

Cassway Contr. Corp. v Beqi
2015 NY Slip Op 30517(U)
April 8, 2015
Supreme Court, New York County
Docket Number: 159330/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CASSWAY CONTRACTING CORP.,

Plaintiff,

- v -

NIKOLIN BEQI and STELA BEQI,

Defendants.
-----X

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

Index No.
159330/2014

**DECISION
and ORDER**

Mot. Seq. 001

This is an action for fraud, breach of contract, and aiding and abetting based on a separation and release agreement (the "Separation Agreement") between a construction company and its former employee. Plaintiff, Cassway Contracting Corp. ("Cassway" or "Plaintiff"), claims to have entered into the Separation Agreement with defendant, Nikolin Beqi ("Nikolin"), Plaintiff's former employee, on or about August 12, 2012. Pursuant to the Separation Agreement, Nikolin allegedly agreed to waive all claims arising from Nikolin's employment with Cassway.

On or about June 26, 2014, Nikolin and his wife, defendant Stela Beqi ("Stela") (and together with Nikolin, "Defendants"), filed an action in Supreme Court, Kings County (the "Kings Action"), for personal injury and loss of consortium arising from a work-related incident that allegedly took place during the course of Nikolin's employment with Plaintiff. Plaintiff claims that Defendants filed the Kings Action as against certain of Plaintiff's clients, including Magnetic Construction Corp. ("Magnetic"), and that Magnetic has demanded indemnification from Cassway in connection with the Kings Action. Plaintiff claims that the Kings Action violates the Separation Agreement, and that Defendants filed the Kings Action as part of a scheme to defraud Plaintiff and circumvent the Separation Agreement.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(4), (a)(7), and 3016(b), dismissing Plaintiff's complaint on the basis of documentary

evidence, prior pending litigation, and failure to state a cause of action. In support, Defendants submit: the attorney affirmation of Ylli Cakani; the Separation Agreement; Plaintiff's summons and complaint; and, copies of the summons and complaint in the Kings Action.

Plaintiff opposes. Plaintiff cross-moves for an Order, pursuant to CPLR § 602, consolidating for joint trial and joint discovery the instant action with a related action and third-party action in the Supreme Court, Kings County, entitled *Nikolin Beqi v. Magnetic Construction Group Corp. et al. v. Cassway Contracting Corp.*, filed under the Index No. 9547/2014 (the "Kings Action"), and placing the venue of the joint trial in the Supreme Court, Kings County.

Defendants do not oppose consolidation.

Turning first to Defendants' motion to dismiss, 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:

(1) a defense is founded upon documentary evidence; or

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

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]). 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 Dep't 2007] [citation 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]). 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 Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

In a claim for fraudulent misrepresentation, a plaintiff must allege: 1) a misrepresentation or a material omission of fact; 2) which was false and known to be false by defendant; 3) made for the purpose of inducing the other party to rely upon it; 4) justifiable reliance of the other party on the misrepresentation or material omission; and, 5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). A cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract. (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116 A.D.2d 526, 527 [1st Dep't 1986]). Thus, a fraud cause of action is duplicative of a breach of contract cause of action if the fraud cause of action is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages. (*Financial Structures Ltd. v. UBS AG*, 77 A.D.3d 417, 419 [1st Dep't 2010]). Furthermore, “[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud.” (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2d Dep't 2012]).

Additionally, CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]). However, the requirement for particularity in the pleading of a fraud cause of action, “should not be confused with unassailable proof of fraud.” (*MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 [1st Dep't 2011]). “[T]he purpose of § 3016(b)’s pleading requirement is to inform a defendant with respect to the incidents complained of”, (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008]), and should not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud. (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780 [1977]). Where concrete facts “are peculiarly within the knowledge of the party” charged with the fraud, “it would work a potentially unnecessary injustice to dismiss a case at an early stage” prior to discovery. (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008] [citations omitted]).

Plaintiff’s complaint alleges: “On or about August 12, 2012, Cassway and Nikolin entered into a Separation and General Release (‘Separation Agreement’) for the purpose of terminating Nikolin’s employment and to have Nikolin forever release all claims arising out of Nikolin’s employment with Cassway.” Plaintiff’s complaint further alleges:

A specific inducement to Cassway for entering into the Separation Agreement was the express agreement by

Nikolin to release Cassway from claims and liabilities of any kind whatsoever that Nikolin may have had against Cassway. In addition, and as is relevant here, in exchange for the sum of \$5,000.00, less deductions, Nikolin released Cassway from all claims and obligations arising from Nikolin's employment and represented that he was not participating in any complaints of any kind against Cassway.

Plaintiff's complaint further asserts:

In furtherance of Nikolin's fraudulent scheme, in or about June 26, 2014, Nikolin and, his wife, Stela, instituted an action in the Supreme Court Kings County, against, among other litigants, a client of Cassway, Magnetic Construction Group, Corp ("Magnetic"), entitled Nikolin Beqi and Stela Beqi v. Magnetic Construction Group, Corp. et al, filed under Index No. 9547/2014 ("Fraudulent Action"). In the Fraudulent Action, Nikolin advances the claim that in 2011, while employed as an employee of Cassway, he tripped and as a result was seriously and permanently injured. According to the Fraudulent Action, Nikolin was rendered incapacitated and unable to perform workplace duties.

Plaintiff's complaint alleges that, "Nikolin intentionally and knowingly made false and fraudulent statements of material fact to Cassway and concealed material facts from Cassway in the course of his negotiations of the Separation Agreement." Plaintiff's complaint alleges that, "despite falsely representing, in sworn pleadings, that he is incapacitated and disabled, Nikolin is not, in fact, constrained by injury, but rather is an active and energetic individual, who has been observed dancing and performing other strenuous activities that undermine his false claims of injury." Plaintiff's complaint further asserts that, "the pursuit of the Fraudulent Action was committed with the intent to deceive and defraud Cassway. Nikolin actively concealed his schemes from Cassway. Cassway would have taken steps to protect its interest, had it known about Nikolin's fraudulent schemes and plans", and alleges that Cassway suffered injury as a result.

Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's conclusory allegations of "fraudulent

schemes” are insufficient to support a cause of action for fraud. Even accepting Plaintiff’s allegation that “Nikolin intentionally and knowingly made false and fraudulent statements of material fact to Cassway and concealed material facts from Cassway in the course of his negotiations of the Separation Agreement” as true, Plaintiff’s complaint does not plead when or to whom such “false statements” were made, or plead what “material facts” allegedly were concealed. Furthermore, as Plaintiff’s complaint alleges that Defendants commenced the Kings Action approximately two years after Nikolin entered into the Separation Agreement, Plaintiff’s allegation that Nikolin “represented that he was not participating in any complaints of any kind against Cassway” fails to plead misrepresentation of material fact which was false and known to be false by Nikolin at the time. Plaintiff’s complaint does not allege that Nikolin participated in “any complaints of any kind” other than the Kings Action.

Additionally, even accepting Plaintiff’s allegations that Nikolin “falsely represent[ed], in sworn pleadings, that he is incapacitated and disabled,” as true, these allegations fail to plead a material misrepresentation or omission of fact made for the purpose of inducing Plaintiff to rely upon it. Plaintiff’s complaint does not plead that Plaintiff justifiably relied on Defendants’ allegedly fraudulent pleadings in the Kings Action. To the extent that Plaintiff’s complaint appears to allege that Nikolin entered into the Separation Agreement with intent to pursue claims in contravention of the Separation Agreement’s waiver provisions, Plaintiff’s allegations that Nikolin misrepresented his intent to perform under the contract are insufficient to sustain a cause of action to recover damages for fraud. (*Gorman*, 97 A.D.3d at 727). Accordingly, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint fail to plead a cause of action for fraud.

As for Plaintiff’s second cause of action, for breach of contract, “[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep’t 2009]).

In addition to the foregoing, Plaintiff’s complaint further alleges:

Magnetic has demanded that Cassway hold it harmless and indemnify it for the claims raised against it by Defendants in the context of the Fraudulent Action. Upon information and belief, as a result, Defendants have succeeded in evading and circumventing the preclusive effect of the

Separation Agreement's waiver by Nikolin to seek, in any manner, monies from Cassway relating to his employment. Plaintiff fully expected and assumed that Nikolin would perform fairly and honestly under the Separation Agreement.

Plaintiff's complaint asserts that, "Nikolin has violated both the spirit and the letter of the Separation Agreement by commencing the Fraudulent Action on trumped up and false allegations with the knowledge that Cassway would be implicated in the Fraudulent Action. This is inconsistent with the express intent of the Separation Agreement."

Defendants argue that the Separation Agreement constitutes documentary evidence warranting the dismissal of Plaintiff's complaint because the Separation Agreement does not contemplate a waiver of third-party claims for personal injuries. Pursuant to paragraph 4 of the Separation Agreement:

You, for yourself and for your heirs, executors, administrators, legal representatives and assigns (hereinafter referred to collectively as "Releasor"), forever release and discharge Cassway and its past, present and future parent entities, subsidiaries, divisions, and related business entities, successors and assigns, assets, employee benefit plans or funds, and any of its or their respective past, present and/or future directors, officers, fiduciaries, agents, trustees, administrators, employees and assigns, whether acting on behalf of Cassway or in their individual capacities (collectively the "Releasee") from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever, whether known or unknown, which You ever had, now have, or may have against the Releasee by reason of any act, omission, transaction, practice, plan, policy, procedure, conduct, occurrence, or other matter up to and including the date on which You sign this Agreement.

The Separation Agreement further provides:

You represent and warrant that You have not commenced, maintained, prosecuted or participated in any action, suit,

charge, grievance, complaint or proceeding of any kind against the Cassway or the Releasee in any court or before any administrative or investigative body or agency. You further acknowledge and agree that by virtue of the foregoing, You have waived all relief available to You (including without limitation, monetary damages, equitable relief and reinstatement) under any of the claims and/or causes of action waived pursuant to paragraph 4 above.

Defendants argue that the waiver provisions in paragraph 4 do not bar third-party claims. Defendants further argue that the Separation Agreement contemplates worksite injury claims, and that paragraphs 8 and 11 of the Separation Agreement even preserve workers compensation claims for Nikolin. In addition, Defendants argue that the Kings Action does not violate the representation that “You have not commenced, maintained, prosecuted or participated in any action, suit, charge, grievance, complaint or proceeding of any kind against the Cassway or the Releasee in any court or before any administrative or investigative body or agency”, since Defendants commenced the Kings Action approximately two years after Nikolin made the representation in question.

Here, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the Separation Agreement flatly contradicts the factual allegations and legal conclusions asserted in Plaintiff’s cause of action for breach of the Separation Agreement and conclusively establishes a defense to Plaintiff’s breach of contract claim. Although the Separation Agreement waives all present and future claims as against Cassway, the Separation Agreement, on its face, does not extend to preclude third-party personal injury claims commenced two years after the Separation Agreement. Accordingly, the Separation Agreement flatly contradicts Plaintiff’s factual allegations and legal conclusions that the Kings Action violates “both the spirit and the letter” of the Separation Agreement, and Defendants are entitled to a dismissal of Plaintiff’s breach of contract claim.

As for Plaintiff’s third cause of action, for aiding and abetting fraud as against Stela, in order to sustain a cause of action for aiding and abetting the plaintiff must allege: (1) the existence of wrongful conduct by the primary wrongdoer; (2) that defendant knowingly induced or participated in the wrongdoing; and, (3) damage resulting from the same. (*see Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 101 [1st Dep’t 2006]). Here, Plaintiff’s complaint alleges that “Stela knowingly aided and abetted the fraudulent scheme that was perpetrated on Cassway by

Nikolin. The acts of Stela in furtherance of this unlawful scheme include, knowingly and falsely asserting claims in the Fraudulent Action that Nikolin is unable to engage in sexual relations and other husbandly duties.” However, as discussed above, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint fail to plead with particularity a cause of action for fraud. Accordingly, in the absence of a viable claim for fraud, even viewing Plaintiff’s complaint in the light most favorable to the non-moving party, Plaintiff’s related claim of aiding and abetting such fraud fails. (see *Kagan v. HMC–New York, Inc.*, 94 A.D.3d 67, 73 [1st Dep’t 2012]).

In light of the foregoing, Defendants’ remaining grounds for dismissal need not be addressed and Plaintiff’s cross-motion for consolidation is moot.

Wherefore, it is hereby

ORDERED that Defendants’ motion to dismiss is granted and Plaintiff’s complaint is dismissed in its entirety and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff’s cross motion for consolidation is denied as moot.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: April 8, 2015

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EILEEN A. RAKOWER, J.S.C.