SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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DESMOND ROCHE

Plaintiff

Index No. 640339/17

v

DECISION AND ORDER

DRIVE IN 24, LLC, a/k/a DRIVE IN STUDIOS ROOT CAPTURE, INC., TREC RENTAL CORP., ISAAC LITCHFIELD, JOSHUA STEEN, DEBORAH CHANNER, MOISCHE LANDAU, KIP MCQUEEN, and OLEH SHARANEVYCH

MOT SEQ 001, 002, 003

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover for unpaid wages in violation of Labor Law §§ 191 and 198 and for breach of contract, the defendants Root Capture, Inc. (Root Capture), Moische Landau, and Oleh Sharanevych move, pre-answer, pursuant to CPLR 3211(a)(7) and (8) to dismiss the complaint against them for failure to state a cause of action and improper service of process (SEQ 001). The plaintiff cross-moves pursuant to CPLR 3124 and 3215 to compel limited discovery as to the addresses of Landau and Sharanevych and for leave to enter a default judgment against unidentified defendants.

While the motion and cross motion under sequence 001 were pending, the plaintiff served Root Capture via the Secretary of

State. Root Capture thereafter answered the complaint. The defendants Drive In 24, LLC, a/k/a Drive In Studios (Drive In), Root Capture, and Trec Rental Corp. (collectively the Trec defendants) now move (SEQ 002) pursuant to CPLR 3212 for summary judgment dismissing the causes of action for unpaid wages under the Labor Law (first cause of action) and unjust enrichment (fourth cause of action) against them.

The plaintiff cross-moves for summary judgment on the cause of action to recover for breach of contract, and to strike the one affirmative defense of the Trec defendants, which asserts that the complaint fails to state a cause of action.

The defendants Isaac Litchfield, Joshua Steen, Debbie Channer, and Kip McQueen (collectively the Litchfield defendants) move (SEQ 003) pursuant to CPLR 3212 for summary judgment dismissing the first cause of action against them and pursuant to CPLR 3211(a)(7) dismissing the cause of action to recover for owner's liability for unpaid wages under the Labor Law (second cause of action) and the fourth cause of action, which is to recover for unjust enrichment, against them.

The plaintiff cross-moves for summary judgment on the cause of action to recover for breach of contract, and to strike the one affirmative defense of the Litchfield defendants, which asserts that the complaint fails to state a cause of action.

II. BACKGROUND

The plaintiff alleges that he was retained by the Trec defendants to perform computer and data base recovery and security system work over a period of time, he fully performed all the work for which he was retained, he periodically invoiced them for his work, he was never paid therefor, and he is thus owed $295,203.98. He seeks to recover that sum, alleging that it constituted unpaid wages within the meaning of the Labor Law, and he seeks to impose Labor Law owner liability upon the individual defendants for those wages. He also seeks to recover for breach of contract and unjust enrichment.

III. DISCUSSION

A. MOTION SEQUENCE 001

With respect to motion sequence 001, Landau and Sharanevych establish, with Litchfield's affidavit, that they did not maintain an actual place of business at Root Capture's Manhattan office, which was where the plaintiff attempted to serve them with process pursuant to the deliver and mail method of CPLR 308(2). There is nothing in the plaintiff's opposition papers to show that those individuals were ever served at their residence addresses or at any other address, and the plaintiff does not adduce evidence to refute the allegation that they did not maintain an actual place of business at Root Capture's office.

Thus, even if the complaint states a cause of action against Landau and Sharanevych for individual owner liability for unpaid wages, the complaint must be dismissed against them, since they were not served at their actual place of business. See Lawrence v Ruskin, 186 AD2d 485 (1st Dept. 1992).

Proper service upon Root Capture was subsequently effected. Accepting the allegations in the complaint as true, as the court must on a motion pursuant to CPLR 3211(a)(7) (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]), the complaint states a cause of action against it for unpaid wages and breach of contract. Since the plaintiff seeks to recover under an express agreement, however, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987). Thus, on this motion, the fourth cause of action must be dismissed against Root Capture.

In their motion papers, the movants provide the plaintiff with the residence addresses of Landau and Sharanevych, thus rendering academic that branch of his cross-motion which is for limited discovery on that issue. With respect to the remainder of his cross motion, the plaintiff does not identify any defendant who was in default, and makes no showing that would entitle him to that relief in connection with his cross motion.

B. MOTION SEQUENCE 002

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form. See Zuckerman v City of New York, 49 NY2d 557 (1980). The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In connection with motion sequence 002, the Trec defendants make a prima facie showing, with Litchfield's affidavit and the plaintiff's invoices, that the plaintiff was never an employee of any of the Trec defendants, since none of them controlled the means used to produce the results of his work, the results themselves, or his work hours. See Matter of O'Brien v Spitzer, 7 NY3d 239 (2006); Matter of Hertz Corp. [Commissioner of Labor], 2 NY3d 733 (2004); Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516 (1985). Moreover, Litchfield avers that the plaintiff worked mostly from home, did not receive a salary,

did not receive a W-2 form after 2010 from any defendant, did not receive benefits, and billed the defendants for his time. Hence, the Trec defendants established that the plaintiff was an independent contractor (see Matter of O'Brien v Spitzer, supra), and was not covered by the wage payment provisions of the Labor Law. See Bizjak v Gramercy Capital Corp., 95 AD3d 469 (1st Dept. 2012). The plaintiff, in his affidavit, does not refute any of these allegations, and submits no other evidence that raises a triable issue of fact as to whether he was an employee, rather than an independent contractor, during the time period for which he seeks compensation.

Thus, the Trec defendants are entitled to summary judgment dismissing the first cause of action against them.

Inasmuch as the fourth cause of action, alleging unjust enrichment, was dismissed against Root Capture in connection with motion sequence 001, that branch of the motion under sequence 002 which is for summary judgment dismissing that cause of action against Root Capture is denied as academic. However, for the same reason that this cause of action was dismissed against Root Capture, the remaining Trec defendants established their entitlement to dismissal of that cause of action against them by demonstrating that there was an express agreement between them and the plaintiff. Since the plaintiff fails to show or allege that there was no express agreement covering his claims, summary

judgment must be awarded to Drive In and Trec dismissing the fourth cause of action against them.

The plaintiff, on his cross motion, establishes his prima facie entitlement to recover for breach of contract against the Trec defendants in connection with his invoices, in that he asserts that there was an agreement for his provision of services to the Trec defendants, he performed thereunder, timely billed the Trec defendants therefor, and was never paid. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). The Trec defendants, however, raise a triable issue of fact with Litchfield's affidavit, in which he asserts that the plaintiff did not actually perform some of the subject work, was paid in connection with the work he did undertake, and failed to timely invoice the Trec defendants in accordance with the parties' understanding. Therefore, the branch of the plaintiff's cross motion which is for summary judgment is denied.

There is no basis upon which to "dismiss the 'affirmative defense' of failure to state a claim, because failure to state may be asserted at any time even if not pleaded (CPLR 3211[e]) and is therefore 'mere surplusage' as an affirmative defense." San-Dar Assoc. v Fried, 151 AD3d 545, 545-546 (1st Dept. 2017); see Bernstein v Freudman, 136 AD2d 490 (1st Dept 1988); Riland v Frederick S. Todman & Co., 56 A.D.2d 350 (1st Dept 1977). Hence, that branch of the plaintiff's cross motion which is to dismiss

the affirmative defense is denied.

C. MOTION SEQUENCE 003

With respect to motion sequence 003, the Litchfield defendants established their prima facie entitlement to judgment as matter of law dismissing the first cause of action against them, which sought to recover unpaid wages under the Labor Law. They make this showing with the same proof as supported the Trec defendants' motion under sequence 002, as well as with the affidavit of the defendant Channer, who asserts that the Trec defendants provided the plaintiff with an IRS form 1099 for all of their payments to him, thus showing his status as an independent contractor. As with the motion under sequence 002, the plaintiff's affidavit does not set forth any facts to refute this showing, and he submits no documentation that would lead to a contrary inference.

The Litchfield defendants also show that, since there were no unpaid wages under the Labor Law, the second cause of action, which seeks to recover unpaid wages from them individually, in their capacity as the owners of the Trec defendants, fails to state a cause of action. They further show that the unjust enrichment cause of action fails to state a cause of action because the plaintiff seeks to recover under an express agreement.

In connection with his cross motion for summary judgment on the breach of contract cause of action under motion sequence 003, the plaintiff repeats the contentions and submits the same proof as in motion sequence 002. This second cross motion must be denied for the same reasons as the first, and also because the Litchfield defendants raised a triable issue of fact as to whether they could be held personally liable under any theory for contractual obligations incurred by the Trec defendants. See 150 Broadway N.Y. Assocs., L.P. v Bodner, 14 AD3d 1 (1st Dept. 2004).

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants Root Capture, Inc., Moische Landau, and Oleh Sharanevych (SEQ 001) to dismiss the complaint against them is granted to the extent that the complaint is dismissed against Moische Landau and Oleh Sharanevych, and the fourth cause of action is dismissed against Root Capture, Inc., and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's cross motion (SEQ 001) to compel discovery and for leave to enter a default judgment is denied; and it is further,

ORDERED that the motion of the defendants Drive In 24, LLC, a/k/a Drive In Studios, Root Capture, Inc., and Trec Rental Corp.

(SEQ 002) for summary judgment dismissing the first and fourth causes of action against them is granted to the extent that the first cause of action is dismissed against Drive In 24, LLC, a/k/a Drive In Studios, Root Capture, Inc., and Trec Rental Corp., and the fourth cause of action is dismissed against Drive In 24, LLC, a/k/a Drive In Studios, and Trec Rental Corp., and the motion is otherwise denied as academic in light of the determination of the motion under sequence 001; and it is further,

ORDERED that the plaintiff's cross motion (SEQ 002) for summary judgment on the third cause of action, which is to recover for breach of contract, against Drive In 24, LLC, a/k/a Drive In Studios, Root Capture, Inc., and Trec Rental Corp., and to dismiss the affirmative defense asserted by those defendants is denied; and it is further,

ORDERED that the motion of the defendants Isaac Litchfield, Joshua Steen, Debbie Channer, and Kip McQueen (SEQ 003) for summary judgment dismissing the first cause of action against them and to dismiss the second and fourth causes of action against them is granted, and the first, second, and fourth causes of action are dismissed as against the defendants Isaac Litchfield, Joshua Steen, Debbie Channer, and Kip McQueen; and it is further,

ORDERED that the plaintiff's cross motion (SEQ 003) for

summary judgment on the third cause of action, which is to recover for breach of contract, against Isaac Litchfield, Joshua Steen, Debbie Channer, and Kip McQueen, and to dismiss the affirmative defense asserted by those defendants is denied.

This constitutes the Decision and Order of the court.

Dated: July 6, 2018

ENTER:

J.S.C.
HON. NANCY M. BANNON