

Dastain v K. Zark Med. P.C.

2017 NY Slip Op 30333(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 653281/2016

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

JEAN-YVES DASTAIN, M.D.,

Plaintiff,

-against-

K. ZARK MEDICAL P.C., HISPANIC MEDICAL, P.C.,
KONSTANTINOS ZARKADAS, M.D.,

Defendants.

Index No.: 653281/2016
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' pre-answer motion to dismiss under CPLR 3016 (b), 3211 (a) (1) and 3211 (a) (7).

Papers	Numbered
Defendants' Notice of Motion	1
Defendants' Memorandum of Law	2
Plaintiff's Affirmation in Opposition	3
Plaintiff's Memorandum of Law in Opposition	4
Defendants' Reply Memorandum of Law	5
Defendants' Reply Affidavit	6
Affidavit of Scott J. Laird	7
Affidavit of Ellias N. Fillas	8

Law Offices of Kenneth L. Kutner, New York (Kenneth L. Kutner of counsel), for plaintiff.
Blodnick, Fazio & Associates, P.C., New York (Edward K. Blodnick of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff, Jean-Yves Dastain, M.D.,¹ commenced this action on July 28, 2016, asserting five causes of action — breach of contract, fraudulent misrepresentation, breach of implied duty of good faith and fair dealing, pierce the corporate veil (only with respect to defendant Konstantinos Zarkadas, M.D.), and Labor Law violations — against defendants for improperly dismissing plaintiff from his employment a couple of months after entering into an employment agreement with defendant K. Zark Medical P.C., on April 18, 2016. The agreement provides for a guaranteed term of two years with a salary of \$250,000 and other benefits. Defendants now move, pre-answer, to dismiss the second, third, fourth, and fifth causes of action under CPLR 3016 (b), 3211 (a) (1), and 3211 (a) (7).

¹ Throughout its papers, plaintiff's counsel refers to Dr. Dastain (plaintiff) and Dr. Zarkadas (defendant) interchangeably. The court assumes plaintiff's counsel's intention from the context.

Preliminarily, plaintiff requests that the court not consider defendants reply affidavits because they were submitted late. The court considers the reply affidavits properly submitted and on time. Due to the reasons explained below, however, the court may not consider the affidavits as part of defendants' CPLR 3211 (a) (1) motion.

Defendants' Motion to Dismiss under CPLR 3016 (b)

The court dismisses plaintiff's second cause of action, the fraud claim. A claim rooted in fraud must be pleaded with particularity. (CPLR 3016 [b].) A plaintiff pleads fraud with particularity when the facts provided are sufficient to permit a reasonable inference of the alleged conduct. (*Sargiss v Magarelli*, 12 NY3d 527, 531 [2009].) To assert a claim for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, intent to induce reliance, justifiable reliance by the plaintiff, and damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].)

Alleging a lack of intent to perform under a proposed contract or a hope of future performance of entities subject to defendant's control does not amount to fraud. (*Wilmoth v Sandor*, 259 AD2d 252, 255 [1st Dept 1999].) A fraud claim does not lie when the fraud alleged relates to a breach of contract. (*Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187 [1st Dept 1998].) General allegations that a defendant entered into a contract without the intent to perform it are insufficient to support a fraud claim. (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008] ["Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages."].)

On a fraud claim, a plaintiff must allege that the defendant breached a duty independent of the duty that defendant breached on plaintiff's breach-of-contract claim. (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 99 [1st Dept 2010] ["Contrary to Abaplus's argument, the claim of fraud is independent of the breach of contract claim inasmuch as plaintiff alleged that Abaplus breached a duty of reasonable care distinct from its contractual obligations by fraudulently inducing plaintiff to enter agreements."].)

Damages for a breach of contract "are meant to place the non-breaching party in as good a position as it would have been had the contract been performed." (*Manas*, 53 AD3d at 454.) Recovering damages on a fraudulent-inducement claim is meant to "indemnify for the loss suffered through that inducement," such as damages for foregone opportunities. (*Id.*, citing *Deerfield Communications Corp.*, 68 NY2d 954, 956 [1986]; *accord Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001].)

Plaintiff alleges, in the fraud claim, that Zarkadas fraudulently induced plaintiff into signing an employment contract by representing to plaintiff that he would be employed for "a guaranteed period of two years at a salary of \$250,000.00 per year plus bonus, health care benefits and payment of Plaintiff's malpractice insurance premium and four weeks paid vacation per annum." (Plaintiff's Affirmation in Opposition, Exhibit A.)

But plaintiff's allegation of fraud does not arise from defendants' duty independent of the contract claim. Similar to the allegations in plaintiff's fraud claim, plaintiff alleges, in the contract claim, that defendant breached the employment agreement "by terminating Dr. Dastain's employment without cause and without notice prior to the completion of the two-year guaranteed employment term," "by failing to pay Plaintiff a performance bonus in accordance with schedule B of the Agreement," and "by failing to pay all wages due as well as Plaintiff's health insurance premium." (Plaintiff's Affirmation in Opposition, Exhibit A.)

Plaintiff's allegation that defendants never intended to perform under their contract does not amount to an independent claim of fraud. (*See Wilmoth*, 259 AD2d at 255.) Because plaintiff's fraud claim relates to its breach-of-contract claim, plaintiff's fraud claim may not survive. (*See Krantz*, 256 AD2d at 187.) Plaintiff has not alleged that defendants breached a duty separate from the duty defendants allegedly breached on plaintiff's breach-of-contract claim. (*See Manas*, 53 AD3d at 454.) Plaintiff, likewise, does not assert damages on its fraud claim separate from its damages on its breach of contract claim. (*See id.*) Defendants' motion to dismiss plaintiff's second cause of action, the fraud claim, is granted.

Defendants' Motion to Dismiss under CPLR 3211 (a) (1)

Defendants' CPLR 3211 (a) (1) motion is denied. On a motion to dismiss under CPLR 3211 (a) (1), a defendant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [citations omitted]; *accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) The documentary evidence must "be unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.) Judicial records, mortgages, deeds, and contracts qualify as documentary evidence. (*Fontanetta*, 73 AD3d at 84.) Affidavits, EBT transcripts, emails, and medical records are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). (*Id.* at 85.) Affidavits and summary notes do not constitute documentary evidence within the meaning of the statute; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp., v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].)

In support of its motion to dismiss based on documentary evidence, defendants initially provided two employment agreements (dated October 13, 2015 and April 11, 2016, between defendant K. Zark Medical P.C. and plaintiff),² emails between plaintiff and Zarkadas' counsel in another case regarding an affidavit signed by plaintiff, and a handwritten note by Zarkadas. (Defendants' Notice of Motion, Exhibits B-E.) In reply to plaintiff's opposition, defendants provide two affidavits. (Affidavit of Scott J. Laird; Affidavit of Ellias N. Fillas.) The emails and the affidavits raise issues of credibility for a jury to decide. They do not constitute documentary evidence within the statute's meaning. (*See Art & Fashion Group Corp.*, 120 AD3d at 438.)

² The October 2015 agreement was for a period of 3 years with a salary of \$225,000 per year and other benefits. (Defendants' Notice of Motion, Exhibits B.) The April 2016 agreement was for a period of two years with a salary of \$250,000 per year and other benefits.

The court may consider only the two employment contracts. The court may not consider the emails, handwritten note, or the two affidavits. (*See Art & Fashion Group Corp.*, 120 AD3d at 438.) The contracts alone do not provide enough evidence for the court to conclusively resolve this action. Defendants' CPLR 3211 (a) (1) motion is denied.

Defendants' Motion to Dismiss under CPLR 3211 (a) (7)

Defendants motion to dismiss under CPLR 3211 (a) (7) is granted. Plaintiff's third, fourth, and fifth causes of action are dismissed. On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts, as a plaintiff alleges, fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one."].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

Plaintiff's Third Cause of Action

The covenant of good faith and fair dealing is implied in every contract. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002].) However, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsicly tied to the damages allegedly resulting from a breach of the contract.'" (*The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004].) Because defendants' alleged breach of the implied duty of good faith and fair dealing and the alleged breach of contract claims both arise from the same facts, the breach of the implied duty of good faith and fair dealing claim is dismissed as duplicative. (*See MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009].) Plaintiff's third cause of action is dismissed.

Plaintiff's Fourth Cause of Action

Generally, piercing the corporate veil requires a showing that (1) the owners exercised complete dominion and control over the corporation with respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury. (*Matter of Morris v New York State Dept of Tax. & Fin.*, 82 NY2d 135, 141 [1993].) A party who seeks to "pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (*Id.*)

Although plaintiff alleges that Zarkadas had control over the other defendants and made business determinations, plaintiff has not provided any facts to establish that Zarkadas, through his domination of the other defendants, abused his privilege of doing business in the corporate

form. Therefore, under CPLR 3211 (a) (7), plaintiff fails to state a claim, and plaintiff's fourth cause of action is dismissed.

Plaintiff's Fifth Cause of Action

Under CPLR 3211 (a) (7), plaintiff fails to state a cause of action under New York State Labor Law. Because plaintiff is a medical professional, Labor Law § 191 (1) (d) does not apply to him. Labor Law § 191 (1) (d) provides that “[a] clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly.” Labor Law § 190 (7) defines “clerical and other worker” as “all employees not included in subdivisions four, five and six of this section, *except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week.*” [Emphasis added.] Professionals, like plaintiff, who earn more than \$900 a week are not entitled to the pay-frequency requirements under the Labor Law. (*See Naderi v North Shore-Long Island Jewish Health System*, 135 AD3d 619, 620 [1st Dept 2016].) Therefore, plaintiff fails to state a valid cause of action under CPLR 3211 (a) (7). Plaintiff's claim is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent that plaintiff's second, third, fourth, and fifth causes of action are dismissed; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that this action will continue against defendants with respect to the first cause of action, and defendants must serve/file its answer within 20 days from notice of entry.

Dated: February 14, 2017

J.S.C. 
HON. GERALD LEBOVITS
J.S.C.