

Manda Intl. Corp. v Yager

2015 NY Slip Op 31920(U)

October 14, 2015

Supreme Court, New York County

Docket Number: 653012/13

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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MANDA INTERNATIONAL CORP. d/b/a,
CENTRIFUGAL ASSOCIATES, NYC,

Plaintiff,

Index No. 653012/13
Motion Sequence Nos.
002, 003, and 004

-against-

STEPHEN J. YAGER and CENTRIFUGAL
ASSOCIATES GROUP, LLC,

Defendants.

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STEPHEN J. YAGER,

Defendant/Third-Party Plaintiff,

Index No. 595279/14

-against-

CATHERINE GUIDA, ANGELO CORRAO and
FRANK BASILE,

Third-Party Defendants.

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HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

This action involves a dispute over the parties' rights in certain construction contracts and commissions earned therefrom. The 10-count second amended complaint ("SAC") asserts causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, misappropriation of trade secrets, unfair competition, tortious interference with business relations and prospective business relations, and faithless servant. In his answer, defendant Stephen J. Yager ("Yager") asserts counterclaims for

fraud and breach of contract. Yager also commenced a third-party action against Angelo Corrao (“Corrao”), Catherine Guida (“Guida”), and Frank Basile (“Basile”). The third-party complaint (“TPC”) asserts claims for civil conspiracy, fraud, breach of contract, tortious interference with contract, and breach of fiduciary duty. Corrao, Guida, and Basile now move (in motion sequence numbers 002, 003 and 004, respectively) to dismiss the TPC under CPLR 3211 and 3016 (b).

I. Factual Allegations

The parties agree that, in July 2012, Yager entered into a business relationship with plaintiff Manda International Corp. (“Manda”) and/or its president, Corrao. The pleadings allege that Yager was to be paid commissions of 50% of the profits for each project that he referred to Manda, \$2,500 per week as a stipend or draw against those commissions, and a monthly car allowance. The parties never entered into a written agreement. The pleadings present differing versions of the parties’ subsequent relationship and conduct, as follows.

A. Second Amended Complaint

Manda claims that it hired Yager as an “outside sales person/independent contractor,” and that his responsibilities included “pursuing and delivering mechanical and heating, ventilation and air conditioning (“HVAC”) type construction project opportunities to Manda.” Manda maintains that, in his capacity as “sales person/independent contractor,” Yager was “privity to Manda’s confidential information,”

including “customer information and needs, records, books, contracts, agreements, and other documents and data pertaining to Manda’s customers and business, including its internal procedures and bidding information (‘Confidential Information’).” Yager “prepared bids on behalf of Manda (the ‘Bids’), utilizing Manda’s Confidential Information, Manda’s personnel and Manda’s office space and equipment.”

Manda claims that Yager “physically took, misappropriated, recorded and/or memorized Manda’s Confidential Information” and Bids. Yager allegedly signed Manda documents without its authorization, launched a website for Manda without its approval and locked Manda out of the website, and withheld hundreds of thousands of dollars in checks that were payable to Manda. Manda claims that, when it became aware of Yager’s activities, Corrao temporarily relocated Manda’s New York City office to its Long Island office, in order to analyze its files and determine “the full extent of Yager’s activities.” Yager also allegedly formed a new construction company, “New Centrifugal,” to compete with Manda, using Manda’s Confidential Information and Bids to divert Manda’s business to himself and/or New Centrifugal. Manda claims that, on August 22, 2013, Yager solicited Manda’s customers and interfered with Manda’s relationships with its distributors.

B. Third-Party Complaint

Yager claims that he was “never a mere ‘salesman’ for Corrao or Manda,” and that he was “never an employee of the company,” but rather, he developed the contracting

business, obtained customers through his business contacts, issued payment requisition forms and collected payments, oversaw contracting jobs, and maintained customer relationships. Yager alleges that he referred five projects to Manda for work valued at \$8 million, with an estimated profit margin of 25 to 30%, which Yager estimates as between \$2 million and \$2.4 million. Yager claims that he is owed 50 percent of these profits as his commission.

Yager claims that, in July 2013, he noticed that Corrao was not closing new deals for his concrete and masonry business, and Corrao still had not provided Yager with a written agreement showing Corrao's obligations to Yager for the projects obtained by Yager. In July 2013, Yager sent an email to Corrao and his sister, Guida, stating that he was "getting the run around with [his] \$2,500 weekly paycheck. There are also reasons why you 2 will not show me numbers and present me with the deal." Five days later, Yager sent Corrao and Guida another email, stating his understanding of the parties' agreement as "split[ting] the profits 50/50," and stating that he has "been asking for detailed financials on [his] jobs for over FOUR months. I keep getting the BRUSH OFF by both of you. . . . Therefore I DEMAND that I be given detailed financials on my jobs by close of business Friday, August 2nd – I know you have them done. I intend to have my accountant review these financials once I receive them." Yager claims that Corrao and Guida never provided him with the accounting records or a written agreement memorializing Corrao and Yager's business arrangement.

Yager claims that, in early August 2013, there was approximately \$300,000 in Manda's operating account. Yager claims that when he "thereafter went to deposit the new requisition checks in the operating account, the bank informed [him] that the account had approximately \$2,000 in it." At the same time, Yager claims that Manda was not making timely rent payments for its office space, and at one point, Corrao failed to pay Yager the \$2,500 per week that they had allegedly agreed upon. Yager claims that, on August 22, 2013, he was locked out of Manda's offices and received an email from Corrao stating that Yager was terminated and his office bolted.

Guida was allegedly responsible for the books, taxes, and financial records for Corrao and his companies. Yager claims that he asked Corrao and Guida for the "printout" for the jobs he had obtained, showing the costs and profits for each job, but Corrao and Guida allegedly refused to provide "a detailed accounting of the amounts to which . . . Yager was, and is, entitled under their oral agreement." Guida also allegedly refused to show Yager Manda's operating accounts.

Yager claims that Basile is a convicted felon, who was on parole while at Manda, and that Corrao also served jail time. Basile is allegedly a project manager that Corrao asked Yager to hire. Basile allegedly knew that Yager owned 50% of the profits from the jobs he referred to Manda, and Basile, Corrao, and Guida met privately several times to discuss the financial records of Yager's jobs. According to Yager, "the purpose of those meetings was to devise and then execute a plan to alter Manda's books and records and

deprive Mr. Yager of the funds to which he was entitled.” Yager claims that, between August 22 and 29 – the week after Corrao terminated Yager – Basile informed him that he had been given a substantial raise in salary and a new truck. Yager claims that a former Manda employee advised him that “he personally heard Guida, Basile and Corrao discussing ways to defraud Mr. Yager of the substantial monies Mr. Yager is due under his oral agreement with Corrao.”

In essence, Yager claims that Corrao, Guida, and Basile hatched a scheme to alter Manda’s books and records to conceal the profitability of the contracts procured by Yager, intending to “divert funds from the jobs Mr. Yager brought to the company to ensure that the expenses of the jobs are overstated in order to eat up all the profit,” or to ensure that there are insufficient funds to complete the projects for Yager’s customers. Yager requests that a “financial monitor” be appointed for Manda to be responsible for its finances, including the jobs procured by Yager. Yager claims that he is “most concerned that Corrao and Basile, two individuals with a criminal past, are now in charge, aided and abetted by Guida, Corrao’s sister, whose collective actions would suggest evasive and deceptive character.”

II. Legal Analysis

Each cause of action in the third-party complaint was asserted against all three third-party defendants, and Corrao, Guida and Basile all seek dismissal of the third-party complaint in its entirety. Oral argument on these motions was held on May 20, 2015, at

which time I made the following rulings: granted the motion to dismiss the first cause of action for civil conspiracy in its entirety, without prejudice; granted the motion to dismiss the second cause of action for fraud to the extent asserted against Basile, without prejudice; denied Guida's motion to dismiss the fraud cause of action; granted the motion to dismiss the third cause of action for breach of contract to the extent asserted against Guida, Basile, and Manda; denied Corrao's motion to dismiss the third cause of action for breach of contract against him individually; granted the motion to dismissed the fourth cause of action for tortious interference with contract in its entirety, without prejudice; granted the motion to dismiss the fifth cause of action for breach of fiduciary duty against Corrao and Basile only.

I reserved ruling on the fraud claim asserted against Corrao, and the breach of fiduciary duty claim asserted against Guida.

A. Fraud (second cause of action)

Corrao argues that the fraud claim fails to allege any statements he made or Yager's reliance on such statements, lacks sufficient detail, and is duplicative of the breach of contract claim.

To state a cause of action for fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v*

Smith Barney, 88 NY2d 413, 421 (1996). Conclusory allegations of fraud are insufficient to support a fraud claim. *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319 (1995). Rather, where the cause of action is based upon fraud, “the circumstances constituting the wrong shall be stated in detail.” CPLR 3016 (b).

Here, the TPC does not allege any statements by Corrao other than his statements of the terms of the parties’ purported joint venture agreement, whereby Yager would be paid a weekly “consulting fee” of \$2,500, his car allowance and other benefits, and 50% of the profits generated from projects that Manda closed. Yager alleges that, “[a]side from agreeing to the financial terms and to the general scope of Mr. Yager’s work, Corrao and Mr. Yager did not discuss or agree to any other terms.” Yager claims that these statements induced him to enter into the joint venture with Corrao.

However, the essence of Yager’s claim is that he performed under the parties’ agreement by “utiliz[ing] his considerable experience and wealth of contacts in the industry to obtain contracts for a proposed joint venture, yet he has failed to obtain any of the benefits that he earned.” Thus, Yager’s fraud claim is “based on alleged fraudulent misrepresentations related to [Corrao’s] obligation[s] under their [purported] agreement[,]” and the fraud claim “allege[s] no misrepresentations collateral or extraneous to the agreement[.]” *RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 (1st Dept 2008). Therefore, Yager’s fraud claim is dismissed to the extent

that it is based upon allegations that he was induced to enter into an agreement with Corrao.

According to Yager, the fraud claim is based upon allegations that “Corrao made various statements for the very purpose of fraudulently inducing Yager to enter an agreement that Corrao had no intention to honor.” To the extent that the fraud claim is based upon allegations that Corrao induced Yager to “enter[] into a contract while lacking the intent to perform it,” those allegations “are insufficient to support the claim.” *New York Univ.*, 87 NY2d at 318; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 (1st Dept 1999) (“[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract”).

Nor is Corrao’s alleged concealment of his “criminal past” sufficient to support the fraud claim, as Yager fails to allege the existence of a “fiduciary or confidential relationship between the parties” that would give rise to a duty to disclose Corrao’s criminal past. *Auchincloss v Allen*, 211 AD2d 417, 417 (1st Dept 1995).

Yager next argues that Corrao committed fraud during the course of the contract, asserting that he “spoke with Guida, who confirmed that the projects Mr. Yager had referred to Manda were very profitable.” Yager claims that his reliance upon this statement is evidenced by his continued association with Corrao. Yager claims that, in reality, Corrao diverted funds from the projects, evidenced by the fact that Manda’s

operating account was reduced from \$300,000 to only \$2,000. According to Yager, Corrao and Guida deliberately overstated expenses for certain projects in order to diminish profits and Yager's commissions, and Corrao diverted project funds to bribe an official on one project and defend Manda against allegations of "prevailing wage" violations. Yager claims that he continued securing projects for Manda, and that there was no way for him to independently verify the profitability of the projects, evidenced by Corrao and Guida's refusal to provide him with an accounting of profits.

Yager's allegations that Corrao "continued his fraudulent scheme" fail to allege the violation of "a legal duty independent of the contract itself;" rather, Yager's claims are "predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract," as both claims involve Corrao's failure to pay Yager his portion of profits. *OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 (1st Dept 2010) (internal quotation marks and citations omitted). Assuming the truth of Yager's allegations, as this court must on a motion to dismiss, *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), Corrao may have breached the parties' agreement, and he may have done so intentionally and in bad faith, but any such nefarious breach of contract would not convert the cause of action to one sounding in fraud. In addition, these allegations of a continuing fraud are comprised of only "general allegations as to the alleged misrepresentations and virtually no information as to when and by whom these representations were made." *Ferro Fabricators, Inc. v 1807-1811*

Park Ave. Dev. Corp., 127 AD3d 479, 480 (1st Dept 2015). Accordingly, these allegations of a continued fraudulent scheme are dismissed for the additional reason that they “fail[] to plead with requisite particularity pursuant to CPLR 3016 (b).” *Id.* at 479.

Yager alleges that he “understood at all times that his agreement with Corrao could be terminated at any time by Corrao or by Mr. Yager.” However, where “a plaintiff is offered only at-will employment, he or she will generally be unable to establish reasonable reliance on a prospective employer’s representations, which is an element necessary to the recovery of damages under a theory of fraudulent inducement.” *Guido v Orange Regional Med. Ctr.*, 102 AD3d 828, 831 (2d Dept 2013) (internal quotation marks and citations omitted). Therefore, to the extent that Yager’s claim is based upon his status as an “at-will” employee, the fraud claim fails for the additional reason that Yager fails to allege reasonable reliance. *Id.*

For the foregoing reasons, Yager’s fraud cause of action is dismissed as against Corrao.

B. Breach of Fiduciary Duty (fifth cause of action)

Guida argues that Yager fails to state a cause of action for breach of fiduciary duty. “To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct.” *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014).

[A] fiduciary relationship arises 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. A fiduciary relationship is necessarily fact-specific and is also grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. While a contractual relationship is not required for a fiduciary relationship, if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.

Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 592-593 (2012) (internal quotation marks and citations omitted). “A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b).” *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 (2d Dept 2011).

Here, Yager alleges that Guida “work[ed] on a part-time basis for Corrao with responsibility for the books, taxes and financial records for Corrao’s companies,” and that Guida stopped working for Manda in 2013 but “continued to assist Corrao in his efforts to defraud Mr. Yager and to deprive him of the 50% of the profits to which he is entitled.” However, these allegations generalize Guida’s wrongdoing and speculate that Yager’s damages were caused by Guida’s misconduct, which is insufficient to sustain the breach of fiduciary duty claim. *Stafford v Reiner*, 23 AD3d 372, 372 (2d Dept 2005) (dismissing breach of fiduciary duty cause of action that was based upon speculation); *Steinberg v Carey*, 285 A.D. 1131, 1131 (1st Dept 1955) (cause of action for breach of fiduciary duty “must be supported by factual assertions of specific wrongdoing rather than conclusory

allegations,” and “[g]eneralizations and vague references to wrongdoing” are insufficient).

Yager fails to sufficiently allege “that defendant [Guida] had undertaken to act primarily for the benefit of another in matters connected with [her] undertaking,” or any “special circumstances that could have transformed the parties’ business relationship to a fiduciary one, such as control by one party of the other for the good of the other.” *L. Magarian & Co. v Timberland Co.*, 245 AD2d 69, 69-70 (1st Dept 1997) (internal quotation marks and citations omitted). Rather, Yager alleges the existence of a business relationship between himself and Corrao only, and Guida’s alleged provision of bookkeeping services was, at most, incidental to that business relationship, rendering it insufficient to create a fiduciary relationship. *DiTolla v Doral Dental IPA of N.Y., LLC*, 100 AD3d 586, 587 (2d Dept 2012) (“[a] conventional business relationship, without more, is insufficient to create a fiduciary relationship”).

In any event, even assuming that a fiduciary duty arose from Guida’s alleged work as Manda’s bookkeeper, Yager concedes that his claim for breach of fiduciary duty arises from his inability “to obtain an accurate measure of the appropriate compensation due to him under the terms of the agreement with Corrao.” Thus, the “claim for breach of fiduciary duty [i]s duplicative of the breach of contract claim,” as the only breach of fiduciary duty alleged concerns the failure to perform under the purported contract. *Chowaike & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 (1st Dept 2014); *Givoldi, Inc.*

v United Parcel Serv., 286 AD2d 220, 221 (1st Dept 2001) (“a claim arising out of an alleged breach of contract . . . may not be converted into a tort action absent the accordingly, Yager’s cause of action for breach of fiduciary duty is dismissed.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Angelo Corrao to dismiss the third-party complaint (motion sequence number 002) is granted to the extent that the first, second, fourth, and fifth causes of action of the third-party complaint are dismissed against him, and the motion is otherwise denied as to the third cause of action for breach of contract; and it is further

ORDERED that third-party defendant Angelo Corrao is directed to serve an answer to the third-party complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion by third-party defendants Catherine Guida to dismiss the third-party complaint is granted to the extent that the first, third, fourth and fifth causes of action of the third-party complaint are dismissed against her, and the motion is otherwise denied as to the second cause of action for fraud; and it is further

ORDERED that the motion by third-party defendant Frank Basile to dismiss the third-party complaint (motion sequence numbers 004) is granted and the third-party complaint is dismissed in its entirety as against him, with costs and disbursements to said

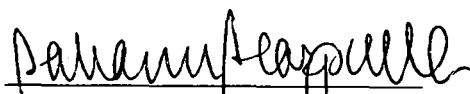
third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendants; and it is further

ORDERED that the third-party action is severed and continued against the remaining third-party defendants, Angelo Corrao and Catherine Guida; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on December 16, 2015, at 2:15 PM.

Dated: New York, New York
October 14, 2015

ENTER:


Hon. Saliann Scarpulla, J.S.C.