

Salescare, Inc. v SEIU 1199 Natl. Benefit Fund

2022 NY Slip Op 31116(U)

April 1, 2022

Supreme Court, New York County

Docket Number: Index No. 101007/2020

Judge: Louis L. Nock

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART **38M**

Justice

-----X

SALESCARE, INC., and MARIAN PARKER,
Plaintiffs,

- v -

SEIU 1199 NATIONAL BENEFIT FUND, 1199 SEIU
FUNDS, AUBURN IT RESOURCES, and JOHN DOES 1-10
Defendants.

INDEX NO. 101007/2020

MOTION DATE 06/09/2021,
06/11/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 16, 18, 19, 20, 24, 28, 29, and 30

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 8, 9, 10, 11, 12, 13, 17, 21, 22, 23, 25, and 27

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that the motion by defendants SEIU I 199 National Benefit Fund and 1199 SEIU Funds (collectively, the "Fund") to dismiss the complaint (Mot. Seq. No. 001) and the motion by defendant Auburn IT Resources ("Auburn") to dismiss the complaint (Mot. Seq. No. 002) are consolidated for disposition and granted based upon the following memorandum decision.

Background

In this action for breach of contract and defamation, plaintiffs SalesCare Inc. ("SalesCare") and Marian Parker ("Parker," and collectively, "plaintiffs") allege six causes of action against defendants: breach of contract and breach of the implied covenant of good faith and fair dealing against all defendants (first and second causes of action), defamation against the

Fund (third cause of action), business disparagement/injurious falsehood against the Fund (fourth cause of action), tortious interference with business opportunity against the Fund (fifth cause of action), and unjust enrichment (sixth cause of action). Defendants move separately to dismiss the complaint based on documentary evidence and for failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (a)(7).

Parker is the President of SalesCare. In August 2019, Auburn contacted Parker to tell her about a potential Information Security project with the Fund (NYSCEF Doc. No. 14, ¶ 5). Parker met with the Fund's staff and discussed the project, and then entered into a Contractors Agreement (the "agreement") with Auburn which governed the terms of the project. Relevant to the instant motions, the agreement provides that its terms became effective on the date it was signed, and that Parker's engagement with the Fund would continue "AS REQUIRED, or until the completion of [SalesCare's] designated work at the client, whichever occurs first" (NYSCEF Doc. No. 12, ¶ 1). Either SalesCare or Auburn could terminate the agreement on ten days' written notice (*id.*, ¶ 9). If the Fund elected to terminate SalesCare's assignment "prior to the time or event as specified in paragraph 1, such notice as [the Fund] gives to [Auburn] will also be given to [SalesCare]" (*id.*, ¶ 11). The agreement "contains the entire Agreement of the parties relative to the subject matter hereof. No waiver, change or modification of any of the terms hereof, or extension or discharge of this Agreement shall be binding on [Auburn] or [SalesCare]" (*id.*).

Parker began her assignment with the Fund on September 3, 2019 (NYSCEF Doc. No. 14, ¶ 13). Plaintiffs make many allegations regarding managerial conflict above her during her time working for the Fund, little of which appears directly relevant to their claims (*id.*, ¶¶ 14-28). From the allegations it appears to the court as if Parker was an involuntarily participant in a

power struggle between the Fund's temporary Chief Information Security Officer ("CISO") and its Information Security Team Manager. Shortly before the Fund ended Parker's assignment, the Fund changed her job responsibilities in a way Parker asserted went beyond the terms of the agreement (*id.*, ¶¶ 29-33). Because of this switch and a lack of administrative guidance with the Fund, Parker alleges that her last two weeks of work with the Fund were unproductive (*id.*, ¶ 38).

On November 7, 2019, Parker reported to work and found that her ID credentials no longer allowed her entrance (*id.*, ¶ 46). Shortly thereafter, she was dismissed from her assignment (*id.*, ¶ 47). Parker alleges that that evening, Auburn's President contacted her and told her that an unnamed representative of the Fund had told him that the CISO had said to them that Parker's assignment had ended due to her "insubordination" (*id.*, ¶ 48). A few days afterwards, Parker spoke to one of her former colleagues at the Fund, who informed her that the CISO had stated in a meeting on November 7, 2019 that he "had to fire her" and the he would fire anyone else who challenged him (*id.*, ¶ 50).

Plaintiffs commenced this action by filing and serving a summons with notice on November 5, 2020 (NYSCEF Doc. No. 2). A demand for a complaint was filed on March 29, 2021 (*id.*), after which plaintiff ultimately served its verified complaint on April 12, 2021 (NYSCEF Doc. No. 9, ¶ 9). Defendants now make the instant pre-answer motions to dismiss the complaint.

Standard of Review

"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 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal

theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Breach of Contract (First Cause of Action)

Plaintiffs allege that defendants breached the agreement “by refusing or failing to perform thereon” (NYSCEF Doc. No. 14, ¶ 57). A breach of contract requires allegations of “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). As an initial matter, the Fund is not a party the agreement, and therefore cannot have breached it. Plaintiffs’ allegations, made for the first time in opposition to the Fund’s motion, that there was an oral agreement between the Fund and plaintiffs in addition to the agreement, or that Parker was an intended third-party beneficiary of the Fund’s contract with Auburn, are too conclusory and vague to support a claim against the Fund (*LaSalle Nat. Bank v Ernst & Young LLP*, 285 AD2d 101, 108 [1st Dept 2001] [“A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary and even then, even if not mentioned as a party to the contract, the parties’ intent to benefit the third party must be apparent from the face of the contract”]; *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [“The IAS Court properly

dismissed . . . [the] cause of action for breach of a 1976 contract . . . as too vague and indefinite, and therefore unenforceable, for plaintiff's failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract"). Even if the allegations were sufficient, they are not pleaded in the complaint, and may not be raised for the first time in opposition to the complaint (*Rumyacheva v City of New York*, 36 AD3d 790, 790 [2d Dept 2007]).

With respect to Auburn, the complaint insufficiently alleges what specific provisions of the agreement Auburn breached (*Sud*, 211 AD2d at 424). In their oppositions papers, plaintiffs offer an interpretation of the contract in support of their claim that would have required the Fund and Auburn to continue Parker's assignment at the Fund until she had completed the work that she claims she was hired to do. This interpretation is plausible, plaintiffs say, because the time period set forth in the agreement is ambiguous and her assignment was not at will.

It is settled law that a court may interpret the unambiguous terms of a contract (*e.g. Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*e.g. Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). Where the contract language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Ins. Co. of N.A.*, 46 NY2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]).

Here, the language of the time provision is not ambiguous. The provision clearly provides that the agreement will end at the earlier of the completion of the work or the Fund's decision to terminate Parker's assignment. Thus, no defendant was required to keep Parker on until the

completion of her assigned work. The time provision, as well as the parties' ability to terminate the agreement at any time on ten days' written notice, or upon such notice as Auburn received from the fund, establishes that the agreement was at-will (*Murphy v American Home Products Corp.*, 58 NY2d 293, 300 [1983] ["where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason"]). For the Court to hold otherwise would be to impermissibly alter the plain language of the agreement, in violation of the agreement's merger clause (NYSCEF Doc. No. 12, ¶ 11). and settled principles of contract interpretation (*Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 [2004]). Thus, plaintiffs have failed to allege a breach of contract claim.

Breach of the Implied Covenant of Good Faith and Fair Dealing (Second Cause of Action)

Plaintiffs assert that defendants breached the implied covenant of good faith and fair dealing when they "conducted themselves so as to specifically withhold payment under the terms of Plaintiff's Contract or otherwise breach their duties to Plaintiff" (NYSCEF Doc. No. 14, ¶ 60). Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v. Educational Testing Serv.*, 87 NY2d 384 [1995]). The covenant exists to protect the parties' justified expectations of their bargained for agreement (*Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003] ["even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract"]). However, if there is no contract between the parties, there can be no claim for a breach of the implied covenant (*Ahead Realty LLC v. India House, Inc.*, 92 AD3d 424 [1st Dept 2012]). As set forth above, there is no contract between plaintiffs and the fund, and thus this claim must be dismissed against the Fund.

The implied covenant exists only “in aid and furtherance of other terms of the agreement of the parties” (*Murphy*, 58 NY2d at 304). Where the facts underlying the claim for breach of the implied covenant are the same as those underlying the breach of contract claim, the claim for breach of the implied covenant should be dismissed as duplicative (*Baker v 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 121 [1st Dept 2003]). Here, the facts underlying plaintiffs’ claims for breach of contract and breach of the implied covenant are identical. Moreover, to make out a prima facie case for breach of the implied covenant, the injured party must actually have been denied its benefit under the contract by virtue of the other side’s bad faith conduct (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 13-14 [1st Dept 2011]). Plaintiffs do not allege that Parker was not compensated for the hours she worked pursuant to the agreement, and as set forth above plaintiffs are not entitled to anything further under the agreement.

Defamation (Third Cause of Action)

The elements of defamation are “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se” (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Defamation must be pled with particularity (CPLR 3016[a]). The injured party must plead not only the specific words used but also the time, place, and manner that the words were said and who specifically they were said to (*Dillon*, 261 AD2d at 38).

Plaintiffs identify two statements by the Fund’s CISO in support of their defamation claim, both on November 7, 2019; the statement the CISO made to another employee of the Fund, which that employee passed to Auburn’s President, that Parker’s assignment had been

terminated because of her insubordination, and his statement to the Information Security team that “he had to fire her” (NYSCEF Doc. No. 14, ¶ 65). As an initial matter, neither statement refers to SalesCare, and thus SalesCare cannot claim to have been defamed by them (*Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016] [“In order to establish a prima facie case of defamation, plaintiffs must show that the matter published is of and concerning them”] [internal quotation marks and citation omitted]).

Plaintiffs allege that Auburn’s President heard from an unnamed employee of the Fund that the CISO had told this unnamed employee that Parker’s assignment was terminated because she was insubordinate. Plaintiffs do not identify this unnamed employee, and their failure to do so is fatal to their claim. CPLR 3016(a) requires that the person to whom the alleged defamatory statement was published be specifically identified (*e.g. Starr v Akdeniz*, 162 AD3d 948, 950 [2d Dept 2018]).

The second statement, that the CISO had to fire Parker, is qualified in the complaint by the statement “or words to that effect” (NYSCEF Doc. No. 14, ¶ 50). However, the particularity requirement set forth in CPLR 3016(a) requires that a defamation plaintiff allege the exact words used; “[a]ny qualification in the pleading thereof by use of the words ‘to the effect’, ‘substantially’, or words of similar import generally renders the complaint defective” (*Geddes v Princess Properties Intern., Ltd.*, 88 AD2d 835 [1st Dept 1982]; *see also Offor v Mercy Med. Ctr.*, 171 AD3d 502, 503 [1st Dept 2019] [“The more recent statements are not actionable because plaintiff failed to set forth the exact words complained of”] [internal quotation marks and citations omitted]).

Business Disparagement/Injurious Falsehood (Fourth Cause of Action)

Plaintiffs allege that the Fund's two statements regarding her conduct and performance "denigrated and disparaged, and continue to do so, the quality of the Plaintiff's work and business" (NYSCEF Doc. No. 14, ¶ 77). A cause of action for business disparagement requires allegations of a false statement "confined to denigrating the quality of the business' goods or services," malice, and special damages (*Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]). If, for example, the damages are lost customers, "the persons who ceased to be customers, or who refused to purchase, must be named" (*Payrolls & Tabulating, Inc. v Sperry Rand Corp.*, 22 AD2d 595, 598 [1st Dept 1965]). Plaintiffs only assert, in conclusory fashion, that the Fund's alleged defamatory statements to "numerous other third-parties will likely induce them to refrain from dealing with Plaintiff or otherwise continue[] to deprive Plaintiff of prospective economic damages" (NYSCEF Doc. No. 14, ¶ 79). Aside from being speculative, these allegations are insufficient to plead special damages, and thus this claim is insufficiently pleaded.

Tortious Interference with Business Opportunity (Fifth Cause of Action)

Plaintiffs allege that the Fund's alleged defamatory conduct caused damage to her reputation and prevented her from securing potential business opportunities after the agreement was terminated (NYSCEF Doc. No. 14, ¶¶ 82-84). In her opposition papers, plaintiffs explicitly identify the Fund's alleged defamatory conduct to every aspect of this cause of action (NYSCEF Doc. No. 23 at 18). Generally, [a] cause of action is duplicative where it arises from the same facts and alleges the same damages as another asserted claim (*e.g. Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]). A tortious interference cause of action is duplicative of a defamation claim where it arises out of the alleged defamatory conduct and seeks damages on the same theory of

recovery (*see Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993] [“The IAS court properly rejected plaintiff’s attempt to bring a defamation action against the defendants . . . in the guise of an economic tort, as well as the plaintiff’s attempt to cast its defamation claim as tortious interference with business relations”]). Plaintiff’s claim arises out of the same defamatory conduct as their cause of action for defamation, and therefore it must be dismissed as duplicative.

Unjust Enrichment (Sixth Cause of Action)

Finally, plaintiffs allege that the Fund has been unjustly enriched by benefitting from her work, for which they have not paid in full (NYSCEF Doc. No. 14, ¶ 87). As set forth above, plaintiff has been fully compensated under the terms of the agreement for all her work. “An unjust enrichment claim rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Since plaintiffs do not and, indeed, cannot allege how the Fund was unjustly enriched at their expense when plaintiffs were fully compensated under the terms of the agreement, this claim must be dismissed.

Accordingly, it is hereby

ORDERED that the motions of defendants SEIU 1199 National Benefit Fund and 1199 SEIU Funds (Mot. Seq. No. 001) and defendant Auburn IT Resources (Mot Seq. No. 002) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

This constitutes the Decision and Order of the court.

ENTER:

Louis L. Nock

4/1/2022

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE