

Walker v Urban Compass, Inc.

2017 NY Slip Op 30299(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 652554/2016

Judge: Cynthia S. Kern

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NYSCEF DOC. NO. 20

RECEIVED NYSCEF: 02/15/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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JASON WALKER,

Plaintiff,

DECISION/ORDER
Index No. 652554/2016

-against-

URBAN COMPASS, INC.,

Defendant.

-----X
HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action asserting causes of action against defendants for breach of contract, conversion of commissions, defamation, conversion of professional network data, violation of Labor Law § 191(c), tortious interference with prospective economic advantage, quantum meruit and unjust enrichment. Defendant moved to dismiss plaintiff’s original complaint on or about July 18, 2016. In response, plaintiff amended his complaint on or about September 1, 2016. Defendant now moves for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiff’s amended complaint in its entirety. Defendant’s two motions are consolidated for the purpose of disposition. Defendant’s motion to dismiss plaintiff’s original complaint, which was made on or about July 18, 2016, is denied as moot. For the reasons set forth below, defendants’ motion to dismiss plaintiff’s amended complaint is granted in part and denied in part.

The relevant facts are as follows. In 2015, plaintiff, who then worked for the non-party real estate brokerage firm Douglas Elliman, was recruited by defendant, also a real estate brokerage firm. On June 17, 2015, plaintiff and defendant entered into a written agreement (the “contract”) engaging plaintiff as an independent contractor. The contract, a copy of which was provided to the court by defendant on the instant motion, provided that the parties’ relationship could be terminated by either party at any time upon notice. Further, the contract provided that “[f]ollowing termination, [plaintiff] shall have no right to commissions

except as mutually agreed upon by [defendant] and [plaintiff] at the time of termination.” The contract also provided that plaintiff would be paid a commission of 75% of the fees earned on transactions he closed for defendant and that plaintiff would be paid “lost commissions” for transactions that he brought to contract while at Douglas Elliman but that closed after he left Douglas Elliman “provided that, [plaintiff] shall deliver to [defendant] reasonable documentation substantiating the closing of each such Lost Commissions Transaction,” which transactions were to be set forth in Exhibit A of the contract. Further, the contract provided that plaintiff was entitled to a one-time signing bonus of \$5,000.00 for a trip to the Canyon Ranch resort or a similar purpose. Finally, the contract contained merger and non-waiver clauses. Paragraph 13 of the contract provides that a “party’s failure to strictly enforce this Agreement or any of its provisions or any default hereunder shall not be construed as or operate as a waiver of such party’s right to demand strict performance of this or any provision or any default under this Agreement.” Further, pursuant to paragraph 15 of the contract,

This Agreement embodies and constitutes the entire understanding between the parties with respect to the independent contractor engagement contemplated herein, and all prior agreements, understandings, representations and statements, oral or written, are superseded by this Agreement. Neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

In his complaint, plaintiff alleges as follows. Plaintiff brought certain transactions to contract at Douglas Elliman that had not yet closed when he left Douglas Elliman, including the sales of apartments at three buildings. Defendant paid plaintiff lost commissions on several of these transactions without requiring plaintiff to submit documentation of the closings of these transactions or set forth the transactions in Exhibit A. Plaintiff also procured two deals while he was with the defendant firm, which would net him a total commission of approximately \$170,000.00 at the closings. On August 20, 2016, plaintiff was informed by Gordon Golub, defendant’s Senior Managing Director of Agent Development and plaintiff’s supervisor, that he was being terminated, allegedly because he corrected an “onboarding specialist” in a meeting, which caused the onboarding specialist to become upset. After being terminated, plaintiff was not allowed to remove his belongings from his office, to access his corporate e-mail account or signed

documents contained in e-mails, to access his exclusive listings or to retrieve a complete copy of the contacts list and associated data that he had brought with him to the defendant firm and was required to upload to defendant's computer system. Defendant then e-mailed plaintiff's contacts in an attempt to gain their business and defamed plaintiff in the process, resulting in one of plaintiff's long-term clients, an unidentified wealthy couple, deciding to no longer do business with plaintiff and in the loss of two deals plaintiff had been cultivating.

Plaintiff alleges that defendant failed to pay him "lost commissions" on some of the deals he brought to contract at Douglas Elliman that closed when plaintiff was with the defendant firm (the "Lost Commissions"). He also alleges that defendant refused to pay him commissions on the two deals plaintiff procured for the defendant firm (the "Commissions") and the \$5,000.00 signing bonus (the "Signing Bonus"). Further, plaintiff alleges that defendant and its employees defamed him following his termination. Specifically, plaintiff claims that a member of defendant's marketing department told "Person A" during a vacation that plaintiff "had a 'bad drug problem,' that he was fired for drug abuse, misogyny and creating a hostile work environment for women and that he 'needed to be escorted out of the building' when he was terminated." Plaintiff also claims that defendant's representative told "Person C" during an interview for a position with defendant, and to other interviewees during other interviews, that it was "not interested in people like [plaintiff]" and that plaintiff was "'unprofessional' and extremely difficult to work with." Further, plaintiff claims that defendant pitched a story to "Person D," plaintiff's professional contact at a news agency, that one of defendant's employees needed to pull the fire alarm to get plaintiff to leave the building after he was terminated. In addition, plaintiff claims that "Person E told him that immediately after [plaintiff] was terminated, [defendant] began to slander him to people throughout the real estate industry" and that "Person F informed [plaintiff] that [defendant] had been spreading false rumors that Walker abused drugs and alcohol, and had to be escorted out of [defendant's] offices after 'showing up to work drunk and high.'"

The court first considers defendants' motion for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiff's cause of action for breach of contract. Plaintiff asserts a cause of action for breach of

contract seeking recovery of the Commissions, Lost Commissions and Signing Bonus. The court will consider defendant's arguments as to why plaintiff is not entitled to these three items individually. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995).

Defendant's motion to dismiss plaintiff's cause of action for breach of contract seeking the Commissions on the ground that plaintiff is not entitled to commissions on transactions that closed after he was terminated pursuant to the contract is granted. The contract provides that "[f]ollowing termination, [plaintiff] shall have no right to commissions except as mutually agreed upon by [defendant] and [plaintiff] at the time of termination." Plaintiff fails to allege in his complaint that the closings for the transactions for which he is allegedly owed the Commissions occurred before his termination.

Plaintiff's argument that defendant should be precluded from relying on this provision because it refused to negotiate with plaintiff with regard to post-termination commissions at the time of plaintiff's termination is without merit as the contract unambiguously states that plaintiff is not entitled to post-termination commissions absent a subsequent agreement but does not require defendant to negotiate or execute an agreement for post-termination commissions.

The court next considers defendant's argument that plaintiff's cause of action for breach of contract seeking the Lost Commissions must be dismissed because plaintiff did not allege that he delivered documentation of the closings of the Lost Commissions transactions in his complaint and because no lost commission transactions are set forth in Exhibit A as required by the contract. Specifically, the contract provides that plaintiff is entitled to receive lost commissions "provided that, [plaintiff] shall deliver to [defendant] reasonable documentation substantiating the closing of each such Lost Commissions Transaction" and states that all lost commission transactions shall be set forth in Exhibit A to the contract. However, plaintiff argues that defendant waived enforcement of these requirements by engaging in a course of conduct whereby defendant paid plaintiff lost commissions without requiring substantiation of the closings and without requiring the transactions to be set forth in Exhibit A on multiple occasions before his termination. In response, defendant argues that the court must reject plaintiff's argument that defendant waived enforcement of these requirements because the contract provides that a party's failure to strictly enforce the contract "shall not be construed as or operate as a waiver of such party's right to demand strict performance" and that no provision of the contract may be waived except by a signed agreement.

"[A] contracting party may waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement" through words or conduct, including partial performance. *Bank Leumi Trust Co. of N.Y. v. Block 3102 Corp.*, 180 A.D.2d 588, 590 (1st Dept 1992). Moreover, "the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause." *Dice v. Inwood Hills Condominium*, 237 A.D.2d 403, 404 (2d Dept 1997). Indeed, a non-waiver clause may itself be waived, depending on the particular facts of the case. *See Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC*, 30 A.D.3d 1, 6 (1st Dept 2006) (holding that a nonwaiver clause was waived by the landlord's acceptance of rent despite knowledge of the tenant's default); *Simon & Son Upholstery v. 601 W. Assoc.*, 268 A.D.2d 359, 360 (1st Dept 2000) (holding that a landlord that actively approved of a tenant's violation of the terms of a lease could not rely upon merger and nonwaiver clauses in the lease as "there [were] sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions").

In the present case, the court cannot determine as a matter of law on this motion to dismiss whether defendant waived the contract's requirements that plaintiff substantiate the closings of the lost commissions transactions and that the transactions be set forth in Exhibit A notwithstanding the contract's merger and non-waiver clauses as plaintiff has alleged that defendant paid him lost commissions multiple times before his termination without ever requiring him to substantiate the closing of those transactions or list the transactions in Exhibit A. Thus, defendant's motion to dismiss plaintiff's cause of action for breach of contract seeking the Lost Commissions is denied.

Defendant's motion to dismiss plaintiff's cause of action for breach of contract seeking the \$5,000.00 Signing Bonus on the ground that he did not actually take a trip to the Canyon Ranch resort or a similar destination, which was allegedly a condition precedent to receiving the Signing Bonus, is also denied. The Signing Bonus provision clearly does not condition plaintiff's receipt of the Signing Bonus on actually taking a trip to the Canyon Ranch resort or a similar destination as the provision unequivocally states that plaintiff is entitled to a Signing Bonus of \$5,000.00 that is to be used for a trip to the Canyon Ranch resort or a similar purpose.

Defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for violation of Labor Law § 191(c) is granted on the ground that plaintiff has failed to sufficiently allege that he was not paid the Commissions in accordance with the terms of the contract. Pursuant to Labor Law § 191(c), "[a] commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment." In the present case, plaintiff's cause of action for violation of Labor Law § 191(c), which is based on defendant's alleged failure to pay plaintiff the Commissions, must be dismissed as the court has found that plaintiff has failed to state a cause of action for the Commissions under the contract.

Defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for conversion of commissions is granted without opposition as plaintiff has agreed to withdraw his cause of action for conversion of commissions in his opposition papers to this motion.

The court next considers defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for conversion of professional network data. To state a cause of action for conversion, a plaintiff must allege "legal ownership or an immediate superior right of possession to a specific identifiable thing and...that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights." *Fiorenti v. Central Emergency Physicians*, 305 A.D.2d 453, 454 (2d Dept 2003), citing *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 757 (2d Dept 1975); see also *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664 (2d Dept 2008).

In the present case, the court finds that the allegations in plaintiff's complaint sufficiently state a cause of action for conversion of professional network data. Specifically, plaintiff alleges in his complaint that he uploaded a list of his professional contacts and potential clients and associated data, which he had cultivated over the course of his career, to defendant's computer network when he was hired but that defendant prevented him from recovering a complete list of his contacts and associated data from its computer network. Plaintiff alleges that defendant instead used his list for its own gain, thereby causing plaintiff to lose at least one client and sustain other damage to his business. Although plaintiff also alleges that defendant prevented him from accessing his e-mail account with defendant after his termination, he does not allege that he had legal ownership or a superior right of possession to his corporate e-mail account and thus this particular allegation does not state a cause of action for conversion.

Defendant's argument that plaintiff has failed to state a cause of action for conversion because plaintiff's list of contacts and associated data is not a specific identifiable thing is without merit. The Court of Appeals has specifically held that electronic records that are stored on a computer but are otherwise indistinguishable from printed documents are subject to claims for conversion. *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292-93 (2007).

Further, defendant's argument that plaintiff has failed to state a cause of action for conversion because he voluntarily uploaded his list of contacts and associated data is without merit. The mere fact that plaintiff uploaded his list of contacts and associated data to defendant's computer network does not give

defendant ownership of the list of contacts and associated data in the absence of a contract provision providing for such a transfer of ownership. *See Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 404-05 (2d Cir 2006). In the present case, defendant has failed to point to any portion of the contract providing that a list of contacts and data plaintiff uploaded to its computer network would henceforth be owned by defendant.

The court next considers defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for tortious interference with prospective economic advantage. To state a cause of action for tortious interference with prospective economic advantage, a plaintiff must allege that he had a business relationship with a third party, that the defendant knew of that relationship and intentionally interfered, "that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort" and that the interference caused injury to the relationship. *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept 2009).

In the present case, the court finds that the allegations in plaintiff's complaint sufficiently state a cause of action for tortious interference with prospective economic advantage. Specifically, plaintiff alleges in his complaint that he had a business relationship with an unnamed wealthy couple, that defendant knew of the relationship and intentionally interfered in the relationship by gaining access to plaintiff's professional network information through his e-mail account and then e-mailing the couple in an attempt to gain their business, defaming plaintiff in the process, which led to plaintiff's loss of the couple's business. Although plaintiff's allegations regarding defamation relating to this cause of action are merely conclusory, he also alleges that defendant interfered in this relationship by accessing and using, or "stealing," his professional network information, which was also the basis for his claim for the tort of conversion.

The court next considers defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's causes of action for quantum meruit and unjust enrichment on the ground that these causes of action are duplicative of plaintiff's cause of action for breach of contract. It is well-established that the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick*,

Inc., 70 N.Y.2d at 388. In the present case, the existence of the written contract precludes plaintiff from asserting causes of action for quantum meruit and unjust enrichment seeking to recover the Commissions on transactions he procured for defendant under the contract. As a result, defendant’s motion to dismiss plaintiff’s causes of action for quantum meruit and unjust enrichment is granted.

The court next considers defendant’s motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff’s cause of action for defamation. Specifically, defendant contends that plaintiff’s defamation claim must be dismissed on the ground that the allegations in plaintiff’s complaint fail to meet the heightened pleading standard of CPLR § 3016(a), which requires the plaintiff to set forth the particular words that were allegedly defamatory. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). The complaint must also specify the time, place and manner of the purported defamation and state to whom it was made. *Id.* See, e.g., *Bell v. Alden Owners Inc.*, 299 A.D.2d 207, 208 (1st Dept 2002) (affirming the dismissal of a defamation claim where “[t]he claimed defamatory remarks were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified”).

In the present case, plaintiff’s cause of action for defamation must be dismissed as plaintiff’s allegations are not pled with the required specificity. Plaintiff’s complaint fails to specify the times or places of the purported defamation. In addition, plaintiff has failed to identify either the persons who made or the persons who heard any of the allegedly defamatory statements, although plaintiff claims that he did not identify his “sources” to protect them from defendant and can make this information available for *in camera* review. Further, plaintiff has failed to set forth the particular words that were allegedly defamatory with regard to his specific claim that “Person E told him that immediately after [plaintiff] was terminated, [defendant] began to slander him to people throughout the real estate industry.”

Moreover, plaintiff’s cause of action for defamation must be dismissed as plaintiff does not allege that he sustained special damages and the statements on which he bases his cause of action for defamation do not constitute defamation per se. A cause of action for defamation must allege either that the allegedly defamatory statements caused special harm or constitute defamation per se. *Geraci v. Probst*, 61 A.D.3d 717, 718 (2d Dept 2009). “A false statement constitutes defamation per se when it charges another with a

