Ja Lee Kao v Onyx Renewable Partners L.P.
2022 NY Slip Op 32382(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 654411/2021
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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JA LEE KAO,

Plaintiff,

- v -

ONYX RENEWABLE PARTNERS L.P., ORP JOINT HOLDINGS GP LLC, BLACK ONYX INVESTMENTS, LLC, BILAL KHAN

Defendants.

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INDEX NO. 654411/2021

MOTION DATE 01/24/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 72, 74, 75, 76, 91

were read on this motion to/for DISMISSAL of COUNTERCLAIMS .

Plaintiff, a former president and chief executive officer (CEO) of defendant Onyx Renewable Partners, LP (Onyx), a limited partnership formed under the laws of Delaware, with its principal place of business in New York City, resigned from Onyx in June 2021. In this motion sequence 004, plaintiff seeks dismissal of defendants Onyx Renewable Partners L.P., ORP Joint Holdings GP LLC, and Black Onyx Investments, LLC's (Black Onyx) (collectively, corporate defendants) four amended counterclaims in their Verified Answer (NYSCEF # 51 – Verified Answer and Affirmative Defenses and Amended Counterclaims (Amended Counterclaims) pursuant to CPLR 3211 (a)(1) and (a)(7). The corporate defendants oppose the motion, except with respect to dismissal of the second counterclaim.

Background

The background of this case can be found in this court's Decision and Order dated March 3, 2022 (NYSCEF # 98). As to this motion, unless otherwise stated, the facts are taken from the Amended Counterclaims (NYSCEF # 68).

The corporate defendants' amended counterclaims are for (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) declaratory judgment that, under implied covenant of good faith and fair dealing and common law, section 22 of the employment agreement does not apply to unreasonable legal fees or expenses or those incurred by plaintiff in bad faith; and (4) declaratory judgment that section 22 of the employment agreement does not apply to plaintiff's claim for retaliation, discrimination, or the counterclaims asserted against plaintiff (*id.*, ¶¶ 76-100).

The corporate defendants allege that plaintiff's notice of voluntary resignation on April 23, 2021 (April 23 notice) was unexpected and "blindsiding Onyx and its Board of Directors" (*id.*, ¶ 34). In her April 23 notice, plaintiff cited as a reason for her resignation the new reporting requirements associated with an auction sale process in February 2021 when non-party Blackstone Inc. sold 50% of its interest in Onyx to Sustainable Development Capital LLP (SDCL) of the United Kingdom (the Hemisphere Transaction). SDCL manages SDCL Energy Efficiency Income Trust PLC (SEEIT), which is an investment company listed on the London stock exchange. The corporate defendants state that because SEEIT is a public company investor, there are new reporting requirements that went with its acquisition of a 50% interest in Onyx (*id.*, ¶¶ 9, 27-30). The corporate defendants assert that plaintiff was aware of these reporting requirements because one of her responsibilities was negotiating the new reporting requirements. The corporate defendants also allege that plaintiff received more than $2 million in connection with the Hemisphere Transaction (*id.*, ¶ 31).

The corporate defendants note that plaintiff stated that she was resigning "without Good Reason under the terms of my Employment Agreement" in her April 23 notice; she nonetheless now claims that she was resigning with "Good Reason" (*id.*, ¶ 36). The corporate defendants also note that, unlike the allegations in her complaint, plaintiff's April 23 notice did not mention any retaliation or discrimination as a reason for her resignation (*id.*, ¶ 37). The reason plaintiff gave when she declined Onyx's request to reconsider her resignation was that she was "burnt out" and "need[ed] a break" (*id.*, ¶ 39).

The corporate defendants further allege that after Onyx sent plaintiff a Proposed Transition and Separation Agreement on April 30, 2021, plaintiff emailed defendant Bilal Khan on May 17, 2021, accusing defendants Khan and Robert Maxwell[1] of racial and gender discrimination (*id.*, ¶¶ 41-44). Since then, without regard to the corporate defendants' allegations about her failure to act reasonably and in good faith, plaintiff has demanded payment for her legal fees (*id.*, ¶ 45).

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[1] Defendant Robert Maxwell's motion to dismiss plaintiff's complaint as against him was granted by Decision and Order of this court dated March 3, 2022 (NYSCEF # 98).

On their first and second counterclaims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, respectively, the corporate defendants allege that plaintiff, as Onyx's CEO and President at the time, owed a fiduciary duty to the corporate defendants. According to the corporate defendants, in 2017, plaintiff convinced Onyx to hire her husband, Hilary Kao (H. Kao), as General Counsel (GC) on a temporary basis, assuring them that she and H. Kao would observe all boundaries and that there would be no conflict of interest (*id.*, ¶ 22). After both plaintiff and H. Kao resigned, the corporate defendants conducted a forensic investigation and learned that plaintiff had breached her obligations to them by using Onyx's GC as her own attorney against Onyx's interest (*id.*, ¶¶ 23-25, 47-55).

The allegations start with plaintiff's Employment Agreement in October 2019 when plaintiff utilized Onyx's GC to revise her employment agreement with Onyx to her benefit (*id.*, ¶¶ 48-66). Specifically, the corporate defendants allege that on October 25 and 31, 2019, and November 14 and 26, 2019, plaintiff collaborated with H. Kao to make changes to her employment agreement that were later transcribed in a General Partner Resolution and sent to Bilal Khan for his review and approval. The revisions were unilateral and surreptitiously done—all without Onyx's knowledge and while H. Kao was Onyx's GC at the time whose representation of plaintiff was a conflict of interest (*id.*, ¶¶ 47-58, 67).

As Onyx's GC, H. Kao worked with Onyx's outside counsel to negotiate employment agreements for the senior executives (*id.*, ¶ 23). But when plaintiff was negotiating her employment agreement with Onyx in 2019, she engaged H. Kao, while still Onyx's GC, to edit and alter the employment agreement in such a way that would not attract the corporate defendants' attention. Plaintiff pointed out to H. Kao that the many changes made the document look "onerous" (*id.*, ¶¶ 24-26, 58). H. Kao responded that "[m]ost of what I changed was routine stuff not significant, but I agree it looks quite red. Perhaps those changes should be done without redline and then I could note only the few things that are commercially material. . . ." (*id.*, ¶ 60). Plaintiff, with H. Kao's help in her employment agreement, resulted in a General Partner Resolution that granted plaintiff more equity in Black Onyx and significantly increased plaintiff's salary while allowing her to spend 50% of her time on the launch of a new energy service business that was not part of her work for Onyx (*id.*, ¶ 62).

Another proposed revision added to plaintiff's employment agreement was a provision that permitted plaintiff "to resign with Good Reason upon Onyx's 'reduction in nondiscretionary bonus payable to Executive,'" which was not found in any other executives or employees' employment agreements (*id.*, ¶ 53).

The allegations of breach of fiduciary duty continue with plaintiff's resignation in April 2021 when plaintiff obtained legal counsel again from H. Kao, who was still Onyx's GC (*id.*, ¶ 67). According to the corporate defendants, plaintiff coordinated with H. Kao on May 17, 2021—two days before H. Kao's resignation—to download a massive number of Onyx's confidential and proprietary information such as financial models, solar energy system designs, power purchase agreements with key customers, and renewable energy incentive application documentation, including projects that Onyx developed and financed. The corporate defendants assert that these documents can be used as building blocks for plaintiff and her husband H. Kao to compete with Onyx, and the leak or misuse of these documents could expose Onyx to liability from third parties (*id.*, ¶ 68). Finally, the corporate defendants add that plaintiff improperly retained a company laptop with sensitive and confidential material (*id.*, ¶ 69).[2]

Accordingly, the corporate defendants brand plaintiff as a "Bad Leaver" — an employee who, among other things, committed "any material act of fraud, breach of fiduciary duty of loyalty, care or similar misconduct or gross negligence . . . with respect to the Partnership or any of its Affiliates" as defined in the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated December 20, 2019 (*id.*, ¶¶ 77, 79). The corporate defendants next allege that, because plaintiff was deemed a "Bad Leaver," the repurchase price of her equity units was not at the fair market value but at $0 (*id.*, ¶ 80).

The third and fourth counterclaims seek a declaratory judgment that plaintiff is not entitled to legal fees and expenses that are unreasonable, incurred in bad faith, or related to plaintiff's discrimination and retaliation claims or the counterclaims against plaintiff (*id.*, ¶¶ 90-93 [third counterclaim]; ¶¶ 95-100 [fourth counterclaim]). Section 22 of the plaintiff's employment agreement states that "the parties acknowledge and agree that in connection with any dispute [sic] any of this Agreement, the Partnership Agreement or the MLP LLC Agreement, the Company shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of the Executive." (*Id.*, ¶ 95). The corporate defendants allege in their third counterclaim that under the implied covenant of good faith and fair dealing, and common law, section 22 applies to reasonable legal fees and expenses but not fees incurred in bad faith. They allege in the fourth counterclaim that fees related to plaintiff's discrimination claims and her defense of the counterclaims are also excluded because they are not contractual claims or based on any rights or obligations under any agreements (*id.*, ¶¶ 98-99).

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[2] In connection with the allegation that plaintiff refuses to return the Onyx-issued laptop, the corporate defendants reserve the right to add a counterclaim for conversion.

Discussion

Breach of Fiduciary Duty

For a cause of action based on breach of trust, CPLR 3016(b) requires the cause of action to be pled in a heightened standard, that the pleadings must provide sufficient detail to inform defendants of the substance of the claims (*Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept 2003]). At the same time, for a cause of action for breach of trust under CPLR 3016(6), the heightened pleading requirement is met when the movant provide "sufficient detail to inform . . . the substance of the claims." (*Louis Capital Mkts., L.P., v REFCO Group LTD*, 9 Misc 3d 283, 289-290 [Sup Ct, NY County 2005] quoting *Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept 2003]). The basic test for sufficiency of a pleading for a CPLR 3211(a)(7) motion still applies, requiring courts to assume facts alleged by the corporate defendants, who are counterclaim-plaintiffs, to be true and liberally interpreting the pleading in their favor (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). It is the sufficiency of a pleading that is examined—not the ultimate determination of facts (*id.*; *LoPinto v J.W. Mays, Inc.*, 170 AD2d 582, 583 [2d Dept 1991]).

As the corporate defendants point out, plaintiff incorrectly relies on New York law on her motion to dismiss the counterclaim for breach of fiduciary duty. Since Onyx was incorporated in Delaware, claims for breach of fiduciary duty are governed by Delaware law under the internal affairs doctrine (*Hart v General Motors Corp.*, 129 AD2d 179, 182-183 [1st Dept 1987]).

Under Delaware law, a claim for breach of fiduciary duty requires proof that a fiduciary exists and that the defendant breached that duty (*Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010]). Plaintiff, as Onyx's former president and CEO, owed a fiduciary duty of care and loyalty to Onyx (*Gantler v Stephens*, 965 A2d 695, 708-709 [Del 2009] ["officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty"]; *Metro Stor. Intl. LLC v Harron*, 275 A3d 810, 842-844 [Del Ch 2022] [finding corporate officers owe "additional and more concrete duties" to the company as agents and "at a minimum, officers owe the same duties" as corporate directors]). "Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision," which includes the duty not to use the company's resources for his benefit and the duty not to use the company's confidential and proprietary corporate information for personal gain (*Harron*, 275 A3d at 848-850).

Here, at the motion to dismiss stage, the court finds that the corporate defendants sufficiently plead the substance of plaintiff's breach of fiduciary duty in multiple ways under CPLR 3016(b). In particular, the corporate defendants provide sufficient details in showing plaintiff's breach of her duty of loyalty as she utilized

Onyx's resources for her personal gain through soliciting and obtaining legal advice and strategies from her husband H. Kao, who was at the time Onyx's GC (*PT China LLC v PT Korea LLC*, 2010 WL 761145, *7 [Del Ch, Feb. 26, 2010] [manager's misappropriation of company's resources and confidential and proprietary information for his benefit demonstrated self-dealing, which was a breach of the duty of loyalty]).

In this connection, corporate defendants also allege that plaintiff's collaboration with Onyx's GC on her employment agreement constituted self-dealing and misappropriating corporate confidential information. As H. Kao was responsible for negotiating employment agreements for Onyx's senior executives, plaintiff utilized H. Kao's position and knowledge of proprietary and privileged corporate information in his capacity as Onyx's GC to benefit herself, as she obtained a substantial increase in salary and equity interest in Black Onyx, and 50% allotment of time to work on her own projects that did not concern Onyx. These allegations raise a reasonable inference that plaintiff's personal gain came at Onyx's expense through plaintiff's use of Onyx's resource and confidential and proprietary information (*Triton Constr. Co., Inc. v E. Shore Elec. Servs., Inc.*, 2019 WL 1387115, *11 [Del Ch, May 18, 2009], *affd* 988 A2d 938 [Del 2010] [using the corporation's confidential information for personal benefit is a breach of fiduciary duty regardless of whether the information rises to the level of a trade secret]).

In support of their allegations, the corporate defendants also refer to communications between plaintiff and H. Kao. Further, the corporate defendants allege that on the night before H. Kao resigned from Onyx, plaintiff coordinated with him to download Onyx's confidential and proprietary documents and that plaintiff founded her new company that competes with Onyx in the renewable energy industry, raising a plausible inference that plaintiff was preparing to use the information in manners that conflict or are against Onyx's interest (*Kates*, 8 A3d at 602-603 [finding breach of fiduciary duty when the director and officer took a large amount of confidential information when he went to another company and revealed the information]; *see also Miami Firefighters' Relief & Pension Fund v Icahn,* 199 AD3d 524, 526 [1st Dept 2021] [refusing to dismiss the breach of fiduciary duty claim since the alleged unauthorized retention and misuse of downloaded confidential information would ordinarily be in the defendant's exclusive knowledge]).

Plaintiff argues that as an executive, she was lawfully seeking an increase in compensation and that the corporate defendants' complaints of H. Kao's redlining is hollow as it can represent negotiations and discussions that were memorialized. However, there are still allegations that her collaboration with H. Kao was unbeknownst to Onyx and other corporate defendants (*Estate of Eller v Bartron*, 31 A3d 895, 898 [Del 2011] [a corporate officer owes a duty to provide information to

the company that the officer knows or has reason to know that the company would wish to have]). Plaintff states that discovery will shed light on plaintiff's dealing, This court agrees, and in the meantime, the allegations, down to the time of these acts, are sufficient at the pleading stage and fit within a cognizable legal theory.

Plaintiff also moves to dismiss the first counterclaim under CPLR 3211(a)(1), arguing that the General Partner Resolution of December 9, 2019 conclusively refutes the corporate defendants' factual allegations. A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted "only if the documentary evidence submitted conclusively establish a defense to the asserted claims as a matter of law," meaning that the legal conclusions and factual allegations in the complaint must be "flatly contradicted by documentary evidence" such that "they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citations and quotations omitted]). Typically, a document will qualify as "documentary evidence" if it is unambiguous, authentic, and its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

Here, although the General Partner Resolution's authenticity and contents are not disputed and therefore may qualify as documentary evidence, the document itself does not "flatly contradict" the allegations since the corporate defendants plead that the General Partner was misled into approving the Resolution without knowing plaintiff's conspiracy with H. Kao that it would wish to know (*Bartron*, 31 A3d at 898). As such, the General Partner Resolution does not conclusively establish a defense to the first counterclaim and therefore does not provide sufficient ground to dismiss the counterclaim.

Aiding and Abetting Breach of Fiduciary Duty

Under Delaware law, a claim for aiding and abetting a breach of fiduciary duty will succeed if the case involves multiple defendants, and there is the existence of a fiduciary relationship, breach of duty by the fiduciary, the knowing participation of a defendant who is not a fiduciary, and damages to the plaintiff resulting from the concerted action of the fiduciary and nonfiduciary (*Globis Partners L.P v Plumtree Software Inc.*, 2007 WL 4292024, *15 [Del Ch, Nov. 30, 2007]). Although H. Kao, as Onyx's General Counsel, owed a fiduciary duty to Onyx, he is not a party to this action and no cause of action has been asserted against him for breach of fiduciary duty.

Moreover, the corporate defendants do not address this issue in their opposition, thereby waiving their opposition and abandoning the counterclaim (*Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016] [finding that plaintiff abandoned his claim by failing to oppose the part of defendant's motion to dismiss]).

Therefore, a claim against plaintiff for aiding and abetting H. Kao's breach of fiduciary duty cannot be sustained.

Counterclaims for Declaratory Relief as to Section 22 of the Employment Agreement

The third counterclaim seeks a declaration that plaintiff is not entitled to attorney's fees under section 22 of the Employment Agreement as the provision does not apply to unreasonable legal fees or expenses incurred in bad faith, while the fourth counterclaim seeks a declaration that Onyx does not have an obligation to pay plaintiff's legal fees and expenses relating to her causes of action for discrimination and retaliation (NYSCEF # 68, ¶¶ 93, 97-98).

As to the third counterclaim, plaintiff contends that the corporate defendants fail to identify any such legal fees or expenses. Plaintiff also argues that the third counterclaim should be dismissed with respect to ORP Joint Holdings GP LLC and Black Onyx as they are not parties to the Employment Agreement. In relation to both the third and fourth counterclaims, plaintiff argues that these counterclaims are without merit since Onyx is obligated to pay her attorneys' fees and expenses under section 22, including those incurred in connection with her claims for discrimination and retaliation. Alternatively, she argues that these counterclaims are duplicative of plaintiff's sixth cause of action which seeks to recover attorneys' fees and expenses for this action, including for her claims for discrimination and retaliation.

These two counterclaims must be dismissed since the issues raised by the counterclaims will be resolved in determining the merits of plaintiff's sixth cause of action for breach of contract based on Onyx's alleged failure to pay attorneys' fees and expenses under section 22 of the Employment Agreement. As such, the court does not reach plaintiff's other arguments.

"The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation" (*Touro College v Novus Univ. Corp.*, 146 AD3d 679, 679-680 [1st Dept 2017] [internal citations and quotations omitted]). Accordingly, "[a] cause of action for declaratory judgment is unnecessary and inappropriate when [a party] has an adequate, alternative remedy . . ." (*Apple Records, Inc v. Capital Records, Inc.,* 137 AD2d 50, 54 [1st Dept 1988]; *see also Maxim, Inc. v Feifer*, 161 AD3d 551, 553 [1st Dept 2018] [dismissing declaratory judgment action because a pending breach of contract action will dispose of all the issues raised in the declaratory judgment action]).

Under these principles, the third counterclaim must be dismissed as it serves no purpose and is the mirror image of plaintiff's sixth breach of contract claim (*see*

JMF Consulting Group II, Inc. v Beverage Mktg. USA, Inc., 97 AD3d 540, 542 [2d Dept 2012], *lv denied* 19 NY3d 816 [2012] [dismissing counterclaim for declaratory judgment as "inappropriate" based on the availability of "adequate and alternate remedies"] [internal citations omitted]). Further, the fact that the counterclaim contains additional allegations as to bad faith and fair dealing does not require a contrary finding, as Onyx would not be obliged to pay for attorneys' fees and expenses incurred by plaintiff in bad faith under the Employment Agreement (*Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22 [1st Dept 1996] ["Implied in every contract is a covenant of good faith and fair dealing."]).

The fourth counterclaim is also duplicative and must be dismissed. In this regard, plaintiff's right to recover attorneys' fees and expenses for her discrimination and retaliation claims will be necessarily resolved in connection with plaintiff's sixth cause of action seeking these fees and expenses.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion to dismiss is granted to the extent of dismissing the second, third, and fourth counterclaims in the Verified Answer and Amended Counterclaims.

07/15/2022
DATE

MARGARET CHAN, J.S.C.

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