

Munn v Yonkers Contr. Co., Inc.
2015 NY Slip Op 32888(U)
May 27, 2015
Supreme Court, Westchester County
Docket Number: 61930-2014
Judge: Joan B. Lefkowitz
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SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
MOLLY MUNN, Individually, and as fifty percent member of APF MANAGEMENT COMPANY, LLC suing derivatively in the name of and on behalf of APF MANAGEMENT COMPANY, LLC, and MAX MUNN, Individually,

**AMENDED
DECISION & ORDER**

Index No: 61930-2014

Plaintiffs,

-against-

YONKERS CONTRACTING COMPANY, INC., and
CARL E. PETRILLO,

Motion Return Date:
March 6, 2015
Motion Seq. #1

Defendants.
-----X

The following papers (e-filed documents 6-24) were read on the **E-filed** motion by defendants for an order dismissing the complaint for failure to state a cause of action (CPLR 3211[a][7]).

- Notice of Motion, Affirmation (Exhibits A-G)
- Memorandum of Law
- Affidavit in Opposition (Exhibits 1-5)
- Memorandum of Law

Upon reading the foregoing papers it is

ORDERED the branch of the motion which seeks an order dismissing so much of the complaint as asserts a cause of action against the defendant, Yonkers Contracting Company, is granted and the complaint is dismissed insofar as it asserts a cause of action against Yonkers Contracting Company and the action against the remaining defendant is severed; and it is further

ORDERED the branch of the motion which seeks an order dismissing the action against the defendant, Carl Petrillo, is granted to the extent that the first, second and third causes of action are dismissed, and in all other respects the motion is denied; and it is further

ORDERED the parties are directed to appear on July 6, 2015, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 800, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

Plaintiff, Molly Munn, defendant, Carl Petrillo, and non-parties, Gregory Petrillo and

Mathew Petrillo, formed the limited liability company, APF Management Company LLC (APF LLC). Pursuant to the APF LLC operating agreement Molly Munn held a 50% interest, Carl Petrillo held a 2% interest, Gregory Petrillo held a 24% interest and Matthew Petrillo held a 24% interest. APF LLC hired plaintiff Max Munn as its executive pursuant to an employment agreement dated February 14, 2011.

Plaintiffs sue claiming the defendant, Carl Petrillo, caused the wrongful termination of Max Munn as executive of APF LLC, and caused the wrongful sale of APF LLC assets to a company he controlled. The complaint alleges five causes of action. The first cause of action alleges Carl Petrillo, aided and abetted by Yonkers Contracting Company, breached the operating agreement by instructing an employee of APF LLC to reduce Max Munn's salary without consulting the other members of APF LLC. Under the first cause of action Max Munn seeks damages claiming he is the third-party beneficiary of the operating agreement.

In the second cause of action Max Munn seeks damages alleging Carl Petrillo violated Labor Law 190(1) by "virtue of Carl's breach of the operating agreement, which was aided and abetted by Yonkers."

In the third cause of action Max Munn seeks damages, alleging Carl Petrillo, aided and abetted by Yonkers Contracting Company, induced APF LLC to breach the Max Munn's employment agreement.

In the fourth cause of action Molly Munn seeks an accounting alleging Carl Petrillo, aided and abetted by Yonkers Contracting Company, breached his fiduciary duty to Molly Munn, his fellow member in APF LLC, by transferring the assets of APF LLC to a newly formed entity, APF Manufacturing Company LLC.

In the fifth cause of action Molly Munn seeks compensatory and punitive damages as a result of the breach of fiduciary duty alleged in the fourth cause of action.

The defendants now move for an order dismissing the complaint pursuant to CPLR 3211(a)(7).

"In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Although the facts pleaded are presumed to be true and are to be accorded every favorable inference bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible entitled to any such consideration. Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Everett v*

Eastchester Police Department, 127 AD3d 1131, 1131 [2d Dept 2015] [internal quotation marks and citations omitted]).

The Action Against Yonkers Contracting Company

The only allegations against Yonkers Contracting Company are that it “aided and abetted” Carl Petrillo in committing wrongful acts against the plaintiffs. The assertion is a legal conclusion unsupported by allegations of fact. Accordingly, the action is dismissed against the defendant, Yonkers Contracting Company.

The First Cause of Action - Breach of Contract

In the first cause of action the defendant, Max Munn, claims to be a third-party beneficiary of the APF LLC operating agreement and seeks damages for its alleged breach. A party asserting rights as a third-party beneficiary must establish “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost” (*State of California Pub. Empls. Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434 [2000]). Munn’s claim that APF LLC was formed and the operating agreement was signed for his benefit is a legal conclusion unsubstantiated by allegations of fact. Moreover, nothing stated in the operating agreement leads to the conclusion that the formation and operation of APF LLC was intended to benefit Max Munn. In fact, the operating agreement explicitly states “[n]o third party beneficiaries are intended whatsoever by the execution of this agreement.”

The Second Cause of Action - Labor Law 198(1-a)

In the second cause of action Max Munn seeks remedies under Article 6 of the Labor Law. However, Max Munn makes no claim that defendants violated any of the substantive provisions of Article 6 of the Labor Law (*see*, Labor Law 191, 192, 193, 194 and 195). Because he asserts only a common law claim for unpaid wages, Max Munn is not entitled to the remedies set forth in Labor Law 198(a-1) (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]; *see also*, *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457 [1993]).

The Third Cause of Action

In the third cause of action Max Munn alleges Carl Petrillo induced APF LLC to breach Munn’s employment contract by urging a reduction of Munn’s salary. “Officers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract merely because they have made decisions and taken actions that resulted in the corporation’s breaching its contract. When an officer or director acts on behalf of his corporation, he may not be held liable for inducing the corporation to violate its contractual obligations unless his activity involves separate tortious conduct or results in personal profit” (*Stern v h. DiMarzo, Inc.*, 77 AD3d 730, 731 [2d Dept 2010] [internal quotation marks and citations omitted]). The third cause of action does not allege that Petrillo engaged in

separate tortious conduct or that his conduct resulted in personal profit. It only asserts that by reducing Munn's salary Carl Petrillo's family members benefitted because the reduction somehow avoided a loan default and a possible action against the unnamed family members who may have guaranteed the loan.

The Fourth Cause of Action

In the fourth cause of action Molly Munn seeks an accounting. She alleges Carl Petrillo breached his fiduciary duty to her by causing the sale of the assets of APF LLC to a company he controls. The fourth cause of action states a cause of action. In addition, it states a derivative cause of action on behalf of APF LLC.

The Fifth Cause of Action

In the fifth cause of action Molly Munn seeks compensatory damages and punitive damages as the result of the breach of fiduciary duty alleged in the fourth cause of action. The fifth cause of action states a cause of action for breach of fiduciary duty. In addition, the demand for punitive damages is not stricken on the present motion to dismiss (*Stein v McDowell*, 74 AD3d 1323 [2d Dept 2010]).

This decision and order amends the decision and order dated May 26, 2015, by directing that the parties appear in the Preliminary Conference Part on July 6, 2015, rather than the Settlement Conference Part on June 23, 2015, as stated in the May 26, 2015, order.

ENTER,

Dated: White Plains, New York
May 27, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

Via E-filing to the attorneys of record