

<b>Chisholm v Legion Enters. LLC</b>
2019 NY Slip Op 33038(U)
October 2, 2019
Supreme Court, New York County
Docket Number: 655232/2017
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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GREG CHISHOLM,

Plaintiff,

Index No. 655232/2017

Motion Seq. No.: 003

- against -

LEGION ENTERPRISES LLC, LEGION CAPITAL  
INVESTMENTS LLC, GML PARTNERS LLC, and  
GRACE M. LOVRET,

DECISION AND ORDER

Defendants.

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**DORIS LING-COHAN, J.S.C.:**

In this action for breach of an employment contract, defendants GML Partners LLC (GML) and Grace M. Lovret (Lovret) move (Motion Sequence No. 003), pursuant to CPLR 3211, to dismiss the complaint as against them.

Plaintiff's procedural objection to the motion, that it was filed prior to notice of entry of the order granting leave to amend, is unsupported by any authority, and lacks merit, especially in light of the consent to the amendment of the complaint by defendant's counsel (Heller Aff. in Reply, ¶ 2).

Plaintiff alleges that he entered a two-year employment agreement (the Agreement) dated March 1, 2011 (Complaint, Exhibit 1), with nonmoving defendant Legion Enterprises LLC (Legion Enterprises). Nonparty Michael Sepso (Sepso), then the

president of Legion Enterprises, signed the Agreement on behalf of Legion Enterprises. Plaintiff agreed to serve as chief operating officer for a two-year term, with automatic one-year renewals, at a base salary of \$250,000.

The amended complaint (the Complaint) alleges that plaintiff worked full-time for Legion Enterprises from April 1, 2011 through October 15, 2011, and part-time through 2013, at which time Legion Enterprises "collapsed" (Complaint, ¶ 41). The Complaint further alleges that, except for one payment of two weeks' salary, just prior to the collapse, plaintiff did not receive his salary, but worked on a deferred compensation basis. The Complaint states that "Chisholm accepted that his salary would be delayed until such time that Legion had funds to pay him" (*id.*, ¶ 42). The Complaint further alleges that Chisholm advanced \$20,000 of his own funds to pay operating expenses of Legion Enterprises and Legion Capital (*id.*, ¶ 44), and that he also performed extensive work for nonmoving defendant Legion Capital Investments. The Complaint provides that, after the collapse:

"the subject of Chisholm's compensation was discussed again, and the timing of his compensation was pushed to when [Legion Enterprises] or Legion Capital Investments raised money or sold one of their assets"

(Complaint, ¶ 42). The Complaint does not allege among whom

these alleged discussions took place.

The Complaint alleges further that, in June 2017, Chisholm demanded payment from Lovret, who refused, and that Lovret, who became the managing member of Legion Capital Investments in January 2017, held \$745,482 in funds from the sale of an asset

"that were due to the entities under GML Partners and could have funded Chisholm's salary, but instead [Lovret] transferred the funds to GML Partners, leaving Legion Enterprises inadequately capitalized"

(*id.*, ¶ 48).

The Complaint alleges Legion Capital was the sole preferred shareholder of Legion Enterprises; GML was the sole preferred shareholder of Legion Capital; and that Lovret, as the managing member of GML, had "final decision making authority" and ultimate control over each of the three entities; that the three entities were "intertwined and observ[ed] few corporate formalities" (Amended Complaint, ¶ 2). It further alleges that the three defendant companies were alter egos, or "mere instrumentalities of each other" (*id.*).

The Complaint contains three causes of action: (1) breach of contract; (2) violation of Labor Law ¶ 198; and (3) unjust enrichment.

The first cause of action for breach of the Agreement sufficiently states a cause of action for breach of contract

against GML, if plaintiff is able to make a prima facie showing of sufficient grounds to pierce the corporate veils, as discussed below. It does not otherwise state a cause of action against GML, and does not state a cause of action against Lovret, because neither GML, nor Lovret, is a signatory to the contract (see *Randall's Isl. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1<sup>st</sup> Dept 2012]).

The second cause of action is based on Labor Law 198, captioned "costs, remedies," which provides as pertinent:

"[i]n any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due"

(*id.* at 1-a).

The provisions of Article 6 of the Labor Law also apply to executives like Chisholm within the meaning of Labor Law § 190(2) (*Pachter v Bernard Hodes Group., Inc.*, 10 NY3d 609, 615 [2008]). However, the motion to dismiss the second cause of action against Lovret and GML is granted, as the Complaint does not

sufficiently allege that either GML or Lovret meet the definition of "employer" under the Labor Law, which uses the "economic reality test". This test considers such factors as whether either Lovret or GML "hired and fired employees, supervised and controlled employees' work schedules, determined the method and rate of pay, kept employment records, and approved any vacations" (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1<sup>st</sup> Dept 2013]). The Complaint, which has no amplifying affidavit, is devoid of sufficient allegations to state a cause of action under Labor Law § 198 against either GML or Lovret and, such claim is therefore dismissed as to defendants GML and Lovret.

The third cause of action for unjust enrichment requires allegations 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"

(*AHA Sales, Inc. v Creative Bath Prod., Inc.*, 58 AD3d 6, 19 [2d Dept 2008][citations and internal quotations marks omitted]).

The motion to dismiss the third cause of action is granted as against Lovret, and denied as against GML, but only with respect to the \$20,000 that plaintiff allegedly advanced to

Legion Enterprises. The unjust enrichment claim against GML also depends upon piercing the corporate veil. The unjust enrichment claim for unpaid salary is duplicative of the breach of contract action (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-91 [2012]).

Plaintiff is entitled to conduct discovery as to the issue of whether the corporate veils of Legion Enterprises, Legion Capital, and GML should be pierced. Indicia of a situation warranting veil-piercing include:

"(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own"

(*Peery v United Capital Corp.*, 84 AD3d 1201, 1202-04 [2d Dept 2011][internal quotation marks and citations omitted]).

The Complaint meets the standard of pleading complete domination of Legion Enterprises by GML in relation to the Agreement and the nonpayment of plaintiff's salary, and that such domination was used to commit "a fraud or wrong against the plaintiff which resulted in plaintiff's injury"

(*Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). In this motion addressed to the sufficiency of the Complaint, plaintiff is entitled to conduct discovery, inasmuch as the relevant information is in the exclusive control of defendants (*Banham v Stanley & Co.*, 178 AD2d 236, 238, [1<sup>st</sup> Dept 1991]).

The Complaint does not contain sufficient allegations to state any causes of action against Lovret. Defendants' statute of limitations arguments are not properly presented in the absence of a motion to dismiss on that ground.


Accordingly, it is

ORDERED that the motion of defendant Grace M. Lovret, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint as against her, is granted; and it is further

ORDERED that the motion of defendant GML Partners, LLC to dismiss the complaint as against it, is granted to the extent of dismissing the second cause of action, and otherwise denied.

Dated: October 7, 2019; and it is further

ORDERED that all remaining parties shall appear before this Court for a previously scheduled discovery compliance conference on October 17, 2019, at 10:30 a.m., Room 428, 60 Centre Street, New York, NY; any remaining discovery shall be completed prior to such date and a note of issue filed by October 16, 2019.1

  
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Doris Ling-Cohan, J. S. C. *10/2/19*

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1 Such conference may be canceled if a note of issue is filed and counsel stipulate that there are no outstanding discovery issues.