

Park v Creative360 LLC
2021 NY Slip Op 31226(U)
April 13, 2021
Supreme Court, New York County
Docket Number: 654279/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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ISAAC PARK,	INDEX NO.	<u>654279/2020</u>
Plaintiff,	MOTION DATE	<u>N/A</u>
- v -	MOTION SEQ. NO.	<u>002</u>
CREATIVE360 LLC, NIFTY TECHNOLOGIES, INC., SHIV KAPOOR		
Defendants.	DECISION + ORDER ON MOTION	

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISSAL.

Defendants' motion to dismiss the amended complaint for failure to state a cause of action is granted in part and denied in part.

Background

In this case, plaintiff seeks unpaid wages from his former employer. Plaintiff contends that he was an employee under the Labor Law; defendants claim that he was an independent contractor and was paid for the work that he performed.

In this motion, defendants argue that the first cause of action for breach of contract should be dismissed because even if plaintiff was an employee, the parties did not enter into a valid employment agreement. Defendants insist that because there was no valid employment contract, plaintiff should be considered an "at will" employee and this claim is without merit.

The second and third causes of action, for quantum meruit and unjust enrichment respectively,

should be dismissed because they are duplicative of his breach of contract claim. The fourth cause of action, for a violation of Article 6 of the Labor Law, should be dismissed because plaintiff is not an employee and is not subject to its protections. The fifth cause of action, for a declaratory judgment, should be dismissed because it is improper to seek a declaratory judgment if it is a derivative of other causes of action and seeks only a declaration of the same rights. The sixth cause of action, for violations of the Wage Theft Protection Act (“WTPA”), should be dismissed because plaintiff lacks capacity to bring an action under the WTPA.

In opposition, plaintiff argues that he was an employee and further argues that that determination cannot be made in a motion to dismiss. Plaintiff also argues that, as for the first cause of action, he has successfully pled a breach of contract claim and refers the court to the amended complaint in its totality, rather than just the “first cause of action” section. Plaintiff argues that the second and third causes of action were properly pled as alternative relief as allowed by CPLR 3014. Plaintiff argues that the fourth cause of action hinges on whether he was an employee or an independent contractor so that issue cannot be decided at this point. Plaintiff withdraws his fifth cause of action and argues that he has capacity to bring an action under the WTPA, his sixth cause of action, by statute.

In reply, defendants reassert their positions and argue that plaintiff has failed to rebut the presumption that he was an at-will employee.

Motion to Dismiss

“When assessing a CPLR 3211(a)(7) motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only

whether the facts as alleged fit within any cognizable legal theory” (*Grassi & Co., CPAS, P.C., v Honka*, 180 AD3d 564, 564-565 [1st Dept 2020]).

Employee or Independent Contractor

“[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results... Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule” (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]).

Both parties rely on *Bynog*. The Court in *Bynog*, however, considered a motion for summary judgment, not a motion to dismiss. Here, the parties agree that the key issue is whether the plaintiff was an independent contractor or an employee. To determine whether a person is an employee or an independent contractor requires a factor-based analysis. That analysis, however, must be explored through discovery and is not appropriate for a motion to dismiss. This Court cannot make this kind of factual determination on a motion to dismiss.

First Cause of Action – Breach of Contract

Pursuant to CPLR 3014, “Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters.” The elements of a breach of contract claim are “the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages” (*Markov v Katt*, 176 AD3d 401, 402-403 [1st Dept 1995]).

Paragraphs 75-78 of the amended complaint state that the parties had a contract, plaintiff performed, defendants did not, and plaintiff was damaged as a result. (NYSCEF Doc. No. 31). Additionally, paragraph 74 of the complaint states “Plaintiff repeats and re-alleges each and every allegation made in the above paragraphs of this Complaint.” (*Id.*). Pursuant to CPLR 3014, plaintiff is permitted to incorporate prior statements of the pleadings into subsequent parts, and has appropriately pled the elements of a breach of contract claim.

Contrary to defendants’ claim, a breach of contract claim is set forth in the amended complaint. Page three states “[b]ased on Kapoor’s [defendant] assurances, on about December 8, 2015, Park agreed to work for Creative360 as a “project manager,” collaborating with software developers to create applications for Creative360’s clients... In return for his work, and per Park’s oral agreement with Kapoor, Defendants initially paid Park \$1,750 per month; however, they soon increased his compensation to \$3,000 per month.”. This satisfies the first element that a contract existed. Page five states “Park never turned down any assignment from Kapoor”, satisfying the second element that plaintiff performed under the contract. Page ten states “in about December 2019, when Defendants kept ignoring Park’s inquiries, and refused to pay him what they owed”, and satisfies the third element that defendants did not perform under the contract. Lastly, page fifteen itemizes the money that plaintiff claims that he is owed, the late payment penalties he sustained on various bills, and the emotional damage he has suffered as a result, satisfying the fourth element that plaintiff has sustained damages.

Defendants claim that vague oral assurances of employment fail to support the breach of contract cause of action is unpersuasive. Defendants, however, refer to a matter where a plaintiff was an at-will employee and claimed to be wrongfully discharged (*Ullman v Norma Kamali*,

Inc., 270 AD2d 691, 692 [1st Dept 1994]). Here, plaintiff claims that there was an oral contract for employment and that he was not paid accordingly.

Based on the totality of the amended complaint, plaintiff has stated a claim for breach of contract sufficient to withstand a motion to dismiss. Defendants' motion is denied with respect to the first cause of action.

Second Cause of Action – Quantum Meruit

Plaintiff's Claim for Quantum Meruit as Alternative Relief

Pursuant to CPLR 3014, "Causes of action or defenses may be stated alternatively or hypothetically." The First Department has held that "Causes of action and grounds for relief may be pleaded in the alternative and are not barred for inconsistency" (*Ellis v Alley & Ellis*, 294 AD2d 168, 170 [1st Dept 2002]).

In *Ellis v Abbey & Ellis*, plaintiff sought to recover for services rendered to defendant law firm (*id*). Plaintiff claimed that he was a partner in a law firm and sought an accounting of his purported interest. The complaint included claims for breach of contract and quantum meruit. The Court held that "While a partner may not maintain an action at law against another partner in the absence of an accounting ... the law similarly bars recovery in quantum meruit unless the contract is found to be unenforceable ... The remedy, as demonstrated by the complaint in the instant action, is to plead both breach of contract and quantum meruit as alternative theories of recovery" (*id* at 170). Plaintiff was not barred by seeking a claim under breach of contract or, in the alternative, quantum meruit.

Here, defendants claim that plaintiff's claim for quantum meruit is duplicative of his breach of contract claim and cannot survive as a matter of law is unpersuasive because plaintiff

has pled quantum meruit as alternative relief. At this stage of the litigation, where defendants have not admitted that there was a contract, quantum meruit and breach of contract may be pled as alternative theories of recovery.

Quantum Meruit Elements

To recover damages under quantum meruit the plaintiff must demonstrate “(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly rendered” (*Crown Construction Builders and Project Managers Corp., v. Francisco Chavez, et al.*, 130 AD3d 969, 971 [2nd Dept 2015])

In paragraph 82 of the amended complaint, plaintiff pleads that he performed services in furtherance of the work agreement in good faith, satisfying the first element. In paragraph 83, plaintiff pleads that defendants accepted the services, satisfying the second element. Also in paragraph 83, plaintiff pleads that he expected to be compensated in the fair and agreed-upon amounts, satisfying the third and fourth elements.

Accordingly, plaintiff was permitted to plead quantum meruit as an alternative relief and has adequately done so in the amended complaint. Defendants’ motion is denied with respect to the second cause of action.

Third Cause of Action – Unjust Enrichment

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached

a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]).

Here, there is a dispute as to whether plaintiff was an employee or an independent contractor but not as to whether there was some sort of agreement for defendant to pay for plaintiff’s services. Therefore, plaintiff cannot plead both breach of contract and unjust enrichment. The Court declines to permit plaintiff to pursue a "catchall" cause of action.

Defendants’ motion is granted with respect to the third cause of action and that claim is severed and dismissed.

Fourth Cause of Action – NY Labor Law

New York Labor Law, Article 6, Section 198 provides, in relevant part “[i]n any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court may allow such employee in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs.” Section 190 defines an employee as meaning “any person employed for hire by an employer in any employment.”

The First Department has held that a trial court “properly dismissed plaintiff’s Labor Law article 6 wage claim, as the evidence established that plaintiff was an independent consultant and not an employee of [defendant]” (*Bizjak v Gramercy Capital Corp.*, 95 AD3d 469, 469 [1st Dept 2012]).

However here, as stated above, this Court cannot decide whether plaintiff was an employee or independent contractor at this stage of the litigation. There must be discovery and an exploration of the relevant facts first.

Defendants' motion is denied with respect to the fourth cause of action.

Fifth Cause of Action – Declaratory Judgment

In his memorandum of law in opposition, plaintiff withdrew his claim for a declaratory judgment (NYSCEF Doc. No. 41). Therefore, that claim is severed and dismissed.

Sixth Cause of Action – Wage Theft Protection Act

Plaintiff claims that defendants violated WTPA, Labor Law Section 195(1). This section details the notice requirements that an employer must provide his or her “employee” at the time of hiring.

Similar to the fourth cause of action, defendants argue that plaintiff has no legal capacity to bring a claim under the WTPA because he was an independent contractor and not an employee. As explained above, this Court cannot that determination at this stage of the litigation.

Therefore, defendants' motion is denied with respect to the sixth cause of action.

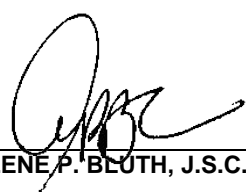
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted with respect to the third cause of action (unjust enrichment) and the fifth cause of action (declaratory judgment) (which was withdrawn), those claims are severed and dismissed, and the motion is denied with respect to the remaining relief requested, and it is further

ORDERED that defendants must answer the amended complaint pursuant to the CPLR.

Preliminary conference: July 14, 2021. The parties are directed to follow the instructions with respect to conferences that will be sent by Court Notice.

4/13/2021
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	DENIED