Feng v Wang
2014 NY Slip Op 31970(U)
June 9, 2014
Sup Ct, Queens County
Docket Number: 703290/2013
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

FENG, XIAOWEN (SHERRY) AND
WANG (SHELLY) YING CHUAN,

Plaintiffs,

-against-

WANG, DING HO,

Defendant.

Index No: 703290/13

Motion Date: 1/27/14

Motion Seq. No.: 1

ORIGINAL

The following numbered papers read on this motion by defendant Wang Ding-Ho s/h/a Wang, Ding-Ho pursuant to CPLR 3211(a)(1) and (7) to dismiss the first, second and third causes of action in the complaint insofar as asserted against him.

FILED
JUN 10 2014
COUNTY CLERK
QUEENS COUNTY

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	4, 6-9
Answering Affidavits - Exhibits	16-19
Reply Affidavits	20

Upon the foregoing papers it is ordered that the motion is determined as follows:

Defendant, who allegedly is experienced in selling life insurance and written books on related financial topics, created an educational course to teach salespersons effective methods of selling life insurance. Plaintiffs allegedly sought to take advantage of his experience and reputation, by becoming members of the "Elite Group of Ding Ho Wong" ("Elite Group"), a group led by defendant for the purpose of selling life insurance. Plaintiffs allege that they and nonparties Robert Jin, the president and owner of "BQ of NY," Cui Hao Lin a/k/a Linda and Daniel Xu (hereinafter the non-parties), entered into an agreement with defendant whereby defendant was to provide plaintiffs and the non-parties with training, and conduct seminars in the New York area to attract potential customers, and the plaintiffs, defendant, and the non-parties, as members of the Elite Group, were to share in the commissions earned in connection with the closing of sales of life insurance policies to such

customers. Under the agreement, plaintiffs and the non-parties allegedly were to pay 100% of the costs of advertising the seminars, the rental of rooms in which to hold the seminars, and defendant's books and pamphlets, and 50% of all other costs, incurred by defendant whenever he visited or stayed in New York, including but not limited to airplane tickets, hotel bills, food bills and local transportation. Defendant admits that he conducted seminars in New York in November 2012 and March 2013, with the Elite Group, and members of the group, other than plaintiffs, closed multiple sales of life insurance policies. He contends he had received complaints about plaintiffs from prospective customers, and consequently decided to terminate his relationship with plaintiffs, and sent an email to the Elite Group notifying them of his decision.

Plaintiffs assert as a first cause of action that they fulfilled their obligations under the agreement by paying, from November 2012 through April 2013, "via BQ of NY," their portion of the advertising expenses, rents for seminar rooms and defendant's personal travel expenses, but defendant breached the agreement by unilaterally terminating their membership in the Elite Group without just reason or compensation, by the email notification. Plaintiffs allege they suffered monetary damages, including loss of profits in an amount exceeding $30,000.00.

Plaintiffs assert a second cause of action based upon unjust enrichment, alleging that defendant has been unjustly enriched and benefitted from their work, advertising and payments made to promote defendant's reputation in the insurance market, and they are entitled to be reimbursed in the amount of $10,660.00.

As a third cause of action for defamation, plaintiffs assert that defendant has libeled them by publishing an email to other persons in which he described plaintiffs as having a "Midas broken touch," and their marketing ability as "changing clients to 'frozen ice marketing.' " Plaintiffs annexed a copy of the agreement and email, written in the Chinese language, along with a copies of an English translation of such documents, as exhibits to the complaint. Plaintiffs seek a judgment awarding monetary damages, and enjoining defendant from doing business under the name of "Elite Group of Ding Ho Wong" or a similar name.

In lieu of answering the complaint, defendant moves to dismiss the causes of action asserted in the complaint pursuant to CPLR 3211(a)(1) and (7). Defendant states he "accepts" for the purpose of his motion only, the English translations of the agreement and email which were annexed as exhibits to the complaint.

Plaintiffs oppose the motion.

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634 [2d Dept 2013]). " 'A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" ' " (*Sullivan v State of New York*, 34 AD3d 443, 445 [2d Dept 2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d at 88)" (*Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d at 87).

Defendant asserts plaintiffs have failed to state a cause of action for breach of contract against him because plaintiffs are not parties to the agreement upon which plaintiffs predicate their claim. He also asserts that he and BQ of New York Insurance General Agency (BQ of NY) entered into the agreement (attached as an exhibit to plaintiff's complaint), and that plaintiffs are not parties to it. According to defendant, plaintiffs are employees of BQ of NY.

The agreement, however, does not utterly refute plaintiffs' claim that they are parties to it (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Leon v Martinez*, 84 NY2d 83, 87). The agreement, in relevant part, provides that:

> "1. All the fees and costs incurred by DingHo Wang (Party A)'s lecture/class activities are split even between Party A and Party B, 50% for each. Party B consists of five persons and BQ of NY.
>
> 2. After lectures, the acquired leads are shared by the 5 persons within Party B...."

The agreement also provides that it becomes effective when "it is signed by both parties." It further provides "[s]igned [b]y: DingHo Wang, Party A" and "Party B: BQ of NY-Robert Jin, Daniel Xu[,] Cuihao Lin[,] Xiaowen Feng[,] YingChuan Wang[,] Zhihui

Tang.[1]" Such provisions indicate that the agreement is between "Party A" and "Party B," but raise a question of fact as to whether plaintiffs are among the five persons included within "Party B," and therefore are parties to the agreement. Defendant's affidavit does not qualify as "documentary evidence" for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1) (*see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807 [2d Dept 2012]; *Fontanetta v John Doe 1*, 73 AD3d 78, 85-86 [2d Dept 2010]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]).

Defendant also asserts the complaint fails to state a cause of action against him for breach of contract based upon his termination of plaintiffs' participation in the Elite Group. He asserts the agreement upon which plaintiffs predicate their claim, does not provide for a definite term, and therefore, he was free to terminate any contractual relationship with plaintiffs at any time.

The agreement does not provide for any agreed upon term length, an identifiable termination date or particular undertaking to be achieved (*see Gelman v Buehler*, 20 NY3d 534 [2013]), or contain any limitation or restriction on defendant with respect to his unilateral termination of the agreement . Thus, the allegation that defendant sent an email notification terminating plaintiffs' membership in the Elite Group does not constitute a breach of the agreement. Nor have plaintiffs alleged that they earned a share of the commissions as a result of their having closed sales of life insurance policies to attendees of the November 2012 or March 2013 seminars, but have been wrongfully deprived of the commissions by defendant. Under such circumstances, plaintiffs have failed to state a cause of action for breach of contract.

With respect to the second cause of action for unjust enrichment, which is a quasi-contract claim, the elements are "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]; *see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Plaintiffs make no claim that they had a fiduciary relationship with defendant, but rather allege the parties entered into an express agreement. The agreement does not provide for reimbursement or refund of expenses paid by plaintiffs, including in the event no commissions were earned by plaintiffs. The second cause of action for unjust enrichment thus is not viable where plaintiffs have failed to allege facts which would demonstrate it is against equity and good conscience for

---

[1] The agreement bears signatures of Ding Ho Wang, Robert Jin, Daniel Xu, Cuihao Lin, Xiaowen Feng and Yingchuan Wang, but not of Zhihui Tang.

defendant to retain the benefit of plaintiffs' having paid his travel expenses, purchased his services or materials, or paid the expenses in holding seminars in New York.

Defendant asserts the third cause of action for defamation fails to state a cause of action insofar as the statements contained within the email annexed to the complaint constitute his opinion, and as such, are constitutionally protected as free speech.

On a motion to dismiss a cause of action in which written statements are alleged to be false and defamatory, the legal issue for the court is whether the contested statements are reasonably susceptible of a defamatory connotation (*see Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074 [1997]; *Armstrong v Simon & Schuster*, 85 NY2d 373 [1995]). With regard to whether an opinion is actionable, the key issue to decide is whether the challenged statements reasonably appear to contain "assertions of objective fact" (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 243 [1991], *cert denied* 500 US 954 [1991]). The issue of whether an objective fact is asserted is resolved by deciding whether the statement is verifiable as either true or false. If a statement is not verifiable, then a plaintiff cannot prove it false, and the statement cannot be actionable (*see generally Milkovich v Lorain Journal Co.*, 65 Ohio App 2d 143 [1979], *cert denied* 449 US 966 [1980]).

The statements that plaintiffs have a "Midas broken touch," and their marketing ability is like "changing clients to 'frozen ice marketing' " have no discernable meaning and certainly are not statements of fact. At the most, they appear to be expressions of personal opinion which are not reasonably capable of defamatory meaning (*see Jessel Rothman, P.C. v Sternberg*, 207 AD2d 438 [2d Dept 1994]; *see also Atlantic St. John, LLC v Yeomans*, 26 AD3d 266 [1st Dept 2006]).

Accordingly, the motion by defendant to dismiss the 1st, 2nd and 3rd causes of action asserted against him in the complaint is granted (CPLR 3211[a][7]) and the complaint is dismissed.

Dated: June 9, 2014

J.S.C.