

Global Care Pharm. Inc. v Cheung
2022 NY Slip Op 32506(U)
July 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 516525/2020
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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GLOBAL CARE PHARMACY INC., JIAN HUI LIU,
individually and derivatively on behalf
of GLOBAL CARE PHARMACY, INC.,

Plaintiff, Decision and order

- against -

Index No. 516525/2020

JOSEPHINE WANLING CHEUNG a/k/a
JOSEPHINE CHEUNG and SHAN WANG,

Defendants, July 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to amend the complaint and add an additional defendant. The defendants have cross-moved seeking to disqualify plaintiff's counsel. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On December 28, 2018 the plaintiff entered into an agreement with the defendants to purchase a forty percent interest in a pharmacy located at 5905 8th Avenue in Kings County for \$120,000. The original complaint alleged that the defendants denied the plaintiff access to the company's books and records, engaged in financial improprieties, harmed the pharmacy to benefit another pharmacy wholly owned by the defendants wherein the plaintiff maintains no ownership and paid defendant Wang who is not an employee of the pharmacy. The original complaint asserted causes of action for breach of fiduciary duty, aiding and abetting such breach, civil conspiracy and an accounting. The proposed amended

complaint asserts new causes of action of violations of New York's Labor Law §191, §193, §194 and §195 based upon discrimination due to the plaintiff's pregnancy as well as other employment violations, breach of contract, quantum meruit and violations of New York State's and New York City's Human Rights Laws, fraud and aiding and abetting fraud. Further, the proposed amended complaint seeks to add a new defendant, namely an entity, Pancare Pharmacy Inc., which is allegedly wholly owned by defendant Cheung.

The defendants oppose the motion to amend and also have cross-moved seeking to disqualify plaintiff's counsel because plaintiff's counsel represent, in addition to the plaintiff, Global Care and since allegations have been filed against Global Care, plaintiff's counsel has an obvious conflict of interest.

Conclusions of Law

In order to assert any derivative claims the person must be a shareholder of the corporation (Marx v. Akers, 88 NY2d 189, 644 NYS2d 121 [1996]). There is no requirement the shareholders of the corporation have to agree with the derivative lawsuit. Indeed, the purpose of a derivative action "is to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers'" (see, Espinoza ex rel. JPMorgan Chase & Company v. Dimon, 797 F3d 229 [2d Cir. 2015]).

It is for this very reason the interests of the corporation and the interests of the individual defendants are generally not aligned to permit the same counsel to represent them (Nineteen Twenty Four Inc., v. Parchini, 2015 WL 682814 [Supreme Court New York County 2015]). However, the plaintiff is not asserting any direct claims against Global Care. To the extent the plaintiff is asserting derivative claims, such claims are for the benefit of Global Care not its detriment. Moreover, any direct claims are only against the individual defendants, not Global Care. There is no conflict that would require disqualification. Therefore, the cross-motion seeking disqualification is denied.

Turning to the motion to amend the complaint, it is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice

will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

The proposed amended verified complaint contains nineteen causes of action. While some of these causes of action overlap the original verified complaint which contains six causes of action the amended verified complaint supplements so much information that even the existing causes of action will be examined.

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Moreover, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). In this case the stock transfer and shareholder agreement provides that the defendants "shall be solely responsible for all company and business related liabilities/debts incurred before January 1, 2019" (see, Stock Transfer and Shareholder Agreement, ¶2.1). The agreement further provides that "income generated from the business shall be allocated, monthly, pro rata between Seller and Buyer, on a 60%-40% basis" and that all "expenses or loss of the

Corporation shall also be shared pro rata between Seller and Buyer on a 60%-40% basis" (id at ¶2.2). The proposed breach of contract cause of action (the seventh cause of action) alleges that the defendants used company assets earned after January 1, 2019 to pay for debts due prior to that date (Verified Amended Complaint, ¶139). Further, the proposed breach of contract claim asserts the defendants failed to pay sixty percent of the expenses pursuant to the agreement (Verified Amended Complaint, ¶140). This claim is thus proper.

The defendants assert the three breach of fiduciary claims are duplicative of the breach of contract claim and thus the court should deny the amendments seeking to add the breach of contract claims. It is true that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). However, a careful review of the breach of fiduciary pleadings demonstrates they are not duplicative at all. The first cause of action alleges the defendant Cheung engaged in self dealing and sought to benefit another pharmacy owned by Cheung at the expense of Global Care. Those allegations are entirely distinct from the allegations that comprise the breach of contract claim.

The second cause of action alleges the defendants failed to keep adequate books and records and that the plaintiff's contribution was not adequately recorded. That cause of action is unrelated and not duplicative of the breach of contract claim. The third cause of action alleges the defendant acted improperly toward the plaintiff, created a hostile work environment and forced her from a supervisory position. While a motion to dismiss will determine whether such conduct indeed is a breach of a fiduciary duty the allegations are surely not duplicative of the breach of contract claim which only concerns proper payment and allocation of expenses and profits.

To plead a cause of action for aiding and abetting the breach of a fiduciary duty the plaintiff must demonstrate a fiduciary duty was owed, there was a breach of that duty and the party contributed substantial assistance in effecting the breach (see, Yuko Ito v. Suzuki, 57 AD3d 205, 869 NYS2d 28 [1st Dept., 2008]). In Baron v. Galasso, 83 AD3d 626, 921 NYS2d 100 [2d Dept., 2011] the sustainability of the cause of action was defined as whether the other party knowingly induced or participated in the breach. The Verified Amended Complaint adequately alleges this cause of action.

Next, although the cause of action for civil conspiracy was included in the original complaint it has been supplemented, as noted, with additional facts and is thus proper for consideration.

whether the cause of action should be amended accordingly. New York does not recognize an independent cause of action for civil conspiracy (Plymouth Drug Wholesalers Inc., v. Kirschner, 239 AD2d 479, 658 NYS2d 64 [2d Dept., 1997]). However, where a civil conspiracy allegation is based upon other viable causes of action then the civil conspiracy is "deemed part of the remaining causes of action to which they are relevant" (Errant Gene Therapeutics, LLC v. Sloan-Kettering Institute for Cancer Research, 182 AD3d 506, 123 NYS3d 118 [1st Dept., 2020]). Thus, to plead a cause of action for civil conspiracy "the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (Faulkner v. City of Yonkers, 105 AD3d 899, 963 NYS2d 340 [1st Dept., 2013]). Thus, "the complaint must allege some factual basis for a finding of a conscious agreement among the defendants" (Weaver v. Schiavo, 2020 WL 496301 [S.D.N.Y. 2020]). The Verified Amended Complaint states in conclusory fashion that the "defendants..."entered into an agreement" (see, Verified Amended Complaint, 128) without providing any information about the nature of such "agreement". This is particularly troubling since the defendants are married to each other undermining the existence of any such agreement necessary to establish a claim for civil conspiracy. Therefore, the motion seeking to amend the complaint regarding the claim of

civil conspiracy is denied.

The defendant has not moved opposing the claim seeking an accounting.

Turning to the cause of action seeking quantum meruit, it is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). The Verified Amended Complaint adequately pleads this cause of action.

Concerning claims premised upon Labor Law §§ 191, 193, 194 and 195. Labor Law §191 only protects manual workers, railroad workers, commissioned salespersons and clerical and other workers who earn less than \$900 per week (see, Labor Law §19(7)). Since the plaintiff's salary required a minimum of thirty hours per week, her income exceeded \$900 and cannot pursue this claim.

Labor Law §193 permits a cause of action if wages are summarily reduced without explanation. Even though the plaintiff is a forty percent owner of the pharmacy she had no ability to

contest any salary decisions made about her. Thus, the fact she was entitled to profits is unrelated to her added position as a mere employee (cf., Golizio v. Antonine Holding Inc., 1007 WL 47781 [Eastern District of Louisiana 1997]).

Labor Law §194 permits an employee to assert claims she was paid a different rate based upon her gender. Thus, the Verified Amended Complaint asserts that the plaintiff, while pregnant and after delivering her baby, was denied pay, was not permitted to adjust her hours and was denied a bonus promised to those who worked during the COVID-19 pandemic. Claims brought pursuant to Labor Law §194 are analyzed under the same standards as the Federal Equal Pay Act (Pfeiffer v. Lewis County, 308 F.Supp2d 88 [N.D.N.Y. 2004]). To establish claims under the Equal Pay Act the plaintiff must demonstrate that "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions" (Talwar v. Staten Island University Hospital, 610 Fed. Appx. 28 [2d Cir. 2015]). Thus, the Amended Verified Complaint states that the defendants "during her pregnancy and after childbirth by, without limitation, subjecting her to a hostile work environment, refusing to alter her work tasks or work hours, withholding her earned wages, refusing to pay for the hours that she worked and/or withholding

her non-discretionary bonus payments for the hours that she worked during the pandemic, improperly disclosing her wages without her consent, while Defendants have not caused similar treatment to other employees, including those employees who were not a member of the protected class and had equal or substantially similar work, required equal or similar skill, effort and/or responsibility, and performed under similar working conditions" (Verified Amended Complaint, ¶ 181). However, where a claim is based upon the fact she was paid less than similarly situated employees she must allege her actual job duties and the actual job duties of her "putative comparators" (see, Wu v. Good Samaritan Hospital Medical Center, 815 Fed. Appx. 575 [2d Cir. 2020]). A review of the actual complaint reveals no such job descriptions or comparisons.

Labor Law §195 which requires accurate record keeping concerning wages. Although it appears duplicative of the breach of fiduciary duty count in the same regard at this juncture it has merit.

The fifteenth cause of action of the proposed verified amended complaint and the seventeenth cause allege violations of the New York State and New York City Human Rights Laws on the grounds the defendants discriminated against her due to her pregnancy. While further discovery will necessarily be required to elaborate on this claim, at this juncture the claim has merit.

(see, Farmer v. Shake Shack Enterprises, 473 F.Supp3d 309 [S.D.N.Y. 2020]). The sixteenth cause of action alleges a retaliation claim pursuant to Executive Law §296(7). Thus, to establish a claim of retaliation, a plaintiff must establish that she participated in a protected activity, that her participation was known to her employer, that her employer subjected her to a materially adverse employment action and that there was a causal connection between the protected activity and the adverse employment action (Smith v. New York Presbyterian Hospital, 440 F.Supp3d 303 [S.D.N.Y. 2020]). At this stage of the pleading such allegation has merit.

Concerning the causes of action for fraud and aiding and abetting fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs., 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which

are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]). The defendants seek to dismiss the fraud claims on the grounds the fraud is the same as the breach of contract claims. The plaintiff opposes that contention arguing the breach of contract claim is not duplicative of the fraud claims since the fraud alleges inducement based upon misrepresented material facts. The breach of contract claim, as noted, essentially alleges that the defendant failed to abide by the agreement concerning the payment of profits and losses. The fraud claims allege the defendants misrepresented the value of the pharmacy and thus induced the plaintiff to offer the investment. Thus, the fraud claims clearly are not duplicative of the breach of contract claims.

Lastly, the only viable cause of action that include China Pharmacy is the fourth proposed cause of action, namely aiding and abetting a breach of fiduciary duty. However, that cause of action really alleges improper conduct only against defendant Wang. There is no basis for any independent claim for aiding the breach against China Care.


Therefore, in summary the motion seeking disqualification is denied. The motion seeking to amend the complaint is granted as to the first ten counts except for count five, and counts twelve

through nineteen. The motion seeking to amend is denied regarding counts five, eleven and fourteen. Lastly, the motion seeking to amend to add any cause of action against China Pharmacy is denied.

So ordered.

ENTER:

DATED: July 25, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC