

Paraco Gas Corp. v Jay Z. Gerlitz & Assoc., Inc.

2020 NY Slip Op 35605(U)

September 2, 2020

Supreme Court, Westchester County

Docket Number: Index No. 51723/2020

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ___ Dec __x__ Seq. No. 1 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
PARACO GAS CORPORATION,

Index No. 51723/2020

Plaintiff,

DECISION AND ORDER

-against-

JAY Z. GERLITZ & ASSOCIATES, INC.,
and JAY Z. GERLITZ,

Defendants.
-----X

The following papers numbered 1 to 6 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Affidavit, Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation and Exhibits	5
Reply Memorandum of Law	6

Defendants bring this motion seeking to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7). The complaint asserts three causes of action, for breach of fiduciary duty; fraud; and aiding and abetting fraud. Defendants also seek to dismiss the request for punitive damages.

Defendants are insurance brokers who have, according to the complaint, "managed and controlled all aspects of Paraco's

employee healthcare benefits" for a period of "23 years."

Plaintiff claims that it recently learned that defendants, "in concert with others, have breached their fiduciary duty and acted fraudulently in the handling and misappropriation of said ERISA Trust Funds of Paraco employees, which to date represents a loss to Paraco in excess of \$2 million dollars of said funds." In the complaint, plaintiff alleges that "Defendants, in concert with others" have "fraudulently executed policies of insurance issued" on plaintiff's behalf; "forged signatures of Company officers and employees on documents;" "directed and taken Paraco's ERISA funds to Defendants [sic] own bank for deposit into its own accounts and to date have failed or otherwise refused to account for and deliver same to Paraco." The complaint goes on to list other alleged bad acts by defendants to plaintiff's detriment.

As indicated above, plaintiff does not name the "others" that defendants allegedly acted in concert with; does not give any details about the forgeries, misdirection of funds or, for that matter, anything else in the complaint. In short, the complaint is woefully short on details.

"In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."

Benishai v. Epstein, 116 A.D.3d 726, 727, 983 N.Y.S.2d 618, 620 (2d Dept. 2014). However, it is well-settled that as with claims asserting fraud, "A cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b). Here, as the causes of action alleging breach of fiduciary duty contained only bare and conclusory allegations, without any supporting detail, they failed to satisfy the requirements of CPLR 3016(b)." *Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 653-54, 115 N.Y.S.3d 60, 64 (2d Dept. 2019). See also *Manik v. Citimortgage, Inc.*, 102 A.D.3d 929, 930, 958 N.Y.S.2d 738, 739 (2d Dept. 2013) ("Where a cause of action or defense is based upon fraud the circumstances constituting the wrong shall be stated in detail.").

If the Court had only the complaint to review on this motion to dismiss, it would have to dismiss the action for failure to plead the claims with particularity. Yet "In assessing a motion under CPLR 3211(a)(7) a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Stortini v. Pollis*, 138 A.D.3d 977, 978, 31 N.Y.S.3d 90, 92 (2d Dept. 2016). That means that the Court must consider the affidavit submitted by plaintiff's CFO in opposition to the motion to dismiss.¹ *Quinones v. Schaap*, 91 A.D.3d 739, 740, 937

¹This affidavit raises questions about the "documentary evidence" aspect of defendants' motion to dismiss. It is not as clear-cut as defendants assert, at least at this preliminary juncture.

N.Y.S.2d 262, 264 (2d Dept. 2012) ("In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects.").

Having reviewed the affidavit, the Court finds that it supplies enough details for the complaint to withstand the motion to dismiss. However, given the loose, narrative style of the affidavit, the Court directs plaintiff to amend the complaint to add all relevant details so that defendants can answer (or move to dismiss)² a coherent and particularized complaint. The Court also directs plaintiff to investigate defendants' claim - made only by its counsel, and thus nonevidentiary - that Employee Benefits Solutions, LLC ("EBS"), is the entity that committed all of the alleged bad acts, and that EBS and defendants are separate, unrelated entities. Plaintiff shall conduct such an investigation, and amend the complaint, within 20 days of receipt of this Decision and Order.

As to plaintiff's claim for punitive damages, the Court finds that there are no allegations, in the complaint or the affidavit, that evidence a "high degree of moral turpitude." As the Court of Appeals has explained,

Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future. . . . Punitive damages

²Once the complaint is amended, defendants may make a second motion to dismiss, if they have a valid legal basis for doing so.

are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. . . . The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.

Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 489 (2007).

Nothing in the complaint or the affidavit alleges that

"defendants' actions were aimed at the public or evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations."

Linkable Networks, Inc. v. Mastercard Inc., 184 A.D.3d 418, 419, 125 N.Y.S.3d 92, 94 (1st Dept. 2020). Thus, unless the amended complaint can meet this rigorous standard, plaintiff shall not seek punitive damages. See *Thomas v. Farrago*, 154 A.D.3d 896, 898, 62 N.Y.S.3d 478, 480 (2d Dept. 2017) ("Punitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives.").

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 2, 2020



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Justice of the Supreme Court

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