Bohemian Citizens' Benevolent Socy. of Astoria, Inc. v Samkova
2014 NY Slip Op 33114(U)
May 6, 2014
Supreme Court, Queens County
Docket Number: 11344/13
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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BOHEMIAN CITIZENS' BENEVOLENT SOCIETY OF ASTORIA, INC.,

Plaintiff(s),

- against -

JANA SAMKOVA and VIKTOR HRUSKA,

Defendant(s).

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Index No.:11344/13

Motion Date:10/29/14

Motion Cal. No.: 27

Motion Seq. No: 1

The following papers numbered 1 to 9 read on this motion by defendant Viktor Hruska for an order dismissing the complaint pursuant to CPLR 3211(a)(7).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

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

Plaintiff Bohemian Citizens' Benevolent Society of Astoria, Inc. ("Bohemian") commenced the within action by filing a summons with notice on June 12, 2013, and thereafter served a verified complaint. Plaintiff, in its complaint, alleges that defendant Jana Samkova ("Samkova") was a member of Bohemian and served as its treasurer from 2010 through April 2012, and thereafter resigned on October 26, 2012 and was removed by the Board of Directors on October 30, 2012. Plaintiff further alleges that defendant Viktor Hruska ("Hruska") was employed by Bohemian in the Maintenance and Repair Facility from 2009 until August 21, 2012, when he was terminated for cause; that Jana Samkova, (Hruska's former wife or present partner) while serving as Bohemian's treasurer, altered Hruska's salary from an hourly rate of $17.00 per hour to $19.55 per hour, and then to $1,380.00 per week in September 2001, together with unauthorized payments, without discussing said increases with Bohemian's Board of Directors or documenting it in

the minutes; that Samkova, without the approval of Bohemian's Board of Directors or its General Manager, approved payment of credit card expenses and opened unauthorized credit cards for herself and Hruska, resulting in unlawful charges of at least $68,000 for May through December 2010; of at least $113,000 for 2011; and of at least $41,000 for the period of January through March 2012; and that Samkova approved payment of improper travel expenses for herself and Hruska in the amount of $9,000.

Defendant Samkova has served an answer and interposed affirmative defenses and counterclaims, and served a supplemental summons with respect to the counterclaim defendants. Defendant Viktor Hruska, in this pre-answer motion, seeks to dismiss the complaint on the grounds that it fails to state a cause of action, pursuant to CPLR §3211(a)(7).

It is well-established that on a motion to dismiss pursuant to CPLR §3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2nd Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2nd Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]).

"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 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.; accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,

CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

A complaint adequately states a cause of action for breach of contract when it alleges the existence of a contract; the plaintiff's performance under the contract; the defendant's breach of that contract; and damages as a result of the breach (*W. Park Assoc., Inc. v Everest Natl. Ins. Co.*, 113 AD3d 38 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122 [2d Dept 2011]; *JP Morgan Chase v J.H. Electric*, 69 AD3d 802 [2d Dept 2010]). Here, plaintiff, in its complaint only alleges that Viktor Hruska was its employee for the period of 2009 until August 21, 2012. Plaintiff does not allege whether Hruska was employed pursuant to a written or oral agreement, but asserts in opposition to the within motion that the contract was "unwritten." Plaintiff does not allege work that defendant Viktor Hrushka performed under the oral employment agreement, does not allege any specific contractual agreement Hruska allegedly breached, and does not identify the manner in which Hruska allegedly breached the employment agreement.

Contrary to plaintiff's counsel's assertions, the complaint does not allege that Hruska acted in concert with Samkova, and does not allege the existence of any agency relationship between the defendants. In addition, the complaint does not allege that he knew that Samkova had allegedly acted without the consent and approval of the Board of Directors or the General Manager. Finally, the complaint does not allege that Hruska actually received an increase in salary and benefits. Plaintiff's allegations, thus, are insufficient to state a claim against Viktor Hruska for breach of contract.

To state a cause of action to recover damages for breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *see United States Fire Ins. Co. v Raia*, 94 AD3d 749, 751[2d Dept 2012]). A breach of fiduciary duty cause of action must be pleaded with the particularity required by CPLR §3016(b) (*see United States Fire Ins. Co. v Raia*, 94 AD3d at 751; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]; *Chiu v Man Choi Chiu*, 71 AD3d 621, 623 [2d Dept 2010]). Here, although the complaint alleges that Hruska breached his fiduciary duty to the plaintiff, it is devoid of any facts that would give rise to a fiduciary relationship. Employment relationships by themselves do not create fiduciary relationships (*see Rather v CBS Corp.*, 68 AD3d

49, 55 [1st Dept 2009]; *Schenkman v New York Coll. Of Health Professionals*, 29 AD3d 671, 672 [2d Dept 2006]; *Cuomo v Mahopac Natl. Bank*, 5 AD3d 621, 622 [2d Dept 2004], *lv denied* 3 NY3d 607 [2004]). Finally, a claim for breach of fiduciary duty which fails to allege conduct by a defendant in breach of a duty other than, and independent of, that contractually established between the parties, is duplicative and cannot be maintained *(see Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628 [3d Dept 2006]; *Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004]).

"'The essential elements of a cause of action for fraud are "representation of a material existing fact, falsity, scienter, deception and injury' " (*Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept 2006], *quoting New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see Daly v Kochanowicz*, 67 AD3d 78, 89 [2d Dept 2009]). A cause of action sounding in fraud must allege that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to its own detriment (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]; *Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 900 [2d Dept 2013]).

In addition, CPLR §3016 provides that, in pleading a cause of action to recover damages for fraud, the circumstances constituting the alleged wrong must be stated in detail (*see* CPLR §3016 [b]). "Although there is certainly no requirement of 'unassailable proof' at the pleading stage, the complaint must 'allege the basic facts to establish the elements of the cause of action'" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, [2009] [citation omitted]). The basic facts to be alleged include "the individuals who made the misrepresentations, when they were made and the content of the misrepresentations." (*Barker v Time Warner Cable, Inc.*, 24 Misc 3d 1213[A], 897 NYS2d 668 [Sup Ct, Nassau County 2009]). Here, the plaintiff has failed to allege the essential elements of a cause of action to recover damages for fraud, including misrepresentation of a material fact, made with knowledge of the falsity, upon which the plaintiff relied to its detriment (*see Robertson v Wells*, 95 AD3d 862, 864 [2d Dept 2012]; *Sargiss v Magarelli*, 50 AD3d 1117, 1118 [2d Dept 2008], *mod* 12 NY3d 527 [2009]).

"To prevail on a claim of unjust enrichment, a party must show 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"

(*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 481 [2d Dept 2009] [internal quotation marks omitted]; *see Robertson v Wells*, 95 AD3d at 864).

"[A] plaintiff's allegation that the [defendant] received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment" (*Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2005]; *see McGrath v Hilding*, 41 NY2d 625, 629 [1977]; *Goel v Ramachandran*, 111 AD3d 783, 791-792 [2d Dept 2013]). Here, the complaint merely asserts in a conclusory fashion, that due to the actions of Samkova, Hruska received higher wages, reimbursement for expenses and other benefits, without the approval of the plaintiff's Board of Directors or General Manager. Plaintiff alleges that Hruska was "unjustly enriched at the expense" of the plaintiff, and should re-pay all amounts. Accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d at 87-88), the complaint fails to state a cause of action to recover damages for unjust enrichment (*see Goel v Ramachandran*, 111 AD3d at 791-792; *Robertson v Wells*, 95 AD3d).

In view of the foregoing, defendant Viktor Hruska's motion to dismiss the complaint in its entirety on the grounds that it fails to state a cause of action, is granted.

Dated: May 6, 2014

JANICE A. TAYLOR, J.S.C

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