

Corbin v K1 Inv. Mgt., LLC
2021 NY Slip Op 30414(U)
February 11, 2021
Supreme Court, New York County
Docket Number: 652583/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

Justice

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JEFF CORBIN,

Plaintiff,

- v -

K1 INVESTMENT MANAGEMENT, LLC, K4 PRIVATE
INVESTORS, L.P., K4 CAPITAL ADVISORS, L.P., ERIC
MORGAN, SIMON YU, HASAN ASKARI, SUJIT
BANERJEE, THEIRAPP, INC., TRACKFORCE
ACQUIRECO, INC., THEEMPLOYEEAPP,
LLC, TRACKFORCE TOPCO, INC., TRACKFORCE
ULTIMATE TOPCO, INC., TRACKFORCE MIDCO,
LLC, RON CANO, R. NEIL MALIK, MICHAEL VELCICH,
GEORGE WRIGHT, MORRIS, MANNING & MARTIN, LLP,
SCOTT ALLEN

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25,
26, 27, 28, 29, 30, 31, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54

were read on this motion to/for

DISMISS

Upon the foregoing documents and for the reasons set forth on the record (2.10.2021) and as otherwise set forth below, the defendants' motion to dismiss must be denied as to the breach of contract (first) and the fraudulent inducement (seventh) causes of action. The gravamen of the complaint is that the defendants removed Mr. Corbin as CEO because they did not believe he was the right man for the job to scale the company. When they made this decision, they informed all of the employees that Mr. Corbin was being replaced as the CEO and that David Pearce was the interim CEO. They removed Mr. Corbin's access to the company server. They did not include him in any strategic decision meetings. They told him not to return to the company offices and provided him with boxes to pack up his things (Compl., ¶¶ 126-140).

Without question, as alleged, this constituted a termination of his role as CEO. When Mr. Corbin reminded the defendants that he was entitled to exercise his Put Rights and to receive severance under his employment agreement, the complaint alleges that the defendants did not effectuate a proper cure (e.g., *id.*, ¶ 189). To wit, although they sent him an email saying that he was reinstated as CEO, continued to pay him his CEO salary, let him sit on the board and voted as a board to “reinstate” him, this was all allegedly smoke and mirrors for the defendants’ real objective, which was to have their interim CEO Mr. Pearce continue to perform all the functions of the CEO without having to pay Mr. Corbin his Put Rights compensation, which was due based on their termination of him as CEO and which was more than his salary.

The complaint further alleges that neither the company’s clients nor employees were informed that Mr. Corbin was reinstated as CEO, nor was he otherwise fully restored as CEO of the company (*id.*). Among other things, the well pled complaint alleges that this purported “cure” did not include restoring Mr. Corbin’s picture and biography to the company’s website which had been removed. Nor did this so-called cure include restoring his access to the company systems, or otherwise restoring to him any duties or responsibilities befitting that of the CEO. In fact, the complaint alleges that Mr. Pearce continued as interim-CEO making all of the day to day decisions (*id.*).

It is of no moment that Mr. Corbin’s employment agreement provided that his responsibilities as CEO could change. This simply does not mean that the company could effectively sideline him and prevent him from carrying out the role of being the CEO without recourse. Put another way, a change in responsibilities does not include undermining his status as *the* CEO of the company,

and any purported “cure” by the defendants needed to address how Mr. Corbin was perceived by the company’s employees and clients and to otherwise remove the notion that someone else, i.e., the interim CEO, was running the show. Following this ruse, the complaint alleges that the company was stripped of its assets by the corporate defendants so that they could further avoid the Put Right compensation due Mr. Corbin and otherwise deprive Mr. Corbin of his contractual benefits (Compl., ¶¶ 215-245). Taking these facts alleged as true as the court must on a motion to dismiss, this is sufficient to allege a claim for breach of the employment agreement.

The breach of the covenant and good faith and fair dealing cause of action (second) however must be dismissed. This claim is duplicative (*see* Compl., ¶¶ 267-270) of the breach of contract claim (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2013]).

The branch of the defendants’ motion seeking dismissal of the fraudulent conveyance cause of action (seventh) must be denied because it is based entirely on the notion that the allegations supporting the breach of contract claim are insufficient. As discussed above, they are not. For the avoidance of doubt, the complaint alleges that the sale of the company was “fraudulent since Defendants knew that as a result of it, the IRapp, Inc. would become insolvent and no longer have any revenue generating assets and would not be able to pay Corbin for the Put Right and Severance since all revenue generating assets were now owned by Trackforce,” and that “Defendants conducted [this] Asset Sale in an attempt to defraud Corbin as a creditor of the Company and to preclude him from recovering contractually” (Compl., ¶¶ 291-293).

The successor liability cause of action (eighth) is dismissed as a separate cause of action because this is not a separate cause of action in New York. Inasmuch as the complaint seeks to assert claims against the corporate defendants (with the exception of Morris Manning & Martin, LLP) based on an alter ego or successor liability theory, the plaintiff may proceed based on the underlying cause of action as against these corporate defendants. The individual defendants, however, are not party to the plaintiff's employment agreement and, significantly and unlike the corporate defendants, there are insufficient allegations for the complaint to proceed against them.

As discussed on the record, the court has jurisdiction against the out-of-state corporate defendants at least pursuant to CPLR § 302 (a)(2). The complaint alleges that the out of state corporate defendants may have committed a tort within the state vis a vis the allegedly fraudulent sale of the company. Inasmuch as the allegations are that these actions were purposeful and there is a substantial relationship between the transaction and the claims asserted (*Kreutter v McFadden Oil Corp*, 71 NY2d 460, 467 [1988]), this is sufficient to maintain the claims against them.

Finally, (i) the third, fourth and fifth causes of action are dismissed because the plaintiff does not object to their dismissal (NYSCEF Doc. No. 51 at 11, n. 2) and (ii) the sixth cause of action, which was asserted against Morris, Manning & Martin, LLP and Scott Allen, is also dismissed because the plaintiff voluntarily discontinued his claims against both of these defendants (NYSCEF Doc. No. 53).

Accordingly, it is

ORDERED that the motion to dismiss is denied in part and the complaint is dismissed with respect to the second through sixth and the eighth cause of action, and is dismissed in its entirety as against defendants Eric Morgan, Simon Yu, Hasan Askari, Sujit Banerjee, Ron Cano, R. Neil Malik, Michael Velcich, and George Wright; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that upon service upon the County Clerk of a copy of this Decision and Order, with Notice of Entry by the defendants, the Clerk is directed to amend the caption in this action to reflect the foregoing; and it is further

ORDERED that the remaining defendants are directed to file an answer in 20 days and the parties are directed to appear for a preliminary conference in Part 53 by remote means on March 15, 2021 at 11:30 AM.

2/11/2021

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

20210211161332ABORROK458C9D7EF31D4377966DB009D17EC388

ANDREW BORROK, J.S.C.