

Schoenbach v Insight Venture Mgt., LLC

2019 NY Slip Op 30473(U)

February 27, 2019

Supreme Court, New York County

Docket Number: 651632/2018

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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EVAN SCHOENBACH	INDEX NO.	<u>651632/2018</u>
Plaintiff,	MOTION DATE	<u>10/09/2018</u>
- v -	MOTION SEQ. NO.	<u>001</u>
INSIGHT VENTURE MANAGEMENT, LLC,		
Defendant.		

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 58, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In employment-related action, defendant Insight Venture Management, LLC d/b/a Insight Venture Partners (“Insight”) moves partially to dismiss plaintiff Evan Schoenbach’s (“Schoenbach”) complaint.

Background¹

In August 2011, Schoenbach received an employment offer letter (“Agreement”) from Insight, a private equity and venture capital firm, which he subsequently accepted. The Agreement, which Insight submits in support of this motion, provides that Schoenbach would work as a private equity research analyst from September 10, 2012

¹ Unless otherwise specified, all facts are taken from the complaint, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), or documents referenced to by the complaint.

until August 1, 2014 with a starting base salary of \$65,000 per year, and that his employment was conditioned upon passing a background check, acknowledging and complying with Insight's code of ethics, and executing a confidentiality agreement.

The Agreement specifies several additional forms of incentive compensation that Schoenbach may be entitled to receive, including: (1) a performance-based bonus; (2) phantom carry equity "equivalent to \$25,000 of capital invested in Fund VII at fund valuation as of [September 10, 2012]"; (3) a deal sourcing bonus, in the amount of "\$5,000 cash plus minimum of \$15,000 phantom deal equity participation per deal sourced, subject to minimum investment threshold of \$15 million" ("Deal Bonus"); and (4) a \$5,000 acquisition bonus per portfolio company acquisition sourced ("Acquisition Bonus"). The phantom carry and phantom equity incentives are contingent upon each vesting on May 23, 2014.

The Agreement does not specify how phantom equity awards are calculated, but the complaint alleges that phantom equity awards were based on a percentage of the total investment amount of each deal and acquisition that Schoenbach sourced. The complaint also alleges that, per Insight's policies and practices: Schoenbach was entitled to elect to roll the \$5,000 cash portion of any Deal Bonus he received into additional phantom deal equity; and Insight would award phantom equity to sourcing analysts for new, non-debt cash that was invested in portfolio company acquisitions.

Schoenbach alleges that he was one of Insight's most successful analysts and received excellent yearly reviews from Insight in December of 2012 and 2013; after the

December 2013 review, he allegedly received a significant salary increase and bonus. Schoenbach purportedly worked at Insight without incident until May 2014. On May 22, 2014, Deven Parekh (“Parekh”), one of Insight’s managing directors, sent out a company-wide email regarding a private equity transaction. Schoenbach alleges that he publicly responded to that email to correct an inaccurate statement by Parekh. On May 27, 2014, Parekh allegedly terminated Schoenbach from Insight without explanation. After Schoenbach’s termination, he alleges that he received commendations from former colleagues and one of Insight’s vice presidents, and his former supervisors and colleagues at Insight strongly recommended him to prospective employers.

During Schoenbach’s time at Insight, he allegedly sourced at least five major deals and three portfolio acquisitions. For the deals sourced, Schoenbach received one \$5,000 cash bonus and elected to roll three of the cash bonuses into phantom deal equity, but he neither received the fifth cash bonus, nor was he provided with the opportunity to roll it into phantom deal equity. For the acquisitions sourced, Schoenbach never received Acquisition Bonuses or phantom equity. After Schoenbach was terminated, Insight declined to pay the cash and equity compensation to which Schoenbach alleges he is entitled.

Insight did tender a severance offer, which consisted of \$15,000 plus two weeks’ salary and was contingent upon Schoenbach signing a separation and release agreement that would release and waive all claims against Insight, including those for unpaid compensation. Schoenbach refused this offer. Insight made Schoenbach a second, nearly

identical severance offer that included some of the equity compensation allegedly owed to him, which he also refused.

Schoenbach alleges that Parekh retaliated against him for refusing the severance package by interfering with Schoenbach's relationship with several prospective employers by dissuading them from hiring him. Schoenbach has been employed at Mosaic Ventures ("Mosaic") since October 2014.

Between the fall of 2017 and March 2018, Schoenbach allegedly attempted to negotiate a compromise to recover the compensation owed. On March 21, 2018, Insight's counsel sent a letter ("March Letter") to Schoenbach's current employer, Mosaic, which allegedly mischaracterized the circumstances under which Schoenbach was terminated by falsely stating that he "was fired because of his poor performance" and was required to be "escorted from the building." Schoenbach claims that the March Letter was sent to damage his reputation and relationship with Mosaic and to force him to settle.

Based on the foregoing, Schoenbach commenced this action alleging causes of action for: (1) breach of contract for Insight's failure to pay compensation and reimburse work-related expenses; (2) violation of New York State Labor Law ("Labor Law"); (3) defamation per se, based on the March Letter; (4) tortious interference with prospective business relations/economic advantage; and (5) an accounting. Insight now moves, pursuant to CPLR 3211(a)(1), (5), and (7), to partially dismiss the complaint.

Discussion

On a CPLR 3211 motion to dismiss, “the pleading is to be afforded 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 determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon*, 84 NY2d at 87–88 (internal citations omitted). Dismissal pursuant to CPLR 3211(a)(1) is warranted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law,” *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002) (citing *Leon*, 84 NY2d at 88), “and conclusively disposes of the plaintiff’s claim.” *Fortis Fin. Services, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 (1st Dept 2002) (citations and quotation marks omitted).

1. Breach of contract (first cause of action)

Insight seeks to dismiss the breach of contract claim based on documentary evidence insofar as it seeks: (1) phantom equity based on acquisitions sourced; (2) more than \$15,000 in phantom equity per deal sourced; (3) phantom equity for investments that have not had liquidity events yielding positive returns for investors; and (4) phantom equity for companies that have had liquidity events. In support, Insight submits, *inter alia*, the Agreement and an unsigned document entitled Phantom Equity Participation Plan (“Plan”) with an August 2012 effective date, which Insight maintains is its policy governing the reward of phantom equity awards.

As to the portion of the complaint seeking an award of phantom equity based on acquisitions sourced, Schoenbach argues that Insight's policies and practices – which are evidenced by the Phantom Equity Presentation (“Presentation”) shown to him by Insight after he was terminated – establish that he is entitled to phantom equity for acquisitions sourced under the Agreement.

The Agreement unambiguously provides that Schoenbach is entitled to an Acquisition Bonus consisting of “\$5,000 cash per portfolio company acquisition sourced.” Moreover, the Presentation upon which Schoenbach relies expressly states that it “does not represent a legal obligation of any kind.” Schoenbach's reliance on the Presentation creates additional contractual obligations which are disclaimed in the Presentation and are not contained in the Agreement. Unlike other portions of the Agreement that expressly state that Schoenbach may be entitled to phantom equity, there is no provision for phantom equity being awarded for acquisitions sourced, and therefore he has no contractual entitlement to this type of phantom equity. *See Realtime Data, LLC v Melone*, 104 AD3d 748, 751 (2d Dept 2013).

Because the Agreement is clear and unambiguous, to the extent that Schoenbach's breach of contract claim is based on Insight's failure to compensate him for phantom equity purportedly earned for acquisition deals sourced, that part of the breach of contract cause of action is dismissed. *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 (1st Dept 2004) (“where a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes

documentary evidence warranting [dismissal] pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim”) (citation omitted).

As to the remaining relevant portions of the breach of contract claim, Insight relies on the Plan and argues that it contains Insight’s policies and practices for awarding phantom equity and as well as the terms and conditions governing the Agreement’s phantom equity compensation. Insight seeks to dismiss the complaint’s breach of contract allegations regarding phantom equity that are inconsistent with the plan.

The unsigned Plan – which is not supported by an affidavit of someone with personal knowledge – pre-dates Schoenbach’s employment by more than two years; it is not referenced in the Agreement, and Schoenbach submits an affidavit maintaining that he never signed nor was made aware of the Plan during his employment. The Plan itself does not resolve whether it was the only policy containing the terms and conditions of phantom equity awards; whether the Plan was applicable to Schoenbach; and if so, whether he knew of or was provided with the Plan. Therefore, the Plan fails to “resolve[] all factual issues as a matter of law and conclusively dispose[] of” these portions of the breach of contract claim, *Fortis Fin. Services, LLC*, 290 AD2d at 383, and this portion of Insight’s motion to dismiss is denied.

2. Labor Law claim (second cause of action)

Insight seeks to dismiss the portions of the Labor Law claim that are based on unpaid phantom carry grant of capital invested in Insight’s Fund VII, the amount of

which depends on the valuation of the fund; unpaid cash distributions for deals and acquisitions sourced that have had full or partial liquidity events; and the remaining value of unpaid phantom equity for deals sourced that have not yet had any liquidity events. Insight argues that, because Schoenbach's entitlement to phantom carry and phantom equity is dependent upon the performance of Insight's investments, not on his performance, they do not constitute "wages" within the meaning of the Labor Law.

Under Labor Law § 190(1), "wages" are defined as "earnings [] for labor or services rendered, [and] excludes incentive compensation based on factors falling outside the scope of the employee's actual work." *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 (2000) (citation and quotation marks omitted); *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 73-74 (1st Dept 2006).

As an initial matter, because Schoenbach has no contractual rights to phantom equity for acquisitions sourced, as explained above, he "cannot assert a statutory claim for wages under the Labor Law" and this portion of his Labor Law claim is dismissed. *Tierney v Capricorn Inv'rs, L.P.*, 189 AD2d 629, 632 (1st Dept 1993).

Schoenbach's remaining claims for phantom equity depend upon the success of the deals sourced, and his claim for phantom carry depends upon the value of Insight's Fund VII; because both "awards depend[] on factors outside of [Schoenbach's] actual work," neither constitutes "wages" under the Labor Law. *Gunthel v Deutsche Bank AG*, 2005 N.Y. Slip Op. 30361[U] (Sup Ct, NY County 2005), *aff'd and modified on other grounds*, 32 AD3d 335, 336 (1st Dept 2006); *see Truelove*, 95 NY2d at 224; *Guiry*, 31

AD3d at 73-74.² Therefore, the portions of Schoenbach's Labor Law claim seeking compensation for phantom equity and phantom carry is also dismissed.

Insight also moves strike Schoenbach's demand for punitive damages in connection with the breach of contract and Labor Law claims. Although the complaint seeks punitive damages for all claims, in opposition, Schoenbach maintains that he is not seeking punitive damages for breach of contract and Labor Law claims. Accordingly, the motion to strike the punitive damages demand from these causes of action is granted.

3. Defamation per se (third cause of action)

In support of its motion to dismiss the third claim for defamation per se, Insight submits emails to establish that its statements that Schoenbach was fired for poor performance were true. Insight also argues that the statements were not defamatory, but even if they were, they would be protected by qualified privilege.

The elements of a defamation claim are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999) (citation omitted).

Statements that "suggest[] improper performance of one's professional duties or

² The fact that phantom carry vested prior to termination does not alter this conclusion. *See Gunthel*, 2005 N.Y. Slip Op. 30361[U] ("The awards depended on factors outside plaintiffs' actual work That plaintiffs' [interest] in the plans were vested does not change the fact that the awards depended solely upon whether the investments made money.") (citations omitted). *Cf. Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1, 16 (2012) (bonus that was "expressly link[ed] to his labor or services personally rendered . . . had been earned and was vested before he left his job" constituted "wages" under Labor Law) (citations and quotation marks omitted).

unprofessional conduct” constitute defamation per se. *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014) (citation omitted).

Schoenbach alleges that Insight maliciously published defamatory statements by mischaracterizing the circumstances of his termination in the March Letter, by falsely stating that he “was fired because of his poor performance” and was required to be “escorted from the building,” in retaliation for Schoenbach refusing to accept less compensation than was owed to him.

Insight submits emails between Insight personnel to show that there were problems with Schoenbach’s work to establish that the statements that Schoenbach was terminated for poor performance were true, thereby disproving an essential element to the defamation claim. However, these emails fail to utterly refute the complaint’s allegations, which are to the contrary, and questions remain regarding the reasons for and circumstances surrounding Schoenbach’s termination. *See Goshen*, 98 NY2D at 326.

Insight also argues that statements in the March Letter are not defamatory because they neither relate to professional misconduct, impugn Plaintiff’s integrity, nor subject him to ridicule. While a statement that an employee was terminated “carries no imputation of dishonesty or lack of professional capacity[,] . . . when the publication contains an insinuation that the dismissal was for some misconduct . . . it becomes defamatory.” *Nichols v Item Publishers*, 309 NY 596, 601 (1956) (citations omitted); *Frechtman*, 115 AD3d at 104.

The March Letter states that Schoenbach was terminated for poor performance and was required to be escorted from the building; this sufficiently alleges a claim for defamation per se because it “suggests improper performance of one’s professional duties or unprofessional conduct.” *Frechtman*, 115 AD3d at 104. *See Carney v Mem. Hosp. and Nursing Home of Greene County*, 64 NY2d 770, 772 (1985) (“statement that plaintiff was discharged ‘for cause’” may be susceptible to defamatory connotation because it could be interpreted “as meaning that plaintiff had actually been derelict in his professional duties”).

Finally, Insight argues that even if these statements are defamatory, they are protected by qualified privilege. “[E]ven where a statement is defamatory, a qualified privilege exists where the communication is made to persons who share a common interest in the subject matter. The defense of qualified privilege will be defeated, however, where it is demonstrated that the defendant’s statements were uttered with malice.” *Hoesten v Best*, 34 AD3d 143, 157-58 (1st Dept 2006) (citations omitted).

Statements between employers concerning work performance of an employee are generally protected by qualified privilege. Nevertheless, Schoenbach alleges that the statements – which were sent by Insight almost four years after his termination and after he had been working for Mosaic for over three years – were made maliciously in retaliation for Schoenbach refusing to accept significantly less compensation than was owed. The timing and circumstances surrounding the delivery of the March Letter “are sufficient to potentially establish actual malice,” *Schottenstein v Silverman*, 128 AD3d

591, 592 (1st Dept 2015) (citations and quotation marks omitted). I therefore deny the motion to dismiss the defamation cause of action.

4. Tortious interference with business relations/economic advantage (fourth cause of action)

Insight argues that the portion of the claim for tortious interference with business relations/economic advantage that seeks relief based on interference in 2014 with prospective employers must be dismissed as being barred by the statute of limitations and that the remainder of this claim based on interference with Mosaic and Mosaic's clients must be dismissed for failure to state a claim.

Schoenbach concedes that this claim, based on the alleged interference with prospective employers in 2014, is barred by the three-year statute of limitations. *See* CPLR § 214; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 (1st Dept 2009). Schoenbach also concedes that the complaint failed to state a claim based on Insight's alleged interference with Mosaic's clients. As such, these portions of the claim are dismissed.

The remaining portion of the tortious interference claim is that Insight tortuously interfered with Schoenbach's relationship with Mosaic. To state a claim for tortious interference with prospective business relations/economic advantage, the complaint must allege: "1) that [plaintiff] had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the

relationship with the third party.” *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009).

Here, the complaint alleges that that Insight tortuously interfered with Schoenbach’s relations with Mosaic by sending Mosaic the March Letter, which “caused harm to [his] relationship with Mosaic.” Schoenbach Aff. ¶27. These allegations are vague and conclusory; the complaint fails to allege at all how the March Letter interfered with Schoenbach’s relationship with Mosaic and how Schoenbach sustained damages because of this interference. Thus, the remainder of the tortious interference claim is also dismissed. *See Hersh v Cohen*, 131 AD3d 1117, 1119 (2d Dept 2015) (conclusory allegations insufficient to state claim for tortious interference).

5. Accounting (fifth cause of action)

Finally, Insight seeks to dismiss the claim for an accounting because no fiduciary relationship exists or is alleged. To state a claim for an accounting, the complaint must allege “the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.” *Palazzo v Palazzo*, 121 AD2d 261, 264 (1st Dept 1986) (citation omitted).

Here, Schoenbach seeks an accounting to recover unpaid compensation from Insight, his former employer, but fails to allege the existence of a fiduciary relationship sufficient to support a claim for an accounting. *See Vitale v Steinberg*, 307 AD2d 107, 108 (1st Dept 2003) (“An employer-employee relationship providing for the division of

profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses.”); see also *Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615-16 (1st Dept 2012).

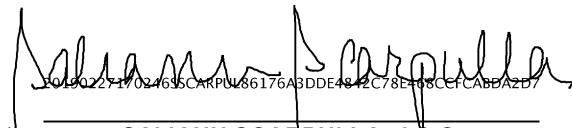
In accordance with the foregoing, it is

ORDERED that defendant Insight Management, LLC’s motion partially to dismiss the complaint is granted in granted in part and denied in part. The first cause of action for breach of contract and second cause of action for violation of the Labor Law are dismissed to the extent described above, the fourth cause of action for tortious interference with business relations/economic advantage and the fifth cause of action for an accounting are dismissed in their entirety, and the motion is otherwise denied; and it is further

ORDERED that defendant Insight Management, LLC is directed to serve an answer to the complaint within twenty (20) days after the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a conference in Room 208, 60 Centre Street, New York, New York, on March 27, 2019, at 2:15 PM.

This constitutes the decision and order of the Court.


SALIANN SCARPULLA, J.S.C.

• 2/27/19
• DATE

• CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
•	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
• APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
• CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE