DMY Sponsor, LLC v Glatt
2020 NY Slip Op 33808(U)
November 16, 2020
Supreme Court, New York County
Docket Number: 653903/2020
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 14**

Justice

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DMY SPONSOR, LLC AND DMY TECHNOLOGY GROUP, INC.,GTY TECHNOLOGY HOLDINGS, INC.

Plaintiff,

- v -

CARTER GLATT AND CAPTAINS NECK HOLDINGS, LLC,

Defendant.

---X

CARTER GLATT and CAPTAINS NECK HOLDINGS, LLC

Defendants/
Counterclaimants,

-against-

DMY SPONSOR, LLC, DMY TECHNOLOGY GROUP, INC., GTY TECHNOLOGY HOLDINGS, INC., and HARRY L. YOU,

Plaintiffs/counterclaim defendants

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INDEX NO. 653903/2020

MOTION DATE 11/13/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 60, 61, 62, 63, 64, 66

were read on this motion to/for DISMISS.

The motion by plaintiffs to dismiss certain counterclaims is granted in part and denied in part.

Background

This dispute concerns defendant Glatt's former employment with plaintiff GTY as a senior Vice President and Head of Corporate Development from August 2019 to April 2020. Plaintiffs allege that in connection with his employment and eventual termination, he signed agreements that required him not to disclose GTY's trade secrets and confidential information.

In September 2019, while defendant Glatt was still working at GTY, the CEO of GTY (Harry You) formed two separate entities (the dMY plaintiffs) and defendant Glatt was purportedly involved in certain aspects of this process. Plaintiffs maintain that Mr. You offered defendant Glatt the opportunity to invest in plaintiff dMY Sponsor.

In February 2020, defendant Captains Neck (an entity of which Mr. Glatt is a member) executed an agreement whereby Captains Neck would purchase certain Class Y Units. Plaintiffs also claims that Mr. You, Mr. Glatt and dMY's counsel discussed a side letter that affirmed that this investment would be forfeited if Mr. Glatt did not maintain his employment with GTY, GTY engaged in a change of control transaction, GTY's CEO resigned or was removed, or Mr. Glatt did not become employed by dMY Technology. Plaintiffs admit that this "side letter" was never executed but that Glatt was aware that his entitlement to the Class Y units was conditioned on the execution of this side letter.

Plaintiffs acknowledge that the signature pages for the underlying agreement concerning the Class Y units were exchanged but insist that the agreement was always conditioned on the side letter. In April 2020, Mr. Glatt was fired from GTY and plaintiffs argue that Mr. Glatt offended many GTY executives during the termination process. They claim that he chose not to work for dMY and instead is receiving an annual $350,000 severance from GTY. And, because he was terminated from GTY, dMY returned the investment from Captains Neck. Plaintiffs also claim that Glatt has misappropriated GTY and dMY materials and refuses to account for confidential materials he may have stored or otherwise transferred to other devices.

Defendants claim that Mr. You and Mr. Glatt worked together to form dMY and that this partnership was intended to be full and equal. Mr. Glatt contends he was told he would be CFO at dMY as well as a member of its Board of Directors. He claims he raised about $900,000 for

dMY. Mr. Glatt claims that the parties entered into an agreement regarding the Class Y units and that the side letter was merely the subject of discussions although the side letter was never finalized or executed.

Defendants admit that Mr. Glatt was fired after working on an initiative that "caused internal strife at GTY." Defendants now bring counterclaims for declaratory judgment affirming the purchase of the Class Y units, breach of contract against GTY and Harry You, fraudulent misrepresentation against dMY Sponsor, dMY Technology and Harry You, and negligent misrepresentation against these same parties. Plaintiffs move to dismiss the second, third and fourth counterclaims.

Discussion

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010] [observing that affidavits and deposition testimony are not documentary evidence under CPLR 3211(a)(1)]).

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value*

Recovery Master Fund L.P. v Key Bank Natl. Assoc., 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

Second Counterclaim- Breach of Contract

Plaintiffs move to dismiss portions of defendants' breach of contract counterclaim in part (they do not seek to dismiss the portion of this claim that alleges a failure to pay Glatt severance). They claim that Mr. You cannot be held liable for breach of contract of the separation agreement because Mr. You is not a party to that agreement. Plaintiffs also claim that the alleged breach of the neutral reference clause by Mr. You's purported disparagement of Mr. Glatt does not state a cause of action because this clause is not a non-disparagement provision. It only required GTY to provide references for Mr. Glatt that confirms his date of employment and title.

Plaintiffs contend that absolute privilege applies to these disparaging comments because they were made in this litigation. Finally, plaintiffs claim that defendants cannot recover for anticipated future breaches (the threats asserted in paragraph 77 of the counterclaims).

In opposition, defendants claim that they have stated a counterclaim for breach of contract based on the neutral reference clause because plaintiffs made statements in this action, publicized those allegations to a third party, and publicized other disparaging comments about Mr. Glatt to the same third party. Defendants claim that the disparaging comments are not protected by any privilege because some were made outside this litigation

In reply, plaintiff emphasize that the allegations in this counterclaim do not relate to a reference and, therefore, do not sustain this cause of action.

The Court grants this branch of the motion. The neutral reference clause provides that "GTY will provide references for Executive consistent with its neutral reference policy, which is

to confirm Executive's dates of employment and title during the period of employment" (NYSCEF Doc. No. 41, ¶ 8).

Defendants attempt to infer a non-disparagement component to this language that somehow prohibits plaintiffs from making negative comments about Mr. Glatt's qualifications to a third party. The problem is that the allegation about this clause (paragraph 74 of the counterclaim) does not mention that these comments were made in connection with providing a reference (NYSCEF Doc. No. 40 ¶ 74). The scope of this provision is limited; a plain reading of it suggests that it applies only to questions from a prospective employer. After all, that is the purpose of reference.

The Court declines to conclude that this provision could reach purported disparaging remarks to a third-party. The fact is that these are sophisticated parties capable of drafting a non-disparagement agreement that barred plaintiffs from making any negative comments about Mr. Glatt's qualifications to anyone. The Court observes that the separation agreement also includes a non-disparagement agreement that barred Mr. Glatt from making "disparaging or defamatory comments regarding GTY" (NYSCEF Doc. No. 41 at 7). There is no support for defendants' claim that they can assert a breach of contract cause of action based on violation of the neutral reference provision.

In any event, the Court does not see how defendants could hold Mr. You liable for breach of contract because he was not a party to the contract. Simply because he might have incurred some obligations under it as an employee of GTY does not make him personally liable for a potential breach of the separation agreement.

The Court also grants the branch of this motion that seeks to dismiss allegations based on future threats of potential breaches. A future breach is not a basis for a breach of contract action.

Fraudulent Misrepresentation

"To state a cause of action for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Gomez-Jimenez v New York Law Sch.,* 103 AD3d 13, 17-18, 956 NYS2d 54 [1st Dept 2012] [internal quotations and citation omitted]).

Plaintiffs claim that defendants failed to meet the heightened pleading standard required to assert this counterclaim. They claim that defendants do not plead this claim with enough specificity to meet the scienter element or that there was justifiable reliance. Plaintiffs contend that purported promises from Mr. You to Mr. Glatt about potential future employment do not state a cause of action.

In opposition, defendants insist that Mr. You promised Mr. Glatt that Glatt would be a full and equal partner at dMY, would be CFO and on the board of directors. Defendants claim that Mr. Glatt relied on these promises, which also included the chance to invest in the Class Y units; he did substantial work for dMY and he passed up on other business opportunities.

In reply, plaintiffs emphasize that this cause of action is based on non-actionable promises of future intent and must be dismissed.

The Court denies this branch of the motion. "Absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on

his statement" (*Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 118, 675 NYS2d 5 [1st Dept 1998] [internal quotations and citation omitted]).

Defendants' claim is that Mr. Glatt helped Mr. You set up dMY for an IPO in reliance on future employment and investment opportunities. Defendants claim that Mr. Glatt was never offered employment with dMY and specifically allege that "dMY Sponsor, dMY Technology and Harry L. You knew that these representations were false when made, and they knowingly made these representations intending to deceive Mr. Glatt into performing substantial work for dMY, remaining employed by GTY, and foregoing other business opportunities (NYSCEF Doc. No. 40, ¶ 83).

At the motion to dismiss stage, this states a cause of action. Assuming all the allegations to be true, as the Court must, Mr. Glatt took numerous steps in reliance on the promise of a lucrative business opportunity and he now claims that Mr. You never had any intention of hiring him. Under these circumstances, it was reasonable for Mr. Glatt to rely on these promises and he claims that he did substantial work for Mr. You because of the proposed business arrangement.

Obviously, discovery will shed more light on this issue; it could reveal that Mr. You simply changed his mind and never made any misrepresentations. But the allegations alleged in this counterclaim clearly support a fraudulent misrepresentation claim.

Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364 [2007]).

This counterclaim makes similar allegations to the fraudulent misrepresentation claim. Plaintiffs assert that defendants fail to allege the special relationship required to state this cause of action. In opposition, defendants claim that there was a long family friendship between Mr. You and Mr. Glatt and that Mr. Glatt relied on the words of an experienced businessman. Plaintiffs point out in reply that defendants only have unsupported allegations in support of this counterclaim.

The Court grants this branch of the motion. As plaintiffs point out, there is no affidavit from Mr. Glatt explaining the nature of his relationship with Mr. You. And the answer does not mention anything about a long friendship or a privity-like relationship between them. The Court cannot assume that such a relationship exists based on the submissions here; an attorney's memo of law is not sufficient.

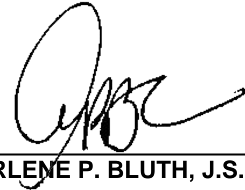
Accordingly, it is hereby

ORDERED that the motion by plaintiffs to dismiss certain counterclaims is granted to the extent that the portions of the second counterclaim based on the neutral reference provision, future threats of a breach and all allegations against Mr. You are severed and dismissed; and it is further

ORDERED that the branch of plaintiffs' motion to dismiss the fourth counterclaim for negligent misrepresentation is granted and this counterclaim is severed and dismissed; and it is further

ORDERED that the remaining portions of the motion are denied and plaintiffs shall respond to the remaining counterclaims pursuant to the CPLR.

Remote Conference: January 12, 2021 at 2:30 p.m.



11/16/2020		ARLENE P. BLUTH, J.S.C.		
DATE				
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE