

People v Conlin

2013 NY Slip Op 32895(U)

May 16, 2013

Supreme Court, New York County

Docket Number: 451017/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 451017/2012
PEOPLE OF THE STATE OF NEW
vs.
CONLIN, KELLI
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1, 2, 3
Answering Affidavits — Exhibits No(s) 4
Replying Affidavits No(s) 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ADDITIONAL DECISION ORDER

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

Dated: 5/16/13

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

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

KELLI CONLIN,

Defendant/Third-Party
Plaintiff,

-against-

NARAL PRO-CHOICE NEW YORK, INC., a New York
Not-for-Profit Corporation, ET. AL.,

Third-Party Defendant.
-----X

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

Index No.
451017/2012

**DECISION
and ORDER**

Mot. Seq 1, 2, 3

This is an action commenced by The People of the State of New York, by the Attorney General of the State of New York (the "Attorney General"), against defendant Kelli Conlin ("Conlin"), the former executive director of NARAL Pro-Choice New York, Inc., a New York not-for profit corporation, and its charitable affiliate, the National Institute for Reproductive Health ("NIRH"), based on Conlin's misappropriation of charitable funds for her personal gain and benefit.

Conlin served as an Executive Director and later President of both NARAL and NIRH from 1992 until her termination in January 2011. Conlin pled guilty on June 22, 2011 to one felony count of falsifying business records in the first degree, a Class E felony, in New York State Supreme Court, Criminal Term. As part of her plea agreement, Conlin was ordered to pay restitution of \$75,000 to NIRH. Plaintiff

commenced this action against Conlin in order to recover from her the funds she misappropriated for her own personal gain and benefit beyond the restitution amount, and asserts the following causes of action against her: (1) breach of fiduciary duty to NARAL; (2) waste and misappropriation of NIRH's charitable assets; and (3) failure to properly administer charitable assets of NIRH.

Conlin filed a Third-Party Complaint, asserting causes of action for breach of fiduciary duty against NARAL and NIRH (Count IIA), the Estate of Irwin Schneiderman (Count IIB) and directors Jill Lafer, Irene Frary and Regina Glocker (Count IIC); hostile work environment against NARAL and NIRH (count V); intentional and/or negligent infliction of emotional distress against NARAL and NIRH (Count VI); and breach of contract against NARAL and NIRH (Count VII). In the caption of her Third-Party Complaint, while Conlin named 35 current and former directors of NARAL and NIRH, she only asserted claims against four of them (Jill Lafer, Irene Frary, Regina Glocker, and the late Irwin Schneiderman through his estate).

Mot Seq. #1

Third-Party Defendants NARAL Pro-Choice, New York, Inc. ("NARAL"), National Institute for Reproductive Health ("NIRH"), Catherine Steck, Jennifer Price, Fiona Rubin, Jill Braufman, Leslie Gimbel, Raquel Levin, Jennifer Gilbert, Tiffany Moller, Elizabeth Rosenman, Regina Glocker, Irene Frary, Lorna Brett Howard, Jill Lafer, Donna Bascom, Debra Cooper, Kathy Green, Lissa Hirsch, Susan Wolfson, Sally Minard and the Estate of Irwin Schneiderman (collectively, "the Moving Third-Party Defendants") move for an Order dismissing defendant/third party plaintiff Kelli Conlin's third-party complaint as against them pursuant to CPLR 3211(a)(3), (7), and (11). Third-party defendant Sara Kovner cross moves for an Order dismissing Conlin's third-party complaint against her, and joins the motion to dismiss brought by Moving Third-Party Defendants.

Moving Third-Party Defendants submit the affidavit of Daniel Brooks and Andrew Stern, the Chief Operating Officer of NARAL and its affiliated charitable organization, NIRH. Sten confirms that the directors of NARAL and NIRH have not received any compensation at any time during which Conlin was employed by those

organizations.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(3) the party asserting the cause of action has no legal capacity to sue;
or

(7) the pleading fails to state a cause of action; or

(11) the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law . . .

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

In her Third-Party Complaint, while Conlin named 35 directors in the caption, she only asserted claims against four of them (Jill Lafer, Irene Frary, Regina Glocker, and the late Irwin Schneiderman through his estate). Apart from being named in the caption, the only factual allegations asserted against the 31 other directors appears in the “Parties” section. That section provides a general description of the board’s duties to protect assets, and alleges that these directors “partook in various events in which the organization paid.” These allegations, even if true, do not state a cause of action against third party defendants Catherine Steck, Jennifer Price, Fiona Rubin, Jill Braufman, Leslie Gimbel, Raquel Levin, Jennifer Gilbert, Tiffany Moller, Elizabeth Rosenman, Lorna Brett Howard, Donna Bascom, Debra Cooper, Kathy Green, Lissa Hirsch, Susan Wolfson, Sally Minard, and Sarah Kovner. Dismissal of the Third-Party Complaint against these individuals is therefore warranted.

In Count II of her third-party Complaint, Conlin asserts a causes of action for breach of fiduciary duty against NARAL and NIRH (Count IIA), the Estate of Irwin Schneiderman (Count IIB) and directors Jill Lafer, Irene Frary and Regina Glocker (Count IIC). The elements of a claim for breach of fiduciary are: (1) defendant owed Plaintiff a fiduciary duty; (2) defendant committed misconduct; (3) and plaintiff suffered damages caused by that misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D. 3d 699, 700 [1st Dept 2011].

Conlin alleges that “[a]s employers, NARAL and NIRH owed a duty of loyalty and care to employees, specifically to their President, Ms. Conlin . . .,” and that NARAL and NIRH, in failing to “inform Ms. Conlin of concerns about her conduct and allow her to explain her conduct or to amend her conduct in conformity with the organization’s expectations,” breached their fiduciary duty to her, as an officer. This claim fails as a matter of law as against NARAL and NIRH in their capacity as Conlin’s employers because under New York law, employers do not owe their employees a fiduciary duty (*see Rather v. CBS Corp.*, 68 A.D. 3d 49, 55 [1st Dept 2009]). Additionally, Irwin Schneiderman, Jill Lafer, Irene Frary, and Regina Glocker, as directors of NARAL and NIRH, owed fiduciary duties to NARAL and/or NIRH to protect the corporation’s interests, not to Conlin to protect her against her own wrongdoing. Furthermore, Conlin, as a former and not current officer of NARAL and NIRH, lacks standing to bring a derivative claim for breach of fiduciary duty on behalf of those organizations. *See* NCPL §720(a); *Freedom Calls Found v. Bukstel*, No. 05 cv 5460 (SJ) (VVP), 2006 WL 845509, at *59 (E.D.N.Y. March 3, 2006)(holding that defendant/third party plaintiff, a former officer and director of plaintiff not-for-profit corporation, lacked standing to bring action to sue third-party defendant directors of plaintiff for breach of fiduciary duties where defendant “filed his counterclaims in this action [at a time] when he was no longer affiliated with Plaintiff.”). Conlin’s Third-Party Complaint does not allege any other factual allegations that even if true, would support a claim for breach of fiduciary duty against the named defendants.

Count V of the Third Party Complaint alleges a hostile work environment against NARAL and NIRH. “A ... hostile work environment exists [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” (*Forest v. Jewish Guild for the Blind*, 3

NY3d 295[2004]). Here, the third party Complaint alleges that Conlin “suffered distress, emotional distress, humiliation and the fear of reprisals because her workplace was permeated with intimidation, ridicule and insult from her board of directors.” Conlin alleges that she “experienced profound ridicule from board members concerning her appearance” and specifically sets forth the alleged incidents:

“a. October 2006: the organization moves into Park Avenue South office. Board Chairs install a small gym in order to ‘help [Ms. Conlin] lose weight and get in shape,” says Board Chair Jill Lafer.

b. Repeatedly at various events, Irwin Schneiderman makes remarks that Ms. Conlin had ‘gained weight’ and that ‘You need to lose weight in order to better represent the organization.’ One specific occurrence happens in September, 2008, when the organizations are co-hosts at an event with Planned Parenthood Federation. Mr. Schneiderman compared Ms. Conlin to Cecile Richards (the Director of Planned Parenthood), saying that she was more appropriately slim than Ms. Conlin. Ms. Conlin related the shame and discomfort she felt at these comments to several staff and other Board members.

c. April, 2008. At the event where Lisa Perry was honored and had helped to ‘style’ Ms. Conlin for the fundraising luncheon, Ms. Conlin’s Board Chairs raved about her appearance, but she overheard mocking jokes about her Timex watch, which she had forgotten to take off for the event, from those at her table.

d. May, 2008. Jill Lafer offers to take Ms. Conlin shopping at Bergdorf Goodman . . .

e. September, 2008. Regina Glocker and Jill Lafer offer to take Ms. Conlin shopping for shoes. “Not good,” said Ms. Glocker, referring to her plain black shoes.

f. December, 2008. Regina Glocker, Jill Lafer and Ms. Conlin met for a dinner at an upper east side steakhouse, and again, the topic of clothing was discussed . . .

g. April, 2009 and April, 2010. Jill Lafer was very focused on what both she and Ms. Conlin would be wearing to the annual luncheon . . .

h. April 2008, 2009, 2010: Many Board members congratulated Ms. Conlin on her dress for the events . . .”

Paragraph 115 of the Third-Party Complaint.

As such, Count V of the Third-Party Complaint states a claim.

Count VI of the Third-Party Complaint alleges intentional and/or negligent infliction of emotional distress against NARAL and NIRH. In order to state a claim for intentional infliction of emotional distress, Plaintiff must allege conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society” (*Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205 [1st Dept. 2002]). Here, Plaintiff alleges that NARAL and NIRH intentionally and/or negligently inflicted emotional distress when they “violated the promise” to Conlin to conceal the circumstances of her termination and “released the financial audit of Ms. Conlin’s expenses to the media before Ms. Conlin had been given an opportunity to see the report, let alone comment [on it].” NARAL and NIRH’s release of the audit does not constitute conduct “so outrageous in character.” As set forth above, NARAL and NIRH did not have a duty to Plaintiff, who had misappropriated funds to protect her from her own misconduct.

Count VII alleges breach of contract against NARAL and NIRH. Conlin, who acknowledges that she is an at-will employee, alleges that NARAL and NIRH “under terms of an implicit employment agreement,” owe her “nearly \$100,000 in unpaid compensation and unreimbursed expenses.” Plaintiff fails to allege any terms and conditions of the “implicit” agreement, and specifically what terms were breached. As a result, this claim is conclusory and fails to state a claim.

Mot. Seq. #2

Third-party defendant Kiwi Partners, Inc. (“Kiwi”), is a New York State Corporation that provides managerial services. Kiwi entered into a letter agreement/contract with NARAL, dated and effective June 18, 2008, to provide managerial assistance and various bookkeeping services. In her third party Complaint, Conlin asserts the following three causes of action against Kiwi based on alleged breaches of the Kiwi-NARAL contract: “Faithless Servant” (Count IA), “Breach of Contract” (Count IIA) and “Professional Malpractice” (Count IVA). Conlin asserts that Kiwi’s “failure to identify mistakes in reporting were the proximate cause of damages to Ms. Conlin.”

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) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Kiwi moves pursuant to CPLR §3211(a)(1), (3), and (7), seeking an Order dismissing the third-party complaint. Kiwi submits the supporting affirmation of Todd Belous, which annexes a copy of the relevant agreement entered between Kiwi and NARAL. Kiwi asserts that dismissal of Conlin’s claims are warranted based on Conlin’s lack of contractual privity and lack of standing and/or legal capacity to sue. Kiwi also contends that the *in pari delicto* defense bars Conlin’s action due to Conlin’s admission of guilt relating to her improper expenditures.

Kiwi is entitled to dismissal as to Conlin’s claims . The three causes of action asserted by Conlin against Kiwi are all premised on the alleged breach of the Kiwi-NARAL contract, which Conlin signed only on NARAL’s behalf as “President.” As Conlin was not personally a party to that contract, she was not in privity with Kiwi

and no exceptions to the privity requirement apply. (see *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d 550, 551 [2nd Dept. 1989]; *Liberty Marble v. Elite Stone Setting Corp.*, 248 A.D.2d 302, 304 [1st Dept. 1998]). Furthermore, Conlin cannot cure the lack of privity by alleging that, as a former employee of NARAL, she is a third party beneficiary of the Kiwi-NARAL Contract. See *Alicea v. City of New York*, 145 A.D. 2d 315 [1st Dept 1988](holding that employees of a corporation were not intended beneficiaries of their former employer's contract with the City of New York)].

Mot. Seq. #3

Third-party defendant Eisman, Zucker, Klein & Ruttenberg, LLP (“Eisman”) served as the auditor and tax-preparer for NARAL, and according to Conlin’s third-party complaint, was responsible for failing to detect Conlin’s purported abuses involving her personal expenses. Conlin alleges a breach of contract (Count IIIB) and professional malpractice claim (Count IVB) against Eisman.

Eisman moves pursuant to CPLR §3211(a)(1), (3), and (7), seeking an Order dismissing the third-party complaint. Eisman submits the supporting affirmation of Gregory W. Gillam, which annexes a copy of the Engagement Letter entered between Eisman, NARAL, and the related Pro-Choice Political Action Committee, Inc., dated June 12, 2006, and a copy of the executed Engagement Letters between the same parties dated June 13, 2007 and July 13, 2008. Eisman also attaches copies of the executed Engagement Letters between Eisman, NARA, Pro-Choice Political Action Committee, and Winning Message Action Fund, dated July 30, 2009 and July 30, 2010.

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) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual

allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Eisman asserts that dismissal of Conlin's third party complaint as plead against Eisman is warranted based on lack of capacity, failure to state a claim, and the doctrine of *in pari delicto*.

Eisman is entitled to dismissal as to Conlin's claims . The causes of action asserted by Conlin against Eisman are all premised on the alleged breach of the contract between Eisman and NARAL. As Conlin was not personally a party to that contract, she was not in privity with Eisman and no exceptions to the privity requirement apply.. (see *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d 550, 551 [2nd Dept. 1989]; *Liberty Marble v. Elite Stone Setting Corp.*, 248 A.D.2d 302, 304 [1st Dept. 1998]). Furthermore, Conlin cannot cure the lack of privity by alleging that, as a former employee of NARAL, she is a third party beneficiary of the contract. See *Alicea v. City of New York*, 145 A.D. 2d 315 [1st Dept 1988](holding that employees of a corporation were not intended beneficiaries of their former employer's contract with the City of New York)].

Wherefore it is hereby

ORDERED that third-party defendants NARAL Pro-Choice, New York, Inc., National Institute for Reproductive Health, Catherine Steck, Jennifer Price, Fiona Rubin, Jill Braufman, Leslie Gimbel, Raquel Levin, Jennifer Gilbert, Tiffany Moller, Elizabeth Rosenman, Regina Glocker, Irene Frary, Lorna Brett Howard, Jill Lafer, Donna Bascom, Debra Cooper, Kathy Green, Lissa Hirsch, Susan Wolfson, Sally Minard, the Estate of Irwin Schneiderman, and Sara Kovner's motion to dismiss the defendant Kelly Conlin's Third-Party Complaint is granted to the extent that at all claims in the Third-Party Complaint are dismissed with the exception of Count V (hostile work environment) against NARAL and NIRH; and it is further

ORDERED that third-party defendant Kiwi Partners, Inc.'s motion to dismiss defendant Kelly Conlin's Third-Party Complaint is granted, and the Third-Party Complaint is dismissed against Kiwi Partners, Inc.; and it is further

ORDERED that third-party defendant Eisman, Zucker, Klein & Ruttenberg, LLP's motion to dismiss defendant Kelly Conlin's Third-Party Complaint is granted, and the Third-Party Complaint is dismissed against Eisman, Zucker, Klein & Ruttenberg; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

5/16/13



EILEEN A. RAKOWER, J.S.C.