Meltzer v Kentucky Hi Tech Greenhouses LLC
2023 NY Slip Op 30124(U)
January 12, 2023
Supreme Court, New York County
Docket Number: Index No. 652396/2022
Judge: Melissa Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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CURT MELTZER, MELTZER MANAGEMENT SERVICES LLC

Plaintiff,

- v -

KENTUCKY HI TECH GREENHOUSES LLC,KENTUCKY FRESH HARVEST LLC,

Defendant.

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INDEX NO. 652396/2022

MOTION DATE 10/20/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

INTRODUCTION

Plaintiffs Curt Meltzer ("Meltzer") and Meltzer Management Services LLC ("MMS") filed the complaint in this action on July 11, 2022, alleging causes of action for breach of contract, unjust enrichment, quantum meruit, promissory estoppel, and violation of New York Labor Law §§ 193 and 198 against Defendants Kentucky Hi-Tech Greenhouses, LLC ("KHTG") and Kentucky Fresh Harvest, LLC ("KFH") (together, "Defendants"). The complaint alleges that Defendants failed to pay Meltzer compensation, failed to re-pay a loan from Meltzer, and failed to reimburse Meltzer's business expenses.

Defendants moved to dismiss pursuant to CPLR 3211(a)(1) and (a)(3), arguing (a) that the complaint should be dismissed because a forum selection clause in KHTG's operating agreement requires disputes to be litigated in Jefferson County, Kentucky, and (b) that Plaintiff MMS lacks the capacity to sue based on its alleged failure to comply with New York's Limited Liability Company Law. Defendants additionally argued (c) that the quasi-contractual claims in the

complaint should be dismissed as duplicative of the breach of contract claim. For the following reasons, the motion to dismiss is granted in part and denied in part.

FACTUAL BACKGROUND

Defendant KHTG is the majority owner of defendant KFH. KFH is an agricultural company. Meltzer, a founding member of KFH and KHTG, alleges that he managed the defendants' businesses starting in 2018 as CEO and COO (Complaint, NYSCEF Doc. No. 1, ¶¶ 10-11, 17). On April 2, 2018, the members of KHTG approved the Second Amended & Restated Limited Liability Company Operating Agreement for KHTG ("Operating Agreement") (Operating Agreement, NYSCEF Doc. No. 23).

Under the Operating Agreement, the members of KHTG were Meltzer, William K. Back, and ORYM Group, LLC. Meltzer and Haim Oz were to manage the business (Operating Agreement, § 4.1). Pursuant to the Operating Agreement, the powers of the managers included, amongst other powers, the authorization to make decisions as to the borrowing of money, the extension of loans, and the employment of persons, firms or corporations for the company's business (Operating Agreement, § 4.3). The Operating Agreement additionally contains a section on "Compensation," describing that managers would be paid "in such amounts as are approved by the Members" (Operating Agreement, § 5.1).

Further, the Operating Agreement includes a section on "Venue and Jurisdiction" which sets forth that the parties:

> irrevocably agree that any legal action, suit or proceedings against them, individually, jointly or severally, with respect to the enforcement of any other matter **under or arising out of or in connection with this Agreement** or for recognition or enforcement of any arbitration or other judgment rendered in any such action, suit or proceeding, shall be brought in the Jefferson (Ky.) Circuit Court or the Federal District Court for the Western District of Kentucky sitting in Jefferson County, Kentucky.
>
> (Operating Agreement, § 9.8).

Additionally, later in 2018, the parties entered into a settlement agreement related to alleged wrongdoing by Meltzer and Oz regarding the "management, operation, or actions" of KHTG ("Settlement Agreement," NYSCEF Doc. No. 24). In particular, the Settlement Agreement related to allegations that "certain business opportunities being pursued by Green Ag are opportunities that should have been made available to [KHTG]" (Settlement Agreement, Recitals). The Settlement Agreement contains a forum selection clause requiring that "[a]ny controversy or claim arising out of or relating to this Release Agreement shall be brought in a state or federal court located in Jefferson County, Kentucky" (Settlement Agreement, § 17). The parties signed the Settlement Agreement between June and July of 2018 (Settlement Agreement).

For his work in his roles as CEO and COO, Meltzer agreed to accept deferred compensation from Defendants. The parties formalized the compensation arrangement through resolutions the members of KHTG passed after member meetings between September-October 2018 and June 2019. Under those resolutions, the members determined that the "fair market value of the services provided by Curt Meltzer, on a full-time basis, is not less than $200,200.00 per annum," that he was owed a total of $408,741.93 as of September 17, 2018, and that, effective June 1, 2019, KHTG "did begin compensating Curt Meltzer with payments at an annualized rate of $120,000 per annum" ("Resolutions," NYSCEF Doc. No. 2). Neither of the Resolutions contains **any** forum selection clause.

Plaintiffs allege that Defendants paid less than they owed, and so their debt to Plaintiffs increased over 2019, 2020, and 2021 (Complaint, ¶ 15). In January 2021, Defendants, through their majority member Carol Hill, allegedly "represented" that they would pay Meltzer his deferred compensation and expenses in the amount of $100,000 per year, beginning in January 2022

(Complaint, ¶ 21). Additionally, the complaint alleges that in October 2021, Meltzer loaned KFH $70,000.00, of which only $30,000.00 has been re-paid to date (Complaint, ¶¶ 23, 24).

Meltzer resigned as CEO in November 2021 after Defendants declined to pay Meltzer the amount they allegedly owed him. In a letter acknowledging his resignation, Carol Hill of KFH agreed to pay Meltzer $50,000 in reimbursement of the loan, and then $10,000 a month starting in March 2022 to pay the deferred compensation (Hill Letter, NYSCEF Doc. No. 3). Plaintiff alleges that, including interest, the total deferred compensation exceeds $900,000.00, in addition to at least $100,000.00 in unpaid business expenses and the value of the loan (Complaint, ¶ 28).

DISCUSSION

Plaintiffs' motion to dismiss the first cause of action for breach of contract and the cause of action for violations of New York Labor Law §§ 193 and 198 is denied. The motion to dismiss the causes of action for unjust enrichment, quantum meruit, and promissory estoppel is granted.

I. CPLR 3211(a)(1) Motion to Dismiss

Plaintiffs' motion to dismiss pursuant to CPLR 3211(a)(1) is denied. A party is only entitled to dismissal under CPLR 3211(a)(1) where documentary evidence "utterly refute[s] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 157 [1st Dept 2022]). Where the documentary evidence is "equivocal," the court must deny the motion (*see id.* at 158-159; *see also Meadow Apartments Corp. v S and H LLC*, 178 NYS3d 436 [1st Dept 2022] [denying motion to dismiss pursuant to CPLR 3211(a)(1) because of parties' factual dispute over documentary evidence]).

Here, Defendants submit two separate documents that purportedly establish that this forum is improper: the Operating Agreement and the Settlement Agreement. However, the Operating Agreement relates to matters such as the formation of KHTG (Operating Agreement, Art. I),

capital contributions and distributions for KHTG (Operating Agreement, Arts. II-III), and the management of KHTG (Operating Agreement, Art. IV). While the Operating Agreement does contain a section on management compensation, that section merely describes the **process** for approval of compensation for managers (Operating Agreement, Art. V ["Management fees may be paid to a Manager in such amounts as are approved by the Members"]). The Operating Agreement does not actually set forth the compensation due to Plaintiffs that is the subject matter of this case; the Resolutions do.

Further, the separate nature of the Resolutions is clear because a portion of the September-October 2018 Resolution differentiates money owed to Meltzer under the Resolutions from distributions (*see* Resolutions [resolving that, "it is unanimously agreed that the Arrearage [defined earlier as the total due to Meltzer for his services] and all Members expenses advanced to the Company shall be treated as a guaranteed payment and shall have absolute priority over any liquidating distributions"]; Transcript, NYSCEF Doc. No. 33, p. 5). Therefore, Defendants have not unequivocally established the forum selection clause in Section 9.8 of the Operating Agreement requires dismissal. That forum selection clause does not definitively apply to the Resolutions that are separate (*see Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC*, 199 AD3d 406, 407 [1st Dept 2021] [finding that subordination agreements' forum selection clause applying to suits "arising out of or relating to this Agreement" did not apply to a lawsuit based on "separate management agreements"]).

Nor does the Settlement Agreement establish that forum in New York is improper. The Settlement Agreement relates to a dispute regarding "business opportunities being pursued by Green Ag . . . that should have been made available to [KHTG]" (Settlement Agreement). The Settlement Agreement makes no reference to the compensation disputes at issue in this case.

Additionally, the Settlement Agreement was signed between June and July of 2018, **pre-dating** the Resolutions that determined amounts owed to Meltzer. Therefore, the forum selection clause in the Settlement Agreement, that states "[a]ny controversy or claim arising out of or relating to this Release Agreement shall be brought in a state or federal court located in Jefferson County, Kentucky" (Settlement Agreement, § 17), is irrelevant and does not require dismissal of this action.

Because defendants have not established that plaintiffs' claims in this case arise from the Settlement Agreement or the Operating Agreement, documentary evidence does not conclusively establish that this forum is improper. Thus, Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

II. Motion to Dismiss Pursuant to CPLR 3211(a)(3)

Additionally, Defendants' motion to dismiss pursuant to CPLR 3211(a)(3) is denied. Defendants argue that the claims MMS brought should be dismissed because MMS lacks legal capacity to sue due to its failure to comply with Section 206 of the New York Limited Liability Company Law. Under Section 206, within 120 days of the effectiveness of the articles of organization for a New York LLC, the LLC is required to publish notice "once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk" (LLC § 206). The failure to comply with these requirements "precludes a limited liability company from maintaining any action or special proceeding in New York" (*Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P.*, 137 AD3d 1102, 1103 [2d Dept 2016]). However, LLC § 206 only precludes an LLC from maintaining such an action "unless and until" it complies (*Barklee Realty Co., LLC. v Pataki*, 309 AD2d 310, 311 [1st Dept 2003]).

Here, Defendants have failed to meet their burden under CPLR 3211(a)(3) to establish, *prima facie*, that MMS has no standing to sue for failure to comply with LLC § 206 (*see Brunner v Estate of Lax*, 137 AD3d 553 [1st Dept 2016]). All Defendants have provided to establish that MMS did not comply with LLC § 206's publication requirements is a filing history printed out from the New York State Division of Corporation's website (*see* NYSCEF Doc. No. 25). At oral argument, counsel for Plaintiffs indicated that they were "investigating whether it's been done" and that if it had not been done, it would be (Transcript, p. 23). In any event, this court has conducted a search of the New York State Division of Corporations website after oral argument and found that MMS has filed its "Certificate of Publication."[1] Therefore, the motion to dismiss MMS under CPLR 3211(a)(3) is denied.

III. Motion to Dismiss the Quasi-Contract Claims

Defendants have established that the causes of action for unjust enrichment, quantum meruit, and promissory estoppel should be dismissed.

Where there is a "valid and enforceable written contract governing a particular subject matter," a cause of action based on a quasi-contractual theory such as unjust enrichment or quantum meruit is ordinarily precluded (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]; *Panattoni Development Co., Inc. v Scout Fund 1-A, LP*, 154 AD3d 555, 557 [1st Dept 2017]). Plaintiffs' argument that they may plead theses causes of action in the alternative is unavailing because none of the parties dispute that the Resolutions govern the compensation agreement at issue in this case (*see* Complaint, ¶¶ 12-14; Memorandum of Law in Support of Motion to Dismiss, NYSCEF Doc. No. 16, pp. 4-6). Similarly, the cause of action for promissory

[1] *See Department of State, Division of Corporations*, https://apps.dos.ny.gov/publicInquiry/FilingHistory.

estoppel should be dismissed as duplicative of the cause of action for breach of contract (*see Kim v Francis*, 184 AD3d 413, 413 [1st Dept 2020]).

IV. The Labor Law Claims

The cause of action for violation of New York Labor Law §§ 193 and 198 is not dismissed. The court has already rejected Defendants' argument that this forum is improper, and Defendants do not move to dismiss this cause of action for failure to state a claim under CPLR 3211(a)(7).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Defendants' motion to dismiss is denied as to the first and fourth causes of action for breach of contract and violation of New York Labor Law §§ 193 and 198; and it is further

ORDERED that Defendants' motion to dismiss is granted as to the causes of action for unjust enrichment, quantum meruit, and promissory estoppel; and it is further

ORDERED that the parties must appear for a compliance conference by Microsoft Teams on 2/23/23 at 11:00 a.m.

01/12/2023
DATE

MELISSA CRANE, 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