Emic Corp. v Barenblatt
2019 NY Slip Op 33686(U)
December 18, 2019
Supreme Court, New York County
Docket Number: 153977/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

EMIC CORP., f/k/a APPLE MORTGAGE CORP. INDEX NO. 153977/16

MOT. DATE

- v -

RICHARD BARENBLATT et al. MOT. SEQ. NO. 003

The following papers were read on this motion to/for ____________

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).________
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).________
Replying Affidavits NYSCEF DOC No(s).________

This is an action brought by plaintiff Emic Corp. f/k/a Apple Mortgage Corp. (sometimes "Emic") seeking to recover damages against its former employees, defendants Richard Barenblatt, David Breitstein, Keith Furer and Kevin Ungar. The individual defendants left Emic in 2013 to work for the corporate defendant, Guardhill Mortgage Corporation ("Guardhill"). In turn, the individual defendants have asserted counterclaims and interposed a third-party complaint against plaintiff's owner, Eric Appelbaum, following plaintiff's successful appeal of an order by the Honorable Carmen Victoria St. George which granted defendants' motion to dismiss pursuant to CPLR 3211[a][5] based upon a prior federal action (see First Department order dated February 28, 2019). Upon remittur, this action was reassigned to this court.

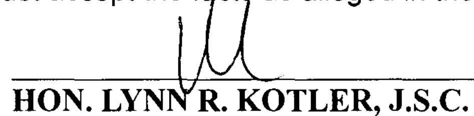
Emic and Appelbaum now move pursuant to CPLR §§ 316[b], 3211 [a][5] and [7] to dismiss the following claims asserted in each of the individual defendant's amended answer/third-party complaints: (i) part of the 2nd COA set forth in the Barenblatt, Breitstein and Ungar answers; (ii) part of the 3rd COA set forth in the Barenblatt, Breitstein, Furer and Ungar answers; (iii) the 5th COA set forth in the Barenblatt, Breitstein, Furer and Ungar answers; and (iv) the 6th COA set forth in the Barenblatt, Breitstein and Ungar answers. The individual defendants oppose the motion. The court's decision follows.

Plaintiff's claims against defendants are, briefly, for breach of fiduciary duty, unfair competition and aiding and abetting breach of fiduciary duty. Defendants' counterclaims/third-party claims challenged herein are for: illegal deductions from wages (2nd COA) in violation of Labor Law § 193 and 12 NYCRR § 137-2.5; unpaid commissions in violation of Labor Law § 191[3] (3rd COA); failure to provide a wage notice in violation of Labor Law § 195 (5th COA); and fraud (6th COA).

Applicable law

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the

Dated: 12/18/19



HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

CPLR § 3211[a][5] ordinarily precludes a party from relitigating an issue decided against that party (*see Kaufman v. Eli Lilly and Co.*, 65 NY2d 449 [1985]). Movants must show that the identical issue was necessarily decided in the prior action and is determinative in the present action (*Mahler v. Campagna*, 60 AD3d 1009 [2d Dept 2009] *citing Buechel v. Bain*, 97 NY2d at 304). Defendants can rebut such a showing if they demonstrate "the absence of a full and fair opportunity to contest the prior determination" (*id.*)

2nd COA

Movants argue that the 2nd COA should be dismissed based upon collateral estoppel to the extent that Barenblatt, Breitstein and Ungar seek to recover for allegedly improper $276 deductions for the period of time preceding execution of compensation agreements. This argument arises from litigation in federal court, where plaintiff, simply as Apple Mortgage Corp., sued the defendants (US Southern District Court, 13-cv-9233). That litigation ended when Judge John G. Koeltl granted defendants' motion for summary judgment dismissing plaintiff's claims based upon lack of standing without prejudice (see opinion and order dated February 15, 2016). Judge Koeltl further denied defendants' motion on their counterclaims as to liability and granted plaintiff's motion for summary judgment dismissing defendant's counterclaims in part.

Meanwhile, defendants contend that the Appellate Division's decision reinstating this action dictates that Judge Koeltl's order has no preclusive effect. The court disagrees.

The First Department's decision was limited to the issues presented on appeal and specifically whether claim or issue preclusion bars this action. That the First Department stated that "the federal court judgment was not on the merits" is not dispositive since the First Department was only addressing Judge Koeltl's dismissal of plaintiff's claims based upon standing without prejudice. To the extent that Judge Koeltl expressly found that the individual defendants could not maintain a claim of improper wage deductions based upon the $276 FICA deduction, the individual defendants cannot relitigate the issue here. Indeed, Judge Koeltl's decision on this claim was expressly on the merits. Further, there can be no dispute that the individual defendants fully and fairly litigated the subject claim.

Accordingly, the motion is granted to the extent that the 2nd COA premised upon the $276 FICA deductions asserted in the Barenblatt, Breitstein and Ungar answers is severed and dismissed.

3rd COA

The 3rd COA is for post-termination unpaid commissions. Judge Koeltl expressly found that the operative compensation agreements "do not specify whether employees will receive commissions if they are no longer working for [plaintiff]." Judge Koeltl noted that the compensation agreements did not "support the defendants' argument that they are entitled to commissions on loans that close after the termination of the defendants' employment." Therefore, Judge Koeltl, denied defendants' motion for summary judgment, reasoning that "[t]he defendants would not be entitled to summary judgment based on this rationale because it is unclear how far along in the process of completion a loan would have to be before requiring a commission payment."

Judge Koeltl also denied plaintiff's motion for summary judgment dismissing the defendants' counterclaims "for unpaid commissions for any loans for which the defendants had not been paid at the time they left [plaintiff]." Judge Koeltl further stated that "[i]t is unclear whether the Compensation Agreements contemplated that the employees should receive their commissions in the event that they left Apple before submitting their final commission sheets and whether the Compensation Agreements pre-

clude paying the employees commissions because the employees were no longer employed at the time the final paychecks were issued."

The court agrees with defendants that Judge Koeltl did not expressly rule on whether defendants could maintain a claim for post-termination unpaid commissions. Therefore, movants collateral estoppel argument on this claim is rejected.

5th COA

Movants argue that the 5th COA should be dismissed because defendants' claimed damages is premised upon a statute that was not effective when defendants resigned. Defendants argue, however, that the statute, Labor Law 198[1-d] still authorized $100 per day up to $2,500 together with costs and reasonable attorney's fees while the defendants were employed by plaintiff. On reply, movants do not address defendant's argument.

Defendants concede that the alleged damages of $250 per day up to $5,000 is not supported by the operative version of Labor Law 198[1-d]. However, since the statute did provide for $100 per day up to $2,500 plus costs and reasonable attorney's fees, the court dismisses the claim only to the extent that it seeks money damages in excess of the effective statute. The motion is otherwise denied.

6th COA

Defendants' fraud claim asserts that plaintiff and Appelbaum "affirmatively misrepresented the nature and purpose of the $276 FICA deductions" and the individual defendants were "told that this charge... was meant to cover the employer's FICA contribution" (emphasis removed). The individual defendants further allege that while they were told this FICA deduction was mandatory and imposed on all employees, it was not. Defendants seek money damages "to the full extent of the FICA deductions imposed on [them] during [their] employment..."

Breitstein expands upon the allegations. He asserts that Appelbaum "explained verbally" to him that plaintiff "contributed an amount equal to 7.2% of each employee's annual salary, and he approximated that the average Apple employee earned $100,000 a year, generating an employer FICA contribution of $7,200 annually. By charging $276 in each of the 26 pay periods each year, Appelbaum told Breitstein that Apple could recoup this amount. Apple and Appelbaum reiterated this explanation from time-to-time and maintained it was the truth until discovery in the Federal Action."

Breitstein characterizes the $276 deduction as a way for plaintiff and Appelbaum to "claw back monies" and was a "large-scale, institutional scam perpetuated on employees by [plaintiff] and Appelbaum." Ungar has asserted a rehash of the allegations made by Barenblatt and Breitstein.

Movants argue that the fraud claims are not pleaded with particularity in violation of CPLR 3016[b] and are untimely as to Appelbaum. Defendants dispute the former and contend that the claims are timely as to Appelbaum under the continuous wrong doctrine because the deductions and/or Appelbaum's fraudulent representations continued up to and including September 2013.

"The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury' " (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995], quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 NY2d 403 [1958]). CPLR 3016[b] provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail. Here, the court agrees with movants that the allegations lack sufficient particularity to state a claim. There are no facts to support defendants' conclusory allegations such as when and where plaintiff and Appelbaum gave them false information regarding the $276 deductions. While CPLR 3016[b] does not require "unassailable proof at the pleading stage", defendants need to provide sufficient facts to support

the cause of action so as to apprise movants of the complained-of incidents (*see i.e. Pace v. Raisman & Associates, Esqs., LLP*, 95 AD3d 1185 [2 Dept 2012]).

As to whether the fraud claim is timely against Appelbaum, the court rejects defendants' arguments. Informing the court's determination that the claim lacks particularity, defendants' vague allegation that Appelbaum continued to fraudulently misrepresent the nature and purpose of the $276 deductions through the date of their resignation is wholly insufficient. Further, it flies in the face of allegations like Barenblatt's that the $276 deduction ended for him in 2012.

Accordingly, the motion is granted as to Barenblatt, Breitstein and Ungar's sixth counterclaim and cause of action.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion is granted to the following extent: [1] the 2nd COA premised upon the $276 FICA deductions asserted in the Barenblatt, Breitstein and Ungar answers is severed and dismissed; [2] the 5th COA is dismissed to the extent that it seeks money damages in excess of $100 per day up to $2,500, excluding costs and reasonable attorney's fees; and [3] the 6th COA asserted in the Barenblatt, Breitstein and Ungar answers is severed and dismissed; and it is further

ORDERRED that the motion is otherwise denied; and it is further

ORDERED that plaintiff and Appelbaum shall reply/answer within 20 days from service of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on February 11, 2020 at Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 12/18/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.