SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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PATRICK AMON, *et al.*,

Plaintiffs,

-against-

JOHN P. DROHAN III., *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 654014/2018

Motion Seq. No.: 001 & 002

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the Complaint and assumed to be true (Complaint, NYSCEF Doc. No. 1).

Plaintiff Patrick Amon is an expert in economic policy and regulation and cybersecurity. Plaintiff Luis Fung is experienced in information security and operational risk management. Plaintiff Ronaldo Cruz is an electrical engineer with experience in systems design and financial services.

Defendant Datacore Innovations, LLC (Datacore) is a financial technology business which uses algorithms to create investment strategies. Defendant John P. Drohan III, an attorney, is a founder and the chair of the board of directors of Datacore. Defendant Raphael Douady is the CEO, a co-founder, and a director of Datacore. The third founder of Datacore, William Dale, is not a party to this action. Datacore was founded to exploit intellectual property developed by Douady, called Dominant Factor, which uses "automated index methodologies" to "improve investment products" (Complaint, ¶ 8).

In 2015, Datacore hired the plaintiffs. Each plaintiff signed an agreement with Datacore (the Amon Agreement, the Fung Agreement, and the Cruz Agreement, attached as Exhibits 1-3 to the Complaint, NYSCEF Docs. No. 2-4, respectively). Although plaintiffs were brought in as independent contractors, they were to be hired as employees later and get interests in the company when it began earning revenue, which was expected to be by March 2016 (Complaint, ¶28). Plaintiffs worked long hours and were instructed by individual defendants on which projects they should work. Around October 2016, Datacore started missing payments to

plaintiffs Datacore stopped paying Cruz and Fung their salaries after July/August 2016. Plaintiffs were assured Datacore would pay them. Defendants promised plaintiffs they would get their back pay, become executives at Datacore, and receive membership interests in the company. These promises were not fulfilled. The promises, and the back pay owed, were confirmed and repeated, but the promises were not fulfilled.

Plaintiffs assert the following claims:

1) Breach of contract and of the implied covenants of good faith and fair dealing against Datacore;
2) Unjust enrichment against Datacore;
3) Negligence and/or gross negligence against all defendants;
4) Violation of NY Labor Laws sections 193, 195, and 198 against all defendants; and
5) Fraud against plaintiffs all defendants.

Datacore has not made an appearance in this action. Defendants Drohan and Douady move separately to dismiss. Defendants' arguments discussed below are addressed in briefs filed on behalf of Drohan. Douady makes no separate argument, opting instead to adopt Drohan's arguments. Accordingly, the discussion below applies to both.

II. DISCUSSION

A. Standards

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is a group of affirmations, affidavits, emails, and so forth.

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

As far as defendants rely on the Drohan Affirmation, that affirmation must be disregarded. "While an attorney is entitled to serve and file an affirmation bearing his signature alone in lieu of and with the same force and effect as an affidavit under CPLR 2106, this provision is unavailing here because even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action" (*Harris v Krauss*, 87 AD3d 469, 469 [1st Dept 2011] quoting *Slavenburg Corp. v Opus Apparel Inc.*, 53 NY2d 799, 801 n., [1981]).

B. Claims 1 and 2

The claims for breach of contract and of the implied covenant of good faith and fair dealing and for unjust enrichment are asserted against Datacore only. Because neither individual defendant is named in these claims, the claims stand.

C. Claim 3, for negligence and/or gross negligence

Regarding Claim 3, alleging negligence and gross negligence, negligence principles apply where individual defendants "intentionally performed an act of unreasonable character in disregard of a *known or obvious risk* that was so great as to make it *highly probable* that harm would follow and have done so with conscious indifference to the outcome." *See Matter of New York City Asbestos Litig.*, 89 NY 2d 955, 957 (1997) (emphasis in original). A claim of gross negligence requires allegations of conduct that evinces disregard of the right of others or "snacks" of intentional wrong doing (*see Colnagi USA, Inc. v Jewelers Protection Svs.*, 81 NY 2d 281 [1993]). The complaint re-states the law but does not allege facts sufficient to satisfy the elements of either cause of action.

Further, it is well settled that a breach of contract does not give rise to a separate claim of negligence (*see Clark-Fitzpatrick v LIRR*, 70 NY 2d 382, 389 [1987]). Here, plaintiffs allege defendants "had a duty to deal truthfully with (plaintiffs). This allegation is merely an aspect of plaintiffs' breach of contract claim (*see id.*). It is not based on upon legal duties that are extraneous to and distinct from the alleged contract and thus must be dismissed as duplicative of the breach of contract claim (*see RKB Enterprises, Inc. v Ernst & Young*, 185 AD 2d 971 [3d Dept 1992]). Pleading this claim in the alternative does not save it because the required elements of the claim have not been stated and there is no dispute as to whether there are contracts. The third claim fails.

D. Claim 4, for violation of NY Labor Laws sections 193, 195, and 198

While the parties focus on the question of whether the plaintiffs qualify as employees, the moving defendants also argue that they are not employers. If plaintiffs are employees, they are employees of Datacore. Any relevant actions taken by the individual defendants were taken in their capacities as employees/officers of Datacore, not in their individual capacities. Accordingly, this claim must be dismissed as to the moving defendants.

As to the question of whether plaintiffs were employees of Datacore, New York Labor Law § 190 broadly defines an "employee" as "any person employed for hire by an employer in any employment" (NYLL § 190 [2]). It excludes independent contractors (*Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d at 597; *see Bynog v Cipriani Group*, 1 NY3d 193, 198-199 [2003]). The critical determinant for deciding whether there is an employment relationship is the degree to which the purported employer exercises control in fact "over the results produced or the

means used to achieve the results" (*Bynog v Cipriani Group*, 1 NY3d at 198). "Factors relevant to assessing control include whether the worker (1) worked at his [or her] own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*id.* at 198). While how the parties defined their relationship, or how the employee identified his or herself on tax forms can be considered, it is not dispositive (*see Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d at 599; *Hart v Rick's Cabaret Intl., Inc.*, 967 F Supp 2d 901, 924 [SD NY 2013]). The fact that a worker is free to take other jobs is of limited significance under the NYLL (*Hart*, 967 F Supp 2d at 922). The "nature of the [parties'] relationship is fact sensitive and often presents a question for a trier of fact," (*Hernandez*, 81 AD3d at 598). Plaintiffs have alleged a significant control by Datacore, and have sufficiently alleged employment to survive a motion to dismiss.

However, a wholesale withholding of payment is not a "deduction" within the meaning of Labor Law § 193 (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). Accordingly, the § 193 portion of the claim fails.

E. Claim 5, alleging fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Here, the misrepresentations alleged relate to Datacore's intention to compensate plaintiffs. The alleged reliance was plaintiffs' performance under the contract. Accordingly, this claim fails, as it is essentially a breach of contract claim.

III. CONCLUSIONS

For the reasons discussed above, the motion to dismiss should be granted to the extent of dismissing the Second (unjust enrichment), Third (negligence and gross negligence), Fifth (fraud) causes of action and the potion of the Fourth Cause of Action alleging violation of Labor Law § 193 as to all defendants. Also, the Fourth (labor law) cause of action should be dismissed. As to the individual defendants who are the movants, the complaint shall be dismissed. It is hereby

ORDERED that the motions of defendants John P. Drohan, III and Raphael Douady to dismiss the complaint herein (motion sequence number 001 and 002) are granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continues against the remaining defendant Datacore Innovations LLC; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, which shall read as follows:

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PATRICK AMON, *et al.*,

Plaintiffs,

-against-

DATACORE INNOVATIONS, LLC,

Defendant.
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and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nyscourts.gov/supctmanh)]; and it is further

ORDERED that the remaining defendant shall answer the complaint within 20 days of service of this decision and order with notice of entry; and it is further

ORDERED that counsel for the remaining parties shall appear for a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York, on September 10, 2019, at 10:30 a.m.

This constitutes the decision and order of the court.

DATED: July 10, 2019

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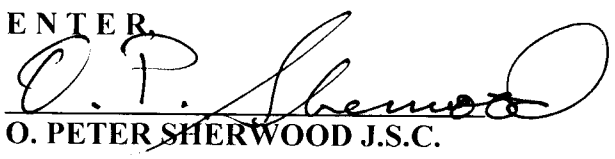

O. PETER SHERWOOD J.S.C.