

Magder v Lee

2016 NY Slip Op 32440(U)

December 8, 2016

Supreme Court, New York County

Docket Number: 653917/2014

Judge: Saliann Scarpulla

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

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ANDREA MAGDER,

Plaintiff,

SUPPLEMENTAL
DECISION/ORDER
Index No. 653917/2014

-against-

BELTON LEE, MADHATTAN FILM COMPANY GLOBAL, LLC,
CHRISTOPHER BONGIRNE, MARC JACOBSON, P.C., MARC
JACOBSON, DINING WITH ALEX, LLC

Defendants.

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HON. SALIANN SCARPULLA, J.:

In an order dated November 23, 2015, I dismissed the causes of action plead by Plaintiff Andrea Magder (“Magder”) against defendants Christopher Bongirne (“Bongirne”), Marc Jacobson, P.C. (“MJPC”), Marc Jacobson (“Jacobson”) (Jacobson, together with MJPC, “Jacobson defendants. (Motion sequence no. 1 and 2). Defendants Bolton Lee (“Lee”), Madhattan Film Company Global LLC (“MFCG”) and nominal defendant Dining with Alex LLC (“DWA” or “Company”), in motion sequence number 003, also moved to dismiss the complaint for failure to state a cause of action and based upon documentary evidence, lack of standing and lack of personal jurisdiction.

As to motion no. 3, I dismissed the action against DWA, upon the parties’ stipulation, and severed the motion to dismiss of defendants Lee and MFCG pending the determination of a traverse hearing, held pursuant to an Order of Reference to Hear and Report, dated November 23, 2015.

A traverse hearing was held on January 13, 2016. Following the traverse hearing, Special Referee Jeremy R. Feinberg issued a Referee Report and Recommendation (the “Referee Report”) on April 22, 2016. The Referee Report recommended that Defendants Lee and MFCG waived,

through Section 13.11 of the Operating Agreement, any possible jurisdictional arguments and that, in any event, service was proper. In an order dated December 8, 2016, I confirmed the Referee's report. Hence, the only issues that remain to be decided on this motion are whether Magder's first through fourth causes of actions should be dismissed as against defendants Lee and MFCG for failure to state a claim and based upon documentary evidence.

Background

In 2012, Magder and nonparty Quintin Cline ("Cline") coauthored a screenplay entitled "Dining with Alex" ("screenplay") and received a Certificate of Registration for the screenplay, on May 28, 2013, from the United States Copyright Office.

Magder collaborated with Lee in order to produce and distribute a feature film based on the screenplay ("Project"). Lee allegedly promised to secure 80 percent of the financing from Chinese investors, who would, in exchange, receive the right to distribute the film in China. Accordingly, MFCG, "the LLC vehicle Lee used to the [sic] finance the Project," entered into a "Co-Production Agreement" ("Co-Production Agreement") with Weishen (Shanghai) Film and Television Media Development LTD. ("Weishen"), the primary Chinese investor, regarding the production and distribution of the Chinese version of the film.

Magder recruited Bongirne as a producer for the project. Then, Magder, Lee and MFCG formed DWA "as the vehicle for developing, financing, producing, distributing and otherwise engaging in transactions in connection with the Project." Lee and Bongirne hired the Jacobson defendants as DWA's legal counsel – an engagement that Magder became aware of after the firm's retention. Magder allegedly objected to the \$100,000 retainer, but Lee nevertheless signed the agreement.

In June 2014, Magder and various parties entered into multiple agreements in furtherance of the Project. First, Magder and Cline entered into a "Purchase Agreement" with MFCG (the

“Purchase Agreement”) in which MFCG agreed to pay \$65,200 for the rights to the screenplay. The Purchase Agreement also provided: “[n]otwithstanding anything contained herein, it is understood and agreed that [MFCG’s] decision in connection with any and all creative decisions and business decisions in connection with the Picture shall be final and binding.”¹

Second, Lee, Magder and MFCG entered into the Operating Agreement. The Operating Agreement provided that “Magder and Lee [were] Managing Members of DWA, with 30 and 70 membership units respectively [and] MFCG [was] its sole ‘class A member’ (with 80 Class A membership units).” The Operating Agreement stated that, except as otherwise provided by the agreement or law, “no approval or consent of the Class A members shall be required with respect to any actions taken by the Managing Members on behalf of the Company.” The Operating Agreement also refers to DWA’s engagement of Ross Katz (“Katz”) to revise the screenplay and turn it into a script for the Project.

Regarding the managing members’ responsibilities and authority, the Operating Agreement states:

SECTION 8.1. Compensation and Appointment. (a) Subject to the terms of this Agreement, the business, property and affairs of the Company shall be managed and directed exclusively by the Managing Members. No other Member shall have the power to so act or bind the Company unless agreed to in writing by the Managing Members. . . .

SECTION 8.2 Approval of Company Matters. (a) subject to clauses (c) and (d) directly below and terms of any producer agreements entered into by the Company and a producer, and for so long as he is a Managing Member of the Company it is agreed that Lee will generally see to and control the day to day business operations of the Company and, accordingly, will (on behalf of the Company) see to the negotiation and execution of agreements with any other Persons (provided that any

¹ Simultaneous with the Purchase Agreement, MFCG entered into an “Assignment and Assumption Agreement” with DWA in which MFCG “assigned to [DWA] (i) all of [MFCG’s] right title and interest (including all copyrights) in and to the [screenplay], and (ii) the Purchase Agreement and all of [MFCG’s] rights and obligations thereunder.”

producer agreements must be approved by both Managing Members), the disbursement of funds (which will be in accordance with the agreed to budget for the Picture) and other business matters relating to the production and distribution of the Picture, provided that (i) Lee will confer with Magder on all material decisions before taking any action in connection therewith, (ii) no third parties will be admitted as members of the Company unless agreed to in writing by both Lee and Magder, (iii) no distribution agreement will be executed with respect to the Picture without the prior written consent of both Lee and Magder, (iv) the Script will not be sold or licensed to any other Person without the prior written consent of Lee and Magder and (v) no accountants, sales agents, attorneys or other professional will be retained or terminated by the Company without the prior written consent of both Lee and Magder.

(b) Subject to clauses (c) and (d) directly below and the terms of any producer agreements entered into by the Company and a producer, and for so long as she is a Managing Member of the Company Magder will control all creative decisions regarding the Picture and, accordingly will (on behalf of the Company) (i) have final say over all decisions regarding the Picture's script, talent, the director and writers engaged for the Picture, and the final cut of the Picture, and (ii) execute and negotiate any agreements relating thereto, provided that Magder will confer with Lee on all material creative decisions before taking any actions in connection therewith. Magder approves of Ross Katz to re-write the script and as Director of the Picture. Magder approves of Chris Bongirne to be a Producer of the Picture.

(c) Notwithstanding the foregoing clauses (a) and (b), Lee and Magder recognize that under the Co-Production Agreement Weishen is granted the right to edit and distribute a Chinese version of the Picture in the Chinese Market, and Magder will not have creative control over such version of the Picture. . . .

(d) Per the Co-Production Agreement, and notwithstanding anything contained herein to the contrary, MFCG will have the right to approve all material actions taken by the Company, including but not limited to: (i) any single expenditure in excess of \$5,000; (ii) approval of the casting of all material parts in the Picture; (iii) increasing the Budget in excess of \$6,000,000; and (iv) hiring or firing the director, producers or other key crew members.”

Third, Lee, Magder, and Bongirne each entered into separate producer agreements with DWA. Magder's Producer Agreement with DWA provides that Magder, Lee and Bongirne would “work cooperatively to produce a world class motion picture in an efficient, quality manner.”

Magder would receive \$125,000 for her services as producer and up to \$60,000 of that compensation could be deferred with the remainder to be paid at different phases of the project. The first payment was due “at the commencement of pre-production, now scheduled to commence on or about July 1, 2014.” Pursuant to the Producer Agreement, Magder would receive thirty percent of the net proceeds, “after payment . . . to all third parties,” as her “Contingent Distribution.”

The Producer Agreement also incorporated “Standard Terms and Conditions,” which provided, in pertinent part:

A-1. Employee’s Services: . . . Company’s judgment shall be final and controlling in all matters respecting the rendition of Employee’s services hereunder including but not limited to any and all matters involving artistic taste or judgment. . . .

A-5. Default:

A-5.1. Upon any breach by Employee of any of the provisions of this Agreement, Company shall immediately have the right, exercisable at any time after becoming aware of such breach, to suspend Employee’s engagement hereunder or to terminate this Agreement by so notifying Employee in writing after providing Employee forty-eight (48) hours to cure such breach (and any default under this Agreement will be subject to such right to cure).

Magder alleges that following the execution of the Operating Agreement and Producer Agreement, Lee withheld material information regarding the Project and DWA, acted on behalf of DWA to enter business arrangements without consulting Magder, and “even assumed full creative decision-making.” Magder further alleges that Lee never told Magder the terms, or provided a copy, of the Co-Production Agreement. She also states that Lee opened a bank account for DWA without notifying Magder or allowing her access to the account. The complaint claims that “Lee and Bongirne made sure that Magder would never see any of Katz’s drafts, and would not be able to comment on them.” Magder states that the final version of Katz’s script was the only draft Magder ever saw. Despite Magder’s dissatisfaction with the final product, Lee “disseminated the

script to third parties for the purpose of moving forward with the production, without Magder's knowledge or consent, and . . . paid Katz \$150,000.00 for his efforts." Magder contends that "Lee unilaterally designated the disbursement of Company funds to Katz and other individuals without consulting Magder prior to the disbursement," while simultaneously withholding payment that was due to Magder and Cline under the Purchase Agreement.

Magder informed MFCG and Lee, via a letter from her attorney dated July 25, 2014, that DWA had not paid \$21,100 owed to Magder pursuant to the Purchase Agreement, and that, as a result of the breach, "the transfer of the rights to the Screenplay as provided therein [was] null and void and all right, title and interest in and to the Screenplay remain[ed] [f]ully vested with [Magder and Cline]." The letter also claimed that MFCG and Lee were in breach of the Operating Agreement because Lee excluded Magder from negotiations with Katz, prevented Magder from receiving earlier drafts of Katz's script and sent the script to third-parties over Magder's objections. The letter gave Lee and MFCG seventy-two hours to cure.

Jacobson, writing on behalf of DWA, responded by letter dated July 28, 2014, and denied that DWA breached any of the agreements. Jacobson stated that Magder violated the Producer Agreement by failing to work cooperatively and efficiently with the other producers. In addition, Jacobson informed Magder that she was terminated as a producer and removed as a managing member of DWA, and warned Magder of potential counterclaims if she pursued litigation. Jacobson ultimately released the \$21,100 owed to Magder from escrow and wired it into Magder's bank account without her consent or notification.

It is Magder's contention that "Lee wrested control of DWA and the film entirely from Magder, cut her out of any entitlements under the [Operating Agreement] and purported to render her fully disenfranchised." Magder initiated this action by filing a summons and complaint on

December 22, 2014.² The causes of action that Magder alleges against Lee and MFCG are: 1) breach of DWA's Operating Agreement (the "Operating Agreement") against Lee and MFCG; (2) breach of the DWA Producer Agreement ("Producer Agreement") against Lee and MFCG; (3) tortious interference with contract against Lee; and (4) breach of fiduciary duty against Lee.

Discussion

When deciding a motion to dismiss for failure to state a cause of action, the complaint "must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dept. 2004). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233, 233-234 (1st Dept. 1994). Moreover, when a defendant seeks a dismissal based upon documentary evidence, "the documentary evidence [must] utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002) (internal citation omitted).

² On September 23, 2014, Jacobson, on behalf of DWA, commenced an action against Magder, in this court, captioned *Dinning with Alex, LLC v. Magder*, Index No. 652915/14 (the "state action"), seeking "judgment of no liability because Defendant [Magder] did not withdraw her instructions to her attorney to file suit unless certain requests or demands were met within a certain time frame, which time frame passed weeks ago." Magder then filed an action in the United States District Court for the Southern District of New York, asserting causes of action for copyright infringement, breach of contract, and breach of fiduciary duties, against Lee, MFCG, Bongirne, the Jacobson Defendants and DWA, captioned *Magder v. Lee, Duffy, J.* case No. 14 Civ. 8461 [JFK] (the "federal action"). After Magder commenced the federal action, Jacobson released the funds owed to her under the Purchase Agreement, and DWA removed Jacobson as counsel and voluntarily dismissed the state action. Thereafter, on December 3, 2014, the Court in the federal action, without addressing Magder's breach of contract and breach of fiduciary duty claims, found that the Purchase Agreement precluded Magder's copyright infringement claim. Magder then voluntarily dismissed the federal action.

In opposition to Lee's and MFCG's motion to dismiss, Magder argues that the motion should be denied in its entirety as untimely. A pre-answer motion to dismiss, pursuant to CPLR 3211 (a), must be made "before service of the responsive pleading is required." CPLR 3211 (e). In the interest of justice, the court may extend the time to respond "upon good cause shown." CPLR 2004. Where a defendant fails to make a timely, pre-answer motion to dismiss and fails to demonstrate good cause for such delay, denial of the motion is proper. *See Smith v. Pach*, 30 A.D.2d 707, 708 (2d Dept. 1968) (affirming denial of the defendants' motion "to dismiss the complaint on the ground that the court did not have jurisdiction of their persons," where "[t]he motion was not timely made" and "[g]ood cause for an extension of time to move was not shown"); *see also Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, 2005 WL 5351322, *1 (Sup Ct, NY County, Apr. 01, 2005, Index No. 603259/2003) (denying motions to dismiss as untimely, because defendants served the motions "more than nine months after the time when service of [their] answers was required" and "failed to either offer any reasonable excuse for their failure to move in a timely manner or to show any 'good cause' [CPLR 2004] for an extension of time in which to move"), *affd* 27 A.D.3d 323 (1st Dept. 2006).

Magder served the summons and complaint on Lee and MFCG via "nail and mail" service, pursuant to CPLR 308 (4), on January 5, 2015. Where the summons and complaint are served pursuant to CPLR 308 (4), "service of an answer shall be made within thirty days after service is complete." CPLR 3012 (c); *see also* CPLR 320 ("if [the summons] was served pursuant to . . . subdivision . . . four . . . of section 308 . . . , the [defendant's] appearance shall be made within thirty days after service is complete"). Service is complete ten days after filing the proof of service with the clerk of the court. CPLR 308 (4). Here, the affidavits of service were filed with the clerk of the court on January 7, 2015. Lee and MFCG served this motion, through the New York State Courts Electronic Filing System, on February 23, 2015. Thus, Defendants' motion is untimely.

Defendants do not dispute that their motion was served late. Nor do they offer any excuse for the delay or seek an extension of time pursuant to CPLR 2004. Instead, their attorney argues that “[t]he moving defendants moved to dismiss as expeditiously as possible,” without further explanation. “Statutory time frames . . . are not options, they are requirements, to be taken seriously by the parties.” *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 726 (2004). However, because I find that a significant portion of Defendants’ motion is meritorious, in the interests of justice and to avoid unnecessary additional litigation, I will not deny the motion, which was filed approximately one week after defendants’ time to respond had expired, on the basis of timeliness. *See Brown v. Noble, Inc.*, 2010 WL 4941999 at *2 (NY Sup. Ct. Dec. 1, 2010) (finding that an untimely motion to dismiss was meritorious and therefore “it would be contrary to the interests of judicial economy to deny the motion and allow meritless causes of action to continue” simply because the motion was served “several days after [the] time to respond expired.”).

Further, because I have now confirmed the findings in the Referee Report, I deny Defendants’ motion to dismiss on the grounds of lack of personal jurisdiction, and turn to the remainder of the parties’ arguments.

Breach of Contract Claims

In New York, to state a claim for breach of contract, a plaintiff must allege facts showing (1) the existences of a contract; (2) the plaintiff’s performance under that contract; (3) the defendant’s breach of its contractual obligations; and (4) damages resulting from the breach. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

Here, Magder’s complaint sufficiently alleges each of the aforementioned elements of a breach of contract claim with respect to the Dining With Alex Operating Agreement. In relevant part, Magder alleges that she fully performed her duties and obligations as a Managing Member

pursuant to the June 2014 Operating Agreement between Magder, Lee and MFCG. Magder further alleges that Lee did not consult with Magder “prior to executing material decisions on behalf of DWA” – in contravention of Section 8.2 of the Operating Agreement – in that Lee: 1) opened a bank account and refused to allow Magder to access funds or statements; 2) disseminated a script over Magder’s objections; and 3) hired counsel without Magder’s consent. And, Magder states that MFCG failed to inform Magder of the full terms of the Co-Production Agreement. Finally, Magder alleges that because of Lee’s and MFCG’s breach, Magder suffered damages in that she is no longer involved with her creation, *i.e.* the screenplay. Hence, Defendants’ motion to dismiss the breach of the Operating Agreement claim is denied.

Magder also alleges that Lee and MFCG breached the 2014 Producer Agreement by causing DWA to withhold payment due to her under the agreement. In addition, Magder avers that her termination as a producer breached the Producer Agreement because she was terminated without receiving forty-eight hours for her to cure the breach.

“Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties.” *Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 A.D.3d 85, 104 (2d Dept. 2009). In this case, the Producer Agreement is between DWA and Magder. Indeed, it states “[t]his agreement is entered into and effective as of June 4, 2004 between Dining With Alec, LLC... and Andrea Magder.” Lee and MFCG were not parties to the Producer Agreement, and Magder may not, therefor, sue them for its breach.

Tortious Interference with Contract

To establish a claim for tortious interference with a contract, a plaintiff must allege: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) the defendant’s intentional obtainment of the contract’s breach; and (4) resultant damages. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993).

Magder alleges that Lee tortiously interfered with both the Operating Agreement and the Producer Agreement. Lee was a party to the Operating Agreement. “Asserting that a defendant tortiously interfered with its own contract ‘quite clearly does not state a legally sufficient cause of action.’” *Ahead Realty LLC v. India House, Inc.*, 92 A.D.3d 424, 425 (1st Dept. 2012) (citation omitted). As Lee cannot have tortiously interfered with the Operating Agreement, I dismiss Magder’s tortious interference claim against Lee with respect to the Operating Agreement.

Magder alleges that Lee knew about the Producer agreement and caused DWA to breach by withholding Magder’s compensation and “ostensibly caused the termination of the agreement without notice or opportunity to cure alleged breaches.” In their Reply Affirmation in Support, Defendants concede that “[a]t best, [Magder] might have an interference claim.” I agree and therefore find that Magder has sufficiently pled tortious interference with the Producer Agreement by Lee.

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, a plaintiff must allege that “(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct.” *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dept. 2011). In addition, a breach of fiduciary duty claim that is “merely duplicative of a breach of contract claim cannot stand.” *William Kaufman Organization, Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dept. 2000).

Here, Magder contends that Lee breached his fiduciary duty to her by “oppressing her managerial authority.” This conduct simply restates the allegations of Plaintiff’s breach of contract claims. Accordingly, I dismiss the breach of fiduciary duty claim as duplicative. *See Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 251-52 (1st Dept. 2004) (finding breach of fiduciary duty claim was properly dismissed in that plaintiffs’ claim “fails to allege conduct by defendants in breach of a duty

other than, and independent of, that contractually established between the parties and is thus duplicative.").

In accordance with the foregoing, it is

ORDERED that the motion by defendants Lee and MFCG to dismiss the complaint is granted as to plaintiff's claims against them for breach of the Producer Agreement and breach of fiduciary duty, is granted as to the tortious interference with the Operating Agreement claim against Lee, and denied as to plaintiff's claims for breach of the Operating Agreement against Lee and MFCG and tortious interference with the Producer Agreement against Lee; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on January 25, 2017 at 2:15pm.

This constitutes the decision and order of the Court.

DATE : 12/8/16


SALIANN SCARPULLA, J.S.C.