

Johnson v Cestone
2018 NY Slip Op 32474(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 152444/2015
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I. A. S. PART 15**

SARAH JOHNSON,

Petitioner,

-against-

INDEX NO.: 152444/2015
SEQ. NO.: 19

DECISION AND ORDER

MARIE CESTONE, CHRISTOPHER WOODROW,
MOLLY CONNERS, HOYT DAVID MORGAN,
ROSELAND VENTURES LLC, PROSPECT POINT
CAPITAL LLC, WORLDVIEW ENTERTAINMENT
HOLDINGS LLC, WORLDVIEW ENTERTAINMENT
HOLDINGS INC, WORLDVIEW ENTERTAINMENT
CAPITAL LLC, WORLDVIEW ENTERTAINMENT
CAPITAL II LLC, WORLDVIEW ENTERTAINMENT
PARTNERS IV LLC, WORLDVIEW ENTERTAINMENT
PARTNERS V LLC, WORLDVIEW ENTERTAINMENT
PARTNERS VI LLC, WORLDVIEW ENTERTAINMENT
PARTNERS VII LLC, AND WORLDVIEW
ENTERTAINMENT PARTNERS IX LLC,

Respondents.

CRANE, J.:

Plaintiff Sarah Johnson, moves pursuant to CPLR 3211 (a) (7) to dismiss the four counterclaims defendants, Worldview Entertainment Holdings LLC, Worldview Entertainment Holdings Inc., and Worldview Entertainment Capital II LLC (collectively the “Worldview Entities”) have interposed.¹

In 2011, plaintiff made an initial investment of \$800,000 into an entity that the Worldview Entities and their managers established, for the purpose of developing a single

¹By order of the Court dated March 17, 2017, the following entities were dismissed from this case: Worldview Entertainment Capital LLC, Worldview Entertainment Partners VII LLC, and Worldview Entertainment Partner IX LLC.

motion picture (second amended complaint at 2, ¶¶ 1, 2). Plaintiff alleges that over the course of the next three years, various defendants engaged in a fraudulent scheme to induce plaintiff to make nearly \$25 million in additional investments in, and loans to, various film entities (*id.* at 2, ¶ 2). In December 2013, plaintiff allegedly received a 20% interest in defendant, Worldview Entertainment Holdings LLC (Holdings LLC) in exchange for her promise to invest \$20 million in a separate entity, defendant, Worldview Entertainment Capital II, LLC (WEC II).² Plaintiff commenced this action for, *inter alia*, fraud, breach of contract, negligent misrepresentation, gross negligence, unjust enrichment and breach of fiduciary duty.

On May 30, 2017, the Worldview Entities asserted four counterclaims in connection with their answer to plaintiff's second amended complaint. These counterclaims arise from plaintiff's alleged refusal to invest \$25 million in WEC II, and from the breach of plaintiff's fiduciary and contractual duties allegedly owed to WEC II. The Worldview Entities allege that plaintiff interfered with WEC II's contractual relationships and was able to compete against WEC II by starting her own film finance company. They allege plaintiff usurped WEC II's film investment opportunities (Worldview Entities' memo of law at 5).

Discussion

Plaintiff moves for an order, dismissing the counterclaims, pursuant to CPLR 3211 (a) (7), for failing to state a cause of action. On a motion to dismiss pursuant to CPLR 3211, the court affords the pleading a liberal construction. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and

² Plaintiff allegedly made an oral promise to defendants, Marie Cestone and Christopher Woodrow, who were acting as agents for defendants Roseland Ventures LLC, and Prospect Point Capital LLC, respectively. Roseland Ventures LLC and Prospect Point Capital are no longer parties in this action.

determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Dismissal is appropriate pursuant to CPLR 3211 (a) (1) “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.*; at 88 see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “Put differently, the documentary evidence must ‘resolv[e] all factual issues as a matter of law and conclusively dispos[e] of the plaintiff’s claim’” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011], quoting *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2d Dept 2010]; see *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*Leon v Martinez*, 84 NY2d at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [other citations omitted]). “[U]nless it has been shown that a material fact as claimed by the pleader 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” (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

Finally, “[i]t is true that ‘in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference’ However, ‘factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible. . . , are not entitled to such consideration’” (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept

2006]).

First Counterclaim: Breach of Oral Contract

The parties and the court agree that there is no conflict between Delaware and New York law as it applies to the applicable Operating Agreement. The elements of a breach of contract claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damage (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In determining whether a contract exists, "the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." (*Central Fed. Sav. v National Westminster Bank, U.S.A.*, 176 AD2d 131, 132 [1st Dept 1991]). In order to invoke "the power of law. . . to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained" (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). A cause of action for breach of contract is subject to dismissal at the pleading stage "as too indefinite, and therefore, unenforceable." (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994])(trial court "properly dismissed, without leave to replead, the plaintiffs' first cause of action, purporting to set forth a cause of action for breach of contract, as too indefinite, and therefore, unenforceable, for plaintiffs' failure to allege, in nonclusory language, as required, the essential terms of the parties' purported personal services contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation"])).

Here, the first counterclaim alleges that in December 2013, plaintiff made an oral promise to defendants Marie Cestone (Cestone) and Christopher Woodrow (Woodrow) to invest at least \$25 million in WEC II, in consideration for a 20% ownership interest in Holdings LLC. Further, in December 2013, plaintiff allegedly signed Holdings LLC's Operating Agreement making her ownership retroactive to January 5, 2011. In support of her motion, plaintiff denies making a promise to invest \$25 million in WEC II and argues that the Worldview Entities lack standing to bring this cause of action as she made the alleged oral promise to defendants Cestone and Woodrow. Further, plaintiff claims that her alleged oral promise was at most, an agreement to agree, lacked essential terms, and is unenforceable.

"The doctrine of indefiniteness or certainty is well established in contract law" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]). A court cannot enforce a contract unless it is able to determine what the parties agreed to (*id.* at 6). Moreover, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*id.*, at 91; citing *Martin Delicatessen v Schumacher*, 52 NY2d 105 at 109).

Here, applying either New York or Delaware law, the first counterclaim purporting to allege a breach of contract is insufficient. The Worldview Entities have failed to allege in nonconclusory language including, specific investment amounts, schedules, particular films, and profit distributions, all of which are essential terms of the parties' alleged agreement.

Accordingly, that branch of plaintiff's motion seeking to dismiss the first counterclaim is granted. In light of the foregoing, it is unnecessary for the court to address the merits, if any, of the remaining arguments pertaining to standing and statute of frauds.

Second Counterclaim: Breach of Contract

The second counterclaim alleges plaintiff signed the Holding LLC's Operating Agreement on or December 2013 and repeatedly violated the conflict of interest provision by engaging in competition against Holdings LLC without advanced full disclosure or approval of managers.

Provision 5.9.1 of the Operating Agreement states, in pertinent parts, as follows:

"A Member is not entitled to enter into any transaction that may be considered competitive with, or into a business opportunity that may be beneficial to, the Company, unless such transaction was approved in advance by the Managers after full disclosure by the Member to the Managers of the details of such proposed transaction. Members must account to the Company and hold as trustee for it any Property, profit or benefit derived by the Member, without the consent of the other Voting Members, in the conduct and winding up of the Company business or from a use or appropriation by the Member of Company Property, including information developed exclusively for the Company and opportunities expressly offered to the Company."

Plaintiff argues that the non-compete clause in the Operating Agreement is overly broad and unenforceable.

The second counterclaim states a valid cause of action for breach of contract based on a violation of the Operating Agreement of Holdings LLC. Specifically, the Worldview Entities argue that plaintiff invested in numerous films that competed directly with those Holdings LLC and others managed. The Worldview Entities further argue that the plaintiff co-founded her own film investment company called "Green Hummingbird Entertainment LLC that also competes with Holdings LLC. The Worldview Entities argue that these acts conflicted with her contractual obligations and damaged Holdings LLC. Without deciding, *inter alia*, the precise scope of the term "transaction" in the Operating Agreement, the court notes that the pleading, liberally

construed, as it must be at this stage of the proceedings, sufficiently alleges that plaintiff, as a member of Holdings, LLC, engaged in prohibited competitive transactions without prior approval. Accordingly, the court denies plaintiff's motion to dismiss the second counterclaim pursuant to CPLR 3211 (a) (7).

Third Counterclaim: Tortious Interference with Contractual Relations

Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of contract without justification, actual breach of the contract, and damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

In this case, the third counterclaim states that plaintiff knew that the purpose of WEC II was to invest in a slate of films, and was aware that WEC II had a contractual relationship with The Weinstein Company. Further, plaintiff allegedly was aware that her refusal to invest the \$25 million would leave WEC II unable to fulfill its commitments to The Weinstein Company. The third counterclaim alleges that, but for plaintiff's interference with its contractual relationship with The Weinstein Company, WEC II would have fulfilled its contractual obligations to The Weinstein Company (Worldview Entities' answer dated 5/30/17 at 62, ¶¶ 43-47).

To the extent that the Worldview Entities allege that plaintiff tortiously interfered with the valid contract between WEC II and The Weinstein Company, the third counterclaim fails as a matter of law. The Worldview Entities fail to allege in nonconclusory terms that plaintiff knew of the existence of WEC II's contract with The Weinstein Company. The exhibits the Worldview Entities rely upon do not mention the specific "Weinstein" contract (Offering Memorandum,

Exhibit C to Burnstein Aff.). Moreover, taking the Worldview Entities argument to its logical conclusion, any simple breach of contract could turn into a tortious interference claim were that breach to affect other commitments. Accordingly, as they have failed to satisfy the elements of tortious interference with a contract, the court grants plaintiff's motion to dismiss the third counterclaim.

Fourth Counterclaim: Breach of Fiduciary Duty

To state a cause of action to recover damages for breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]); see *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2007]). A breach of fiduciary duty cause of action must be pleaded with the requisite particularity under CPLR 3016 (b) (see *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804; *Chiu v Man Choi Chiu*, 71 AD3d 621, 623 [2d Dept 2010]).

The fourth counterclaim alleges that pursuant to §5.9.1 of the Operating Agreement, plaintiff owed a fiduciary duty not to usurp business opportunities from Holdings LLC; to disclose fully opportunities in advance; and seek managers' permission to engage in activities, such as funding other films. In opposition, plaintiff argues that the fourth counterclaim is duplicative of the second cause of action for breach of contract. Moreover, plaintiff argues that the operating agreement specifically bars a claim for breach of fiduciary duty.

Under CPLR 3211 (a) (7), a cause of action for breach of fiduciary duty whose allegations are merely duplicative of a breach of contract claim cannot stand (*William Kaufman Org., Ltd. v*

Graham & James LLP, 269 AD2d 171, 173 [1st Dept 2000], accord *Weight v Day*, 134 AD3d 806, 808-09 [2d Dept 2015] [affirming dismissal of breach of contract cause of action as duplicative of the causes of action alleging accounting malpractice and breach of fiduciary duty]; see also *Joyce v Thompson Wigdor & Gilly LLP*, 2008 WL 2329227, 36 Media L Rep 2030 [SDNY June 3, 2008] [overlapping claims of negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, or fraudulent misrepresentation premised on the same facts and seeking identical relief as a claim for legal malpractice are generally dismissed as duplicative [collecting cases]]. Claims are duplicative where they arise from the same facts and seek the same damages for each alleged breach (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

Conversely, both causes of action may co-exist where a claim of breach of fiduciary duty rests on a duty separate and distinct from the breach of contract (*Savage Records Group, N. V. v Jones*, 247 AD2d 274, 274-275 [1st Dept], *lv denied* 92 NY2d 804 [1998] (when parties have entered into a contract, unless a party can show a separate duty, “independent of the mere contract obligation,” no fiduciary relationship is established); compare *Mandelblalt v Devon Stores, Inc.*, 132 AD2d 162, 163 [1st Dept 1987] (breach of fiduciary duty for disparaging the employer was separate and distinct from the former employee's alleged failure to perform his duties under the contract) with *William Kaufman Org., Ltd* 269 AD2d at 173 (“[h]ere, there is no such distinction. Indeed, the cause of action for breach of contract refers ... to the unethical conduct described in the . . . allegations of breach of fiduciary duty”); see also *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011] (“[u]nlike a misrepresentation of future intent to

perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty”); *Brooks v Key Trust Co. Nat. Assn*, 26 AD3d 628, 630 [3d Dept 2006] [in order to survive a motion to dismiss, a claim for breach of fiduciary duty must “set[] forth allegations that, *apart from the terms of the contract*, the parties created a relationship of higher trust than would arise from [their contracts] alone” [internal quotation marks and citation omitted]).

In this case, there is no appreciable difference between the disputed causes of action. The breach of contract counterclaim seeks damages pursuant to plaintiff’s repeated engagement “in conflicting activities that amounted to direct competition with Worldview Entities.” (counterclaim plaintiff’s opposition to instant motion). In nearly identical language, including allegations of breach of fiduciary duty, the fourth counterclaim seeks damages pursuant to plaintiff’s usurpation of business opportunities from Holdings, LLC in violation of the Operating Agreement (*id.*).

The Worldview Entities’ attempts to disentangle the causes of action are unavailing to the extent that, in their fourth counterclaim, they do not establish a duty separate and distinct from the obligations involved in the breach of contract at issue. The Worldview Entities’ allegations stem from the same series of acts, i.e. engaging in competitive transactions. The allegations are effectively interchangeable, and allege functionally identical actions. Accordingly, the court grants plaintiff’s motion to dismiss the fourth counterclaim pursuant to CPLR 3211 (a) (7).

Accordingly,

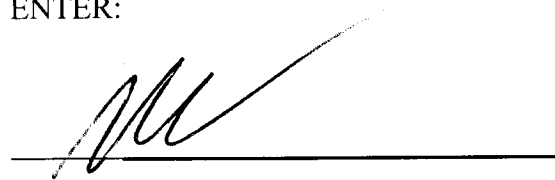
ORDERED that plaintiff’s motion to dismiss is granted and the first, third and fourth causes of action in the second amended answer is hereby severed and dismissed; and it is further

ORDERED that plaintiff's motion to dismiss the second counterclaim for breach of contract in the second amended answer is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be held at the Supreme Court, 71 Thomas Street, New York, New York, Civil Term, I. A. S. Part 15, Room 304 on the 10th day of ~~December~~ ^{October} 2018 at 10:00 a.m.

DATED: ~~October~~ ^{October 1st}, 2018
New York, NY

ENTER:



A.J.S.C.

HON. MELISSA A. CRANE
J.S.C.