

Cooperstein v Securewatch24 LLC
2019 NY Slip Op 31773(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 654307/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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DAVID COOPERSTEIN,
Plaintiff,

- v -

SECUREWATCH24 LLC, NEIL WEINER, JOHN COLGAN, ELYSE WOLF

Defendant.

INDEX NO. 654307/2018
MOTION DATE 10/25/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (6/18/2019), Securewatch 24 LLC, Neil Weiner, John Colgan and Elyse Wolf's (collectively the Defendants) motion to dismiss is granted to the extent that the first, second and third causes of action are dismissed as against Neil Weiner, John Colgan and Elyse Wolfe (the Individual Defendants) but is otherwise denied.

Reference is made to an employment agreement (the Employment Agreement), dated August 5, 2014, by and between Securewatch24, LLC and David Cooperstein (NYSCEF Doc. No. 10) and a sales commission agreement (the Commission Agreement), dated December 21, 2017, by and between Securewatch 24, LLC and David Cooperstein (NYSCEF Doc. No. 9).

Mr. Cooperstein alleges that he is owed unpaid sales commissions earned pursuant to the Employment Agreement and the Commission Agreement. Mr. Cooperstein asserts three causes

of action against the Defendants: (1) breach of contract (first cause of action), (2) anticipatory repudiation (second cause of action) and (3) breach of Article 6 of New York Labor Law §§ 190, 191 (third cause of action) (NYSCEF Doc. No. 1). The Defendants now move to (i) dismiss the complaint in its entirety as it relates to the Individual Defendants and (ii) dismiss the claim of anticipatory repudiation as it relates to Securewatch 24, LLC.

Dismissal under CPLR 3211 (a)(1) is warranted only if the documentary evidence “utterly refutes [plaintiffs’] factual allegations” and “conclusively establishes a defense to the asserted claims as a matter of law. (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].) Under CPLR 3211 (a)(7), a party may move for judgment dismissing a cause of action on the basis that the pleading fails to state a cause of action. The pleading should be “given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference.” (*Simkin v Blank*, 19 NY3d 46, 52 [2012]). The issue to resolve is “whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Leon v Martinez*, 84 NY2d 83, 86 [1994]).

A. First Cause of Action (Breach of Contract)

The Defendants argue that the first cause of action for breach of must be dismissed as against the Individual Defendants because they are not parties to the subject contracts. This court agrees. The documentary evidence utterly refutes the Defendants factual allegations because it is clear that only Securewatch 24 and Mr. Cooperstein are parties to the Employment Agreement and Commission Agreement (NYSCEF Doc. Nos. 9, 10). In any event, the Defendants fail to adequately plead the elements of a claim to pierce the corporate veil. Accordingly, the

Defendant's motion to dismiss the first cause of action against the Individual Defendants is granted

B. Second Cause of Action (Anticipatory Repudiation)

For the reasons set forth above, the Defendants' motion to dismiss the second cause of action against the Individual Defendants is granted because they are not parties to the Employment Agreement and Commission Agreement.

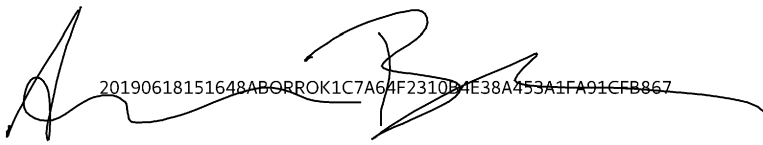
The Defendants argue that the second cause of action for anticipatory repudiation should also be dismissed against Securewatch 24, LLC because the complaint does not allege a definite and final communication of an intention to forgo obligations under the relevant contracts. Mr. Cooperstein argues that its second cause of action remains viable because a party's failure to state its intent to perform a contract can demonstrate repudiation (*See Riv. Terrace Assoc., LLC v Bank of NY*, 10 Misc 3d 1052[A], 1052A, 2005 NY Slip Op 51915[U], *8 [Sup Ct, NY County 2005], *affd* 23 AD3d 308 [1st Dept 2005]). Mr. Cooperstein alleges that he e-mailed the Defendants on three occasions regarding payment of his unpaid commissions and each time, the Defendants did not respond (NYSCEF Doc. No. 1, ¶¶ 15-20). Affording the complaint every favorable inference, the Defendants' failure to state its intent to perform under the Employment Agreement and Commission Agreement when such agreements required payment by a date certain is sufficient to state a cause of action for anticipatory repudiation. Accordingly, the Defendants' motion to dismiss the second cause of action against Securewatch 24, LLC is denied.

C. Third Cause of Action (Violation of Article 6 of New York Labor Law, §§ 190 and 191)

The Defendants argue that the third cause of action for violation of Article 6 of New York Labor Law, §§ 190 and 191, should be dismissed against the Individual Defendants because there is no private right of action against corporate officers. Mr. Cooperstein argues that an action may be sustained against individuals under New York Labor Law as long as an individual meets the definition of an “employer.” A claim against an individual “employer” may be sustained where the plaintiff alleges that the individual “exercised control of [the employer’s] ‘day-to-day operations’ and that he was their employer under New York law.” (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]). The complaint however fails to adequately allege facts which even if true would qualify the Individual Defendants as an employer. Accordingly, the Defendant’s motion to dismiss the third cause of action against the Individual Defendants is granted.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted to the extent that the first, second and third causes of action are dismissed as against Neil Weiner, John Colgan and Elyse Wolfe but is otherwise denied.



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6/18/2019
DATE

ANDREW BORROK, J.S.C.

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	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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