

Prassakos v Greek Orthodox Ladies Philoptochos Socy.

2012 NY Slip Op 33465(U)

May 21, 2012

Sup Ct, Bronx County

Docket Number: 306760/11

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.

C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

DIAMOND PRASSAKOS,

Index No. 306760/11

Plaintiffs,

DECISION/ORDER

-against-

Present:

HON. KENNETH L. THOMPSON, Jr.

GREEK ORTHODOX LADIES PHILOPTOCHOS SOCIETY, GREEK ORTHODOX ARCHDIOCESE OF AMERICA, ARCHDIOCESE BENEFITS COMMITTEE, REV. FR. JAMES ROUSAKIS, REV. FR. COSTAS PAVLAKOS, REV. FR. STEPHEN CALLOS, REV. FR. CHRIS KERHULIS, REV. FR. JAMES T. PARIS, REV. FR. STRATTON DOROZENSKI, REV. FR. WILLIAM M. CHRIST, REV. FR. DIMITRIOS MORAITIS, REV. FR. ANGELO PAPPAS, REV. FR. MICHAEL KONTOGIORGIS, MR. JERRY DIMITRIOU, MARY DOUVRAS, APHRODITE SKEADAS, HELEN LAVORATA, ARLENE SIAVELIS, MARIA STAVROPOULOS, KATHY GABRIEL, ELAINE CLADIS, JOANNE KAKOYINNIS, MARTHA STEFANIDAKIS, MARIA SKEADAS, JOANNE STAVRAKAS, ROSEMARY NIKAS, PHILIPPA CONDAKES, KERRY AGATHOKLIS, BARBARA LATSONAS, ELENI ZAFERES and VALERIA ROUMELIOTIS,

Defendants.

REF
BRONX
MAY 25 2012

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) and (11) dismissing the Complaint is:

GRANTED as to the Fifth and Seventh Causes of Action, specifically directed at "All Defendants," as to Defendant GREEK ORTHODOX ARCHDIOCESE OF AMERICA (Archdiocese), and

GRANTED as to the Fifth and Seventh Causes of Action, specifically directed at "All Defendants," as to Defendants APHRODITE SKEADAS, ARLENE SIAVELIS, MARIA STAVROPOULOS, KATHY GABRIEL, ELAINE CLADIS, JOANNE KAKOYINNIS, MARTHA STEFANIDAKIS, MARIA SKEADAS, JOANNE STAVRAKAS, ROSEMARY NIKAS, PHILIPPA CONDAKES, KERRY AGATHOKLIS, BARBARA LATSONAS, ELENI ZAFERES and VALERIA ROUMELIOTIS (Board) who represent GREEK ORTHODOX LADIES PHILOPTOCHOS SOCIETY's Board of Directors, and

GRANTED as to the Seventh Causes of Action, specifically directed at "All Defendants," as to Defendants ARCHDIOCESE BENEFITS COMMITTEE (Committee), and Defendants REV. FR. JAMES ROUSAKIS, REV. FR. COSTAS PAVLAKOS, REV. FR. STEPHEN CALLOS, REV. FR. CHRIS KERHULIS, REV. FR. JAMES T. PARIS, REV. FR. STRATTON DOROZENSKI, REV. FR. WILLIAM M. CHRIST, REV. FR. DIMITRIOS MORAITIS, REV. FR. ANGELO PAPPAS, REV. FR. MICHAEL KONTOGIORGIS, MR. JERRY DIMITRIOU and MARY DOUVRAS the Committee's Members (Members), and

GRANTED as to the Fourth Cause of Action, specifically directed at "Jerry Dimitriou and Helen Lavorata," as to Defendant MR. JERRY DIMITRIOU only, and

DENIED as to the Fifth Cause of Action regarding the Committee and its Members, including Defendant JERRY DIMITRIOU.

To forestall confusion, the First, Second, Third, Fifth, Sixth and Seventh Causes of Action specifically directed at "Philoptochos" and "All Defendants" currently stands as to Defendant GREEK ORTHODOX LADIES PHILOPTOCHOS SOCIETY, who

Defendants apparently concede was Plaintiff's employer. (Def Memo Law at 6; Compl at ¶¶ 4, 9 and 68). Defendants' application is also devoid of any arguments in favor of dismissing these Causes of Action as to this particular Defendant.

Background

Plaintiff enrolled in her employer's Pension Plan in 2007. She claims, however, that she was misinformed about her eligibility and should have been allowed to enroll in the Plan when she began her employment in 2002. She is now suing for 1) Breach of Contract, 2) Breach of the Covenant of Good Faith and Fair Dealing, 3) Unjust Enrichment, 4) Tortious Interference with Contract, 5) Breach of Fiduciary Duty, 6) Constructive Discharge and 7) Violations of Labor Law § 198.

Arguments

Defendants are moving to dismiss the entire Complaint as to the Board on the grounds that they are immune from suit based on NY Not-For-Profit Law § 720-a.

Defendants are moving to dismiss Count Four as to JERRY DIMITRIOU on the grounds that he had no contact or relationship with her prior to 2007 and Plaintiff's does not allege any conduct on his part indicating that intentionally interfered with any contract involving her.

Defendants are moving to dismiss Count Five as to the Archdiocese, the Committee, its Members, and the Board on the grounds that Plaintiff failed to allege that they committed any misconduct or that any alleged misconduct caused her damages.

Defendants are moving to dismiss Count Seven as to the Archdiocese, the Committee, its Members, and the Board on the grounds that they were not her "employer" and that Plaintiff has failed to allege a cognizable claim under that § 198.

Dismissal

If the motion for dismissal under CPLR § 3211(a)(7) is made on the face of the pleading alone, then it assumes, *arguendo*, the truth of all the allegations of the cause of action or defense and everything reasonably to be implied therefrom, but when ... the moving party offers matter extrinsic to the pleading the court need not assume the truthfulness of the pleaded allegations, the criterion to be applied in such a case being whether the opposing party actually has a cause of action or defense, not whether he has properly stated one.

Rappaport v. International Playtex Corp., 43 AD2d 393, 394-95.

However,

[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action. Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.

Sokol v Leader, 74 AD3d 1180, 1182 (citations omitted)

Immunity

The Complaint is dismissed as to the Board since it is immune from suit.

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of

the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust.

CPLR § 3211(a)(11).

Except as provided in sections seven hundred nineteen and seven hundred twenty of this chapter, and except any action or proceeding brought by the attorney general or, in the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of such trust, no person serving without compensation as a director, officer or trustee of a corporation, association, organization or trust described in section 501(c)(3) of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability.

N-PCL § 720-a. "List of exempt organizations. The following organizations are referred to in subsection (a): ... Corporations ... organized and operated exclusively for religious, ... purposes" 26 USC § 501(c)(3).

Plaintiff alleges in her states in her Complaint that Philoptochos is a 501(c)(3) non-profit corporation. (Compl at ¶ 4.) She also lists the individual Defendants she alleges make up that entities Board of Directors. (*Id.* at ¶ 5.) Joanne Kakyoyiannis, Philoptochos's Treasurer, avers that the Board's current and former members are not compensated for their services as per the by-laws (J. Kakoyiannis Aff at ¶¶ 1-3). See

Thome v. Alexander & Louisa Calder Found., 70 AD3d 88, 112 (finding that “the CPLR does not require that it be the CFO who submits a letter. Rather, the CPLR states only that the evidence ‘may consist’ of a letter from the CFO”). These allegations, coupled with the Affidavit, form a sufficient basis to grant Defendants’ application on this issue.

Plaintiff’s claim that this immunity does not apply because the Board allegedly failed to act in good faith is an insufficient basis to deny Defendants’ request given the pleading requirement that Plaintiff must allege that the Board’s conduct was “grossly negligent” or “intended” to cause her harm, which she failed to do. *See Thome*, 70 AD3d at 112 (dismissing the Complaint on the grounds that “the complaint fail[ed] to provide any specific allegations supporting the bare suggestion that the individual defendants acted with gross negligence or with an intent to harm”); *Pontarelli v. Shapero*, 231 AD2d 407.

NY Labor Law

Plaintiff’s Seventh cause of action alleging violations of NY Labor Law Art VI § 198 is dismissed as to the Archdiocese, the Board, the Committee and its Members because they were not Plaintiff’s employer. Section 198 is “expressly appl[ied] to employers and employees.” *Vysovsky v. Glassman*, 2007 US Dist LEXIS 79725, *37. Plaintiff alleges in her Complaint that: she “is a former employee of Defendant Greek Orthodox Ladies Philoptochos Society (“Philoptochos”)” (Compl at ¶ 1); she “became employed by Philoptochos in 2002” (*id.* at ¶ 9); and “Philoptochos was [her] employer” (*id.* at ¶¶ 63, 68). These allegations were further conceded by her counsel. (See Pl Memo Law at 16.) Plaintiff has not stated a claim as to the aforementioned Defendants

because the NY Labor Law would not apply to them under the facts alleged.

Tortious Interference

Plaintiff's Fourth Cause of Action is dismissed as to Defendant MR. JERRY DIMITRIOUS because she has failed to allege sufficient facts to state a claim of tortious interference on his part.

In order to establish a cause of action for tortious interference with his contractual relations [with a third-party], plaintiff [is] required to allege: (1) the existence of a valid contract between him and [a third-party]; (2) defendants' knowledge of that contract; (3) defendants' intentional procuring of the breach of that contract; and (4) damages.

Burrowes v. Combs, 25 AD3d 370, 373. "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim, a plaintiff must support his claim with more than mere speculation." *Ferrandino & Son, Inc. v Wheaton Bldrs., Inc.*, LLC, 82 AD3d 1035, 1036 (citations omitted).

Plaintiff alleges that she "had a contract with Philoptochos." (Compl at ¶ 36.) She further alleges that "Philoptochos breached the contract by its aforementioned actions." (*Id.* at ¶ 38.) The Court presumes that the alleged contract was to provide Plaintiff access to the Plan as a condition of her employment (see *id.* at ¶ 14) and that Philoptochos breached this contract by misinforming her about her eligibility in 2002 (see *id.* at ¶ 9; see also PI Memo Law at 21). Plaintiff alleges that Defendant DIMITRIOU "intentionally induced Defendant Philoptochos to breach its contract with [her]; alternatively, the intentional acts of Defendant Dimitriou ... rendered performance

of the contract impossible.” (*Id.* at ¶ 52.) She fails, however, to allege anything more than rank speculation that Defendant DIMITRIOU intentionally procured Defendant PHILOPTOCHOS’s alleged breach in 2002. See *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 NY2d 276, 280 (finding that “the interference must be intentional, not merely negligent . . .”).

Fiduciary Duty

Plaintiff has stated a claim for breach of breach of fiduciary duty as to the Committee and its Members, including Defendant DIMITRIOU. “To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct.” *Burry v Madison Park Owner LLC*, 84 AD3d 699-700 (citations omitted). “A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 (citations omitted).

The “booklet” outlining the Pension Plan states that: “lay employees are eligible immediately upon commencement of full-time employment” (F. M. Curran Aff Opp at Ex B at 4); the Benefits Committee, which consists of “six members,” “directs and manages” the “Benefits Program for... lay employees” (*id.* at 3); and it “was written to summarize the benefits, rights and obligations under the Plan” (*id.* at 10).

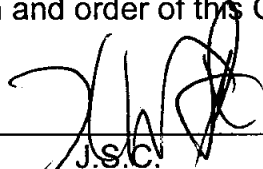
When reading the Complaint in its totality, the Court infers that Plaintiff is alleging that: 1) the Committee and its Members had a duty to advise her of the “benefits, rights

and obligations” of the Plan; 2) they failed to do so; and 3) this failure caused her to miss out on five-years of participation. This is enough to state a claim for breach of a fiduciary duty as to the Committee and its Members, including Defendant JERRY DIMITRIOU, the alleged supervisor of the Benefits Office. See *Sheroff v. Dreyfus Corp.*, 50 AD3d 877-78 (holding that “[a] motion to dismiss pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law”) (citations omitted).

The foregoing shall constitute the decision and order of this Court.

MAY 21 2012

Dated: _____



J.S.C.

KENNETH L. THOMPSON, JR.