v Magee (54 AD3d 14 [1st Dept 2008]), which is inapposite, because that case concerns the fiduciary obligations that a corporate shareholder owes to the corporation, not the fiduciary obligations of an employee.

Defendants' third counterclaim for harassment, malicious prosecution and abuse of process shall also be dismissed. The underlying factual basis of this counterclaim concerns plaintiff's appeal of the denial of seeking unemployment benefits.

If an employee can establish that he or she quit his or her job for good cause, he or she would be entitled to unemployment benefits, and such determination lies with the Unemployment Insurance Appeal Board. See Matter of Maldonado (Commissioner of Labor), 260 AD2d 885 (3d Dept 1999). Hence, plaintiff had every right to seek unemployment benefits, alleging that he quit TaxPro for good cause. The fact that he appealed a negative decision is not an abuse of process or harassment, just as defendants' appeal of this court's earlier decision against them is neither harassment of plaintiff nor an abuse of process. Further, "New York does not recognize a common-law cause of action to recover

damages for harassment." Santorò v Town of Smithtown, 40 AD3d 736, 738 (2d Dept 2007).

Defendants' fourth counterclaim for libel shall be dismissed, based on the unchallenged attorney affirmation that defendants' voluntarily withdrew this counterclaim orally at a conference before the court.

Defendants' fifth counterclaim for interference with contractual relations shall be dismissed. Kronos, Inc. v AVX Corp. (81 NY2d 90 [1993]) states the elements necessary to maintain a claim for tortious interference of contract. As enunciated by the Court, these elements are: (1) the existence of a contract between defendant and a third party, (2) plaintiff's knowledge of the contract, (3) plaintiff's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to defendant. Here, there was no contract between defendants and a third-party that was breached because of plaintiff's interference. Therefore, defendants cannot maintain this counterclaim. NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614 (1996).

Lastly, that branch of plaintiff's motion seeking to dismiss defendants' sixth counterclaim for fraud and fraudulent misrepresentation is granted.

In their counterclaim, defendants allege that plaintiff entered into the shareholder's agreement without ever intending

to fulfill his contractual obligations. Defendants' allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). Further, "the mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud." Modell's N.Y. Inc. v Noodle Kidoodle, Inc., 242 AD2d 248, 249 (1st Dept 1997); see also 767 Third Avenue LLC v Greble & Finger, LLP, 8 AD3d 75 (1st Dept 2004).

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion seeking summary judgment on the first cause of action and entering judgment in his favor in the amount of \$66,876.95, plus interest, is DENIED; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss defendants' first counterclaim is DENIED; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss defendants' second through sixth counterclaims is GRANTED and the second through sixth counterclaims are DISMISSED; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a pre-trial conference on February 7, 2012 at 2:30 P.M.

This is the decision and order of the court.

Dated: January 11, 2012

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES

FILED

JAN 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**