

M.E. Zukerman & Co., Inc. v Rashid

2019 NY Slip Op 30663(U)

March 13, 2019

Supreme Court, New York County

Docket Number: 652713/2012

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 652713/2012

M.E. ZUKERMAN & CO., INCORPORATED, SAN YSIDRO CORP.

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 004

- v -

TAHIR RASHID,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for JUDGMENT - SUMMARY

The motion by defendant for partial summary judgment dismissing the complaint is granted in part and denied in part.

Background

This action arises out of defendant's employment for both plaintiffs. Defendant was allegedly responsible for managing plaintiffs' tax and financial reporting as well as overseeing payables and receivables.

Plaintiffs allege that in April 2012, they discovered that defendant had been creating false financial records, forging documents and lying to plaintiffs' chairman (Morris Zukerman served as chairman for both companies) since at least 2008. Defendant purportedly made unauthorized transfers of funds from plaintiffs' accounts to his own personal bank accounts. Plaintiffs argue that at least \$95,000 was taken and plaintiffs also incurred fines and penalties from taxing authorities.

Defendant moves for summary judgment on the ground that plaintiffs' claims rest solely on defendant's interactions with Zukerman and Zukerman did not appear for a deposition. Zukerman cited the Fifth Amendment and pointed to his indictment for tax evasion. Defendant argues that plaintiffs do not have any admissible evidence that substantiate the allegations against defendant. Defendant moves on causes of action one through three and five through seven of the complaint. Defendant did not move on plaintiffs' fourth claim—this cause of action for conversion seeks to recover \$88,809 in monies allegedly misappropriated by defendant.

In opposition, plaintiffs point to an internal investigation completed by Joshua Cender into defendant's conduct at both San Ysidro Corp. ("SYC") and M.E. Zukerman & Co. ("Mezco"). Cender concluded that defendant engaged in fraudulent transactions, including creating false audit reports for SYC.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

Plaintiffs’ first and second causes of action allege fraud against SYC and Mezco. Plaintiffs claim that “Rashid informed Zukerman and provided documents to Zukerman indicating that he was obtaining annual audits of SYC finances, that SYC was running an operating surplus and that SYC was timely filing and paying its taxes” (NYSCEF Doc. No. 1, ¶ 26). Plaintiffs add that “Zukerman, as SYC’s Chairman, reasonably relied upon Rashid’s misstatements and misrepresentations” (*id.* ¶ 28). Plaintiffs make the exact same allegations with respect to Mezco, including that “Zukerman, as MEZCO’s Chairman, reasonably relied upon Rashid’s misstatements and misrepresentations” (*id.* ¶ 36).

Defendant contends that he left the company before Cender took over (Cender now runs both SYC and Mezco) and that plaintiffs cannot establish an issue of fact concerning reliance without Zukerman’s deposition testimony.

Plaintiffs contend that Cender was present when defendant made certain misrepresentations and that Zukerman's testimony is not necessary to prove plaintiffs' claims. And plaintiffs insist that Cender's investigation is enough to compel a trial concerning defendant's alleged embezzlement of funds, selling SYC's inventory at a loss, creating false documents and awarding himself bonuses.

The Court severs and dismisses the fraud causes of action because plaintiffs failed to raise an issue of fact with respect to either plaintiff. The fact is that the complaint alleges that defendant "reported directly to Zukerman" (NYSCEF Doc. No. 1, ¶ 7) and Cender acknowledged that he did not supervise Mezco employees nor did any employees report to him (Cender tr at 23). Plaintiffs are not entitled to a trial on Mezco's fraud claim (the second cause of action) because they cannot establish that they relied on defendant's alleged misrepresentations.

Cender's testimony appears to indicate that Mezco was a very small company where employees reported directly to Zukerman (*see id.* at 30-37). That type of working environment requires deposition testimony from the boss to create an issue of fact because Zukerman was apparently the only person taking actions in reliance on defendant's alleged misdeeds. Put another way, because Zukerman did not explain what actions he took on behalf of Mezco based on defendant's conduct, the Court is compelled to dismiss the fraud claims. It may be that defendant injured Mezco through financial impropriety or it could be that Zukerman was aware of everything that defendant was doing and, therefore, no fraud was committed. Cender cannot offer personal knowledge about how Mezco relied on defendant's purported misdeeds.

The analysis with respect to SYC is similar. Cender testified that he became vice president after defendant left and that he had no management role in the company (*id.* at 48).

SYC's fraud claim requires someone with personal knowledge about managing SYC to offer testimony that SYC relied on defendant to its detriment.

Cender's investigation is akin to an expert's forensic analysis of the evidence (although the Court makes no finding that Cender is an expert). Cender draws conclusions after the fact about defendant's actions (*see e.g. id.* at 103 [reviewing materials found in defendant's desk]). That type of internal investigation can help clarify the exact nature of fraud allegations, but it cannot, by itself, raise an issue of fact for a fraud claim where no supervisor testified about defendant's actions. For instance, when testifying about a money transfer initiated by defendant into SYC, Cender testified that "I *surmised* that the company needed money to pay a bill, and that he didn't want to ask Mr. Zukerman to provide the funding to do that, because he had been telling Mr. Zukerman that the company didn't need cash and that it had performed in a manner that didn't require that cash" (*id.* at 110 [emphasis added]). When asked whether Zukerman told defendant to "make it work" despite defendant's request for cash, Cender replied that he didn't know (*id.*) This testimony shows that Cender is merely offering an educated guess about complex financial transactions long after those transactions were completed. That is not enough to raise an issue of fact for fraud.

The Court also observes that Cender's investigation was based, at least in part, on conversations Cender had with Zukerman (*see id.* at 110-11 [discussing his conversations with Zukerman about defendant's responsibilities]). That admission provides an even more compelling reason to find that Cender cannot establish an issue of fact—plaintiffs cannot indirectly rely on Zukerman (through his assistance with Cender's investigation) without offering his deposition testimony.

Breach of Fiduciary Duty and Breach of Duty of Good Faith and Loyalty

“To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct” (*Castellotti v Free*, 138 AD3d 198, 209, 27 NYS3d 507 [1st Dept 2016]).

The complaint alleges that defendant “breached his fiduciary duty to plaintiffs by means of the fraudulent conduct described above, including but not limited to making unauthorized transfers of the plaintiff's funds for his own benefit; failing to file plaintiffs' tax returns; failing to pay taxes owed by plaintiffs; falsifying plaintiffs' financial records and audit reports and by repeatedly misleading plaintiffs' Chairman about his actions and conduct” (NYSCEF Doc. No. 1, ¶ 40).

“[E]mployees owe a duty of loyalty and good faith to their employer in the performance of their duties. However, the mere failure to an employee to perform assigned tasks does not give rise to a cause of action alleging breach of that duty” (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 986, 936 NYS2d 224 [2d Dept 2011]). “An employee owes his or her employer undivided and unqualified loyalty and may not act in any manner contrary to the interests of the employer” (*Qosina Corp. v C&N Packaging, Inc.*, 96 AD3d 1032, 1033, 948 NYS2d 308 [2d Dept 2012] [internal quotations and citations omitted]).

For this cause of action, the complaint states that defendant “breached this duty by means of the fraudulent acts and gross disloyalty described above, including without limitation: (a) his conversion of plaintiffs' funds; (b) his fraudulent misrepresentation of the contribution to be made by him with respect to MEZCO's health insurance for his family (c) his systematic and long running failure perform the duties entrusted to him including filing tax returns, paying taxes

and other obligations and preparing truthful financial reports; (d) his repeated misrepresentations to Zukerman about the financial status of SYC; (e) his unauthorized use of MEZCO funds to hide his mismanagement of SYC; and (f) his subjecting plaintiffs to potential criminal investigation and prosecution as well as large tax penalties” (NYSCEF Doc. No. 1, ¶ 49).

Defendant claims that plaintiffs cannot prove that defendant breached any duty to plaintiffs or that his conduct caused either company any damage. Defendant counters that he did his job the best he could to protect the companies from Zukerman’s misdeeds and, at worst, inadvertently took \$10,000 in excess of what he was owed. Defendant contends he has offered to return the \$10,000. Defendant insists that he was never an officer or director of Mezco (although he was a VP for SYC) and that he had no fiduciary duty to Mezco. Defendant also points out that it was not his responsibility to prepare Mezco’s tax returns and that any money transfers had to be confirmed by Zukerman.

With respect to SYC, defendant claims he loaned his own money to SYC to protect the company from Zukerman’s misdeeds. And Defendant argues that even if he did fail to file taxes for Mezco or SYC, it does not rise to a breach of the duties alleged above. Defendant also alleges that these causes of action are barred under New York Labor Law because employers are prohibited from making deductions from employees’ wages except as required by law. Defendant contends that plaintiffs cannot claw back defendant’s salary based on negligent acts.

In opposition, plaintiffs contend that Cender’s testimony creates an issue of fact regarding both the duty of loyalty and fiduciary duty causes of action. Plaintiffs point out that Cender testified that defendant caused Mezco to repay \$20,809.05 of defendant’s 401(k) loans and that defendant managed payroll deductions for Mezco employees (including defendant

himself). Plaintiffs also argue that there were suspicious transfers between SYC accounts and defendant's personal accounts and point to 40 transfers between these entities that netted defendant \$10,000.

The Court also dismisses these causes of action because defendant's testimony supports his theory that he was an "intimidated" employee who was bullied by his boss. "Defendant testified that "I felt a lot of pressure and I felt overwhelmed and so I felt intimidated by Zukerman . . . I also recall that Zukerman asked about a Castle Rock Winery payment and I had not recorded that payment to him because I was afraid that Zukerman was going to use the money for his own good, own uses and this is something that was happening often throughout the years. The business needed the money out there, so I didn't tell him about it and I . . . I just admitted that the money had already come in and he didn't know about that" (defendant's tr at 108-09).

Defendant confirmed that anything he did in connection with tax returns was passed through Zukerman (*id.* at 103). And defendant expressed concern that some of the numbers he put on tax returns were incorrect because "Oftentimes Zukerman would just make up the number out of thin air and say put this in there" (*id.* at 135-36).

Defendant also testified about Zukerman's handling of SYC, claiming that "Zukerman knew that we were cash flow strapped and he knew that, you know, these liabilities, SYC—there's no way SYC would be able to accommodate and pay all of the liabilities that he created" and that Zukerman "was consistently just sucking the cash out of that business and we couldn't operate" (*id.* at 141-42).

Defendant testified that he did not prepare the tax returns for Mezco (*id.* at 106) and that Zukerman was aware of the tax notices from states, including from Wisconsin, to Mezco to pay taxes because he showed the notices to Zukerman (*id.* at 209-10).

The problem for plaintiffs is that defendant's numerous claims about Zukerman's involvement and role in the various financial transactions is un rebutted. Although plaintiffs—through Cender's testimony—attempt to point out the various misdeeds arising from defendant's work, defendant has answers for these accusations. Defendant continues to point the finger at Zukerman and accuse him of knowing about financial irregularities. Defendant's argument is that Zukerman was using SYC for his own personal purposes and had no issue ignoring tax notices from various states.

Defendant testified that he was not responsible for deductions to his paycheck in response to questions about Mezco's repayment about defendant's 401(k) loans and only Zukerman had this responsibility (*id.* at 251). Plaintiffs also cannot substantiate the Wisconsin tax letter (NYSCEF Doc. No. 106). Although this letter appears to have been altered, there is no admissible evidence regarding who altered it, whether it was given to anyone in this altered form or whether anyone at Mezco relied on it. Plaintiffs cannot create an issue of fact by pointing to suspicious documents and then make a conclusion about them without offering admissible evidence to place these exhibits into context.

Zukerman's testimony (or the testimony of another Mezco and SYC employee with personal knowledge) is needed to discuss plaintiffs' exhibits including the Wisconsin letter addressed to ME Zukerman Specialty Oil Company, care of Mezco concerning taxes (*id.*); the Briggs letter (NYSCEF Doc. No. 108) -- a letter sent by Zukerman to Briggs Consulting

regarding the selling of the same set of grapes to two different entities); and the allegedly fake audit report (NYSCEF Doc. No. 109). Without Zukerman's testimony, plaintiffs rely on speculation from Cender about why these exhibits demonstrate that defendant breached the duty of loyalty and his fiduciary duty.

While defendant appears to acknowledge that he made some mistakes, that is not enough to sustain a cause of action for breach of a fiduciary duty or breach of loyalty. The elements of these causes of action require more than a showing that defendant was bad at his job—and plaintiffs cannot conclusively show that either. Defendant's testimony contends that Zukerman controlled the company and used defendant to help Zukerman manipulate financial transactions. The overall work environment as described by defendant included an overbearing boss who did not seem to care about following the rules. Plaintiffs failed to raise an issue of fact about whether defendant had a fiduciary duty to Mezco and whether he committed any misconduct with respect to SYC or Mezco.

And defendant testified that he loaned SYC money and that the money listed in NYSCEF Doc. No. 104 (where defendant came out ahead by \$10,000) included instances where SYC was paying defendant back (Rashid tr at 246-49). There cannot be an issue of fact for these causes of action where defendant offers un rebutted testimony that he accidentally paid himself back only \$10,000 more than he should have and offers to repay the money.

Plaintiffs' claim that defendant's deposition testimony is self-serving is not sufficient to deny defendant's motion. The Court cannot make that type of credibility finding on a motion for summary judgment under these circumstances. Defendant offered his version of events and plaintiffs' mere disagreement with defendant's version of events does not render it meritless.

Unjust Enrichment & Money Had and Received

“The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show “that (1) the other party was enriched, (2) at that party's expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, 919 NYS2d 465 [2011]).

“The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it” (*Litvinoff v Wright*, 150 AD3d 714, 716, 54 NYS3d 22 [2d Dept 2017]).

The real dispute with respect to these causes of action is the extent of the damages sought by plaintiffs. Plaintiffs want to recoup defendant's salary and bonuses on the ground that had plaintiffs known about defendants' alleged misdeeds, he would have been fired. Defendant “agrees that he was overpaid by \$10,000 for the loans he made to SYC. Rashid also agrees that he took loans from this 401(k) account, which were allegedly repaid by MEZCO, totaling \$28,809, but that no corresponding deductions were taken from his salary” (NYSCEF Doc. No. 88 at 18).

To the extent that this cause of action seeks to recover the \$10,000 defendant admits he should give back, the benefits arising from the 401(k) loan or any other monies defendant should not have received, the motion for summary judgment is denied. To the extent that plaintiffs seek to recover defendant's wages and bonuses, that portion of these causes of action is severed and

dismissed because plaintiffs failed to cite any support for the claim that they can claw back these payments.

It makes no sense that plaintiffs could get back defendant's salary and bonuses based on his admissions that he paid himself back too much or that no deductions were made to his salary related to his 401(k) loans. These causes of action are equitable, and equity does not contemplate that defendant should get back money paid to defendant for working for plaintiffs. Instead, these claims suggest that defendant should pay back the benefits he admits he should not have received. It does not suggest that he should pay back money he earned while continuing to work for plaintiffs.

And plaintiffs' theory is simply too attenuated. Plaintiffs claim they would have fired defendant and would not have paid him salary and bonuses. Plaintiffs are not saying that defendant's salary was stolen, or that he was no longer working for them when he received it—plaintiffs are contending that defendant should pay back the money because he would have been fired. But when would this firing have occurred? There is no testimony from defendant's supervisor claiming when he would have fired defendant. The notion that defendant would have been fired earlier is only speculation. And what would stop an employer from concluding, several years after terminating an employee, that it should get back salary and bonuses because it should have fired him or her much earlier? The fact is that plaintiffs chose to fire defendant when they did; they cannot get back salary simply because, in hindsight, they wish they would have fired him earlier.

Plaintiffs cannot meet the prima facie elements for unjust enrichment or money had and received. Critical to both is a showing that the defendant received money at the expense of the plaintiffs, thereby causing the defendant to receive a benefit to which defendant was not entitled.

Here, defendant was entitled to his salary because he worked for plaintiffs. An employer's subjective claim that it would have fired its employee earlier had it known about any purported fraudulent behavior does not establish that the employee-defendant was unjustly enriched. Because the plaintiffs fail to meet the elements of both causes of action, the claims must be dismissed.

Denying, in part, this branch of defendant's motion is not inconsistent with the dismissal of the fraud or duty claims because defendant offered unrebutted deposition testimony that he did not commit fraud, breach a fiduciary duty or the duty of loyalty. Those causes of action require more than an accusation that defendant received money to which he was not entitled. And here, defendant admits he received certain monies that did not belong to him. The Court also observes that plaintiffs need not elect their remedies in response to defendant's motion for summary judgment.

To the extent that defendant argues that plaintiffs cannot recover under Labor Law § 193, that argument is misplaced. That provision allows an employer to deduct from wages to recover overpayment or repayment of advances of salary or wages (*see* Labor Law § 193 [c]-[d]). Defendant admitted that he was overpaid and that he took loans from his 401(k) account that were not subsequently reduced from his salary. This section of the Labor Law does not bar plaintiffs' attempt to recover those benefits here.

Summary

It is abundantly clear from reading the deposition transcripts of Cender and defendant that defendant made plenty of mistakes while working for Mezco and for SYC. However, the Court is unable to conclude that those mistakes represent triable issues of fact for plaintiffs' fraud, breach of fiduciary duty and breach of the duty of loyalty causes of action because

Zukerman was not deposed. Plaintiffs cannot establish that they relied on defendant’s purported misrepresentations without Zukerman’s testimony because defendant reported directly to him. Plaintiffs cannot establish a fiduciary duty existed or was breached without Zukerman either.

Even if Cender’s conclusions are correct, they cannot establish an issue of fact because they are the result of an analysis conducted long after defendant left. And according to Cender, this analysis was based, in part, on conversations he had with Zukerman. For that reason alone, it would be inappropriate to find an issue of fact from Cender’s testimony because it is based on *Zukerman’s* personal knowledge. And defendant offers explanations for his alleged mistakes—he claims he was loaning money to SYC to counter Zukerman’s impropriety, he had no responsibility for overseeing payroll deductions or for preparing Mezco’s taxes, and Zukerman had full knowledge about various tax issues (including the letters from Wisconsin’s tax agency) and the cash flow problems at SYC.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant is granted to the extent that plaintiffs’ fraud, breach of fiduciary duty and breach of the duty of loyalty are severed and dismissed, and plaintiffs may not seek defendant’s wages or bonuses as damages for the money had and received or unjust enrichment causes of action; and it is further

ORDERED that the motion is denied to the extent it sought to sever and dismiss plaintiffs’ unjust enrichment and money had and received causes of action.

3/13/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

ARLENE P. BLUTH