

Global Care Pharm. Inc. v Cheung

2023 NY Slip Op 30493(U)

February 7, 2023

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,

February 7, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5 & 6

The plaintiff has moved seeking to dismiss the defendant's counterclaims filed. The defendant has cross-moved seeking to amend the complaint. 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.

According to the amended complaint, on October 25, 2018 the defendant Josephine Cheung the sole owner of Global Care Pharmacy Inc., offered the plaintiff Jian Liu an opportunity to purchase a forty percent share of the pharmacy. Indeed, on December 28, 2018 the parties entered into a stock transfer agreement whereby Liu became a forty percent owner of the pharmacy and was also hired as the supervising pharmacist while Cheung maintained her role as the president and manager of the pharmacy. The amended complaint alleges that upon informing the defendants that she was pregnant she was denied a bonus that was paid other employees and after she gave birth her hours were increased despite her

requests for accommodations. Further, the amended complaint asserts her hourly salary was reduced without notice and that the defendants pressured her to relinquish her forty percent share of the pharmacy.

The amended complaint also alleges the defendants engaged in mismanagement and the diversion of corporate assets. The amended complaint alleges causes of action for the breach of a fiduciary duty, aiding and abetting such breach of duty, an accounting, breach of contract, a declaratory judgment, quantum meruit, violations of New York Labor Law §193 and §195, violations of the New York Human Rights Law §296, §296(7) and §8-101, fraud and aiding and abetting fraud (see, Amended Complaint [NYSCEF Doc. No. 134]).

The defendant answered the amended complaint and asserted numerous counterclaims. The first counterclaim asserts the plaintiff breached a fiduciary duty by engaging in self-dealing, by failing to sublease a portion of the premises and overstocked the pharmacy resulting in the necessity of capital contributions. The second counterclaim also alleges the plaintiff breached a fiduciary duty by attempting to dilute the value of the pharmacy. The third counterclaim alleges a breach of contract and breach of good faith and fair dealing. The fourth counterclaim alleges conversion. The fifth counterclaim alleges defamation, libel and slander.

The plaintiff has now moved seeking to dismiss all the counterclaims. The defendants have cross-moved seeking to amend the counterclaims to cure some of the infirmities noted in the plaintiff's motion to dismiss them.

Thus, the first, second and fourth counterclaims can only be asserted by the entity Global Care Pharmacy Inc., and not by the defendants in their individual capacities. The defendants, therefore, seek to amend the counterclaims to reflect the derivative nature of the breaches of fiduciary duty. The first counterclaim asserts the plaintiff "engaged in a scheme to decrease the value" of the pharmacy in order to "decrease the amount necessary to purchase the remaining 60%" of the pharmacy owned by the defendants (see, Verified Answer to Amended Verified Complaint and Counterclaims, ¶149 [NYSCEF Doc. No. 136]). The following paragraph of the counterclaim asserts the plaintiff engaged in self-dealing (see, Verified Answer to Amended Verified Complaint and Counterclaims, ¶150 [NYSCEF Doc. No. 136]). However, the counterclaim does not allege any conduct undertaken by the plaintiff that constitutes self-dealing or the nature of the scheme to reduce the value of the pharmacy. The ensuing paragraphs of the counterclaim merely allege such improprieties took place in conclusory fashion without explaining in any manner the activities that comprised such improper conduct. However, Paragraph 155 of the counterclaim alleges the plaintiff refused

to permit a sublease of the premises at a loss of \$72,000 in revenue (id). The counterclaim also alleges the plaintiff disparaged the business and caused customers to seek their pharmacy needs elsewhere. Lastly, the counterclaim alleges the plaintiff intentionally overstocked the pharmacy with goods which required contributions and which caused a loss. The defendants assert the plaintiff engaged in these activities to lower the value of the pharmacy so the defendants would sell their 60% share to the plaintiff at a lower rate. Thus, the elements of a breach of a fiduciary duty must be examined.

To succeed on a claim for breach of a fiduciary duty, a party must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct and (3) damages that were directly caused by the misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007]; see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]).

The first element, namely a fiduciary relationship is satisfied as defendant adequately establishes, and there is really no opposition, that the plaintiff owed a fiduciary responsibility to the corporation (Greenberg v. Wiesel, 186 AD3d 1336, 131 NYS2d 36 [2d Dept., 2020]).

The second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take

one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Generally, a breach of loyalty will be established where the movant can show the other party participated in both sides of a transaction. "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (Birnbaum, supra). "The duty of care refers to the responsibility of a...fiduciary to exercise, in the performance of his or her tasks, the care that a reasonably prudent person would use under similar circumstances" (In re Ticketplanet.com, 313 BR 46 (S.D.N.Y. Bankruptcy Court, 2004), citing Norlin Corp. v. Rooney, Pace, Inc., 744 F2d 255, [2d Cir. 1984]). In turn, the fiduciary duty of due care, "obligates [fiduciaries] to act in an informed and 'reasonably diligent' basis in 'considering material information'" (Higgins, supra). Lastly, concerning damages, the movant must demonstrate that they did in fact suffer financial injury caused by the fiduciary's breach of duty (105 East Second St. Assocs. v. Bobrow, 175 AD2d 746, 573 NYS2d 503 [1st Dept., 1991]). To establish the damages component of a claim for a breach of fiduciary duty, the movant is required to show at a minimum, that the fiduciary's actions were "a substantial factor"

in causing an "identifiable loss" (see, (105 East Second St. Assocs. v. Bobrow, supra)).

The acts allegedly committed by the plaintiff, namely chasing away customers, failing to sublease space and overstocking merchandise, all done with improper motives can establish a breach of a fiduciary duty. Of course, discovery will sharpen these allegations, however, it cannot be said at this stage of the litigation that there can be no basis at all establishing such breach of a fiduciary duty. Thus, where reasonable inferences can be drawn to establish self-dealing and the record is not sufficiently developed to determine if the transactions were proper then the allegations must proceed (Pinnacle Consultants Ltd., v. Leucadia National Corporation, 923 F.Supp 439 [S.D.N.Y. 1995]). While the plaintiff argues she acted properly and no such breaches can possibly be established it is well settled that "pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith" (Ackerman v. 305 East 40th Owners Corp., 189 Ad2d 665, 592 NYS2d 365 [1st Dept., 1993]).

Therefore, the motion seeking to amend the first counterclaim is granted and the motion seeking to dismiss the first counterclaim is denied.

The motion seeking to dismiss the second counterclaim is

granted and the motion seeking to amend the complaint in this regard is denied. The second counterclaim, even in amended form fails to allege any cause of action for breach of any fiduciary duty. Specifically, the counterclaim alleges that "in breach of her fiduciary duty to GLOBAL CARE and the 60% shareholder, through her actions as a 40% shareholder, supervising pharmacist, and secretary of GLOBAL CARE, the Plaintiff/Counterclaim-Defendant sought to dilute the value of GLOBAL CARE so that she could purchase the remaining 60% ownership stake at a reduce priced" (see, Verified Answer to Amended Verified Complaint and Amended Counterclaims, ¶163 [NYSCEF Doc. No. 147]). There are no facts contained within the counterclaim that consist of any breach of loyalty or breach of due care. As noted, the counterclaim accuses the plaintiff of attempting to dilute the corporation. Besides the fact these acts, if true, harmed the plaintiff herself as well as the defendant, they do not allege any breach of any fiduciary duty at all. They do not allege any impropriety, any actual self-dealing or any act that could be considered motivated by self-interest. Rather, the allegations are conclusory that do not establish any counterclaim. Consequently, the second counterclaim is dismissed.

The third counterclaim asserts a breach of contract based on the plaintiff's failure to consent to the defendant's efforts to

sell their 60% share of the corporation.

It is 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]). Further, 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).

The counterclaim asserts the plaintiff breached Paragraph 10 of the Stock Transfer and Shareholder Agreement which states that "no shareholder shall assign, sell, transfer, pledge, create a security interest in, encumber, or in any other manner dispose of the whole or any part of her interest in the Corporation, without first offering to sell such interest to the remaining shareholder and obtaining the consent of the remaining shareholder. Except up to 9% of the total shares of Global Care Pharmacy owned by Josephine Cheung may be transferred or sold to other third or fourth parties at her selection at any time" (id [NYSCEF Doc. No. 13]). Thus, it is well settled that "when a party reserves discretion as to how to define the benefit that the other party is to receive from it by way of a provision giving the first party a right to withhold consent, the contract may be read to

imply that consent shall not be unreasonably withheld" (see, Firtzpatrick v. American International Group Inc., 2013 WL 709048 [S.D.N.Y. 2013]). Therefore, at this juncture there are questions if the plaintiff's refusal was reasonable. Consequently, the motion seeking to amend this counterclaim is granted and the motion seeking to dismiss this counterclaim is denied.

Concerning the motion seeking to dismiss the conversion counterclaim, it is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile

Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred.

The counterclaim in this case does not allege any specific items that were the subject of any conversion. The counterclaim merely states in conclusory fashion that "the Plaintiff/Counterclaim-Defendant began to regularly convert additional funds to herself that were in dispute and were not compensable based upon the SPA" (see, Verified Answer to Amended Verified Complaint and Amended Counterclaims, ¶179 [NYSCEF Doc. No. 147]). That is an insufficient basis upon which to allege any conversion (see, Goodman v. Port Authority of New York and New Jersey, 2013 WL 5313427 [S.D.N.Y. 2013]). Therefore, the motion seeking to dismiss this counterclaim is granted and the motion seeking to amend the complaint in this regard is denied.

The fifth counterclaim alleges defamation. To establish a cause of action for defamation, the party must allege that there was a "[1] false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged by, at a minimum, a negligence standard, and [4] it must either cause special harm or constitute defamation per se'" (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). Further, to successfully plead defamation the complaint must provide the time, place and manner of the defamation (Buffolino v. Long Island Savings Bank FSB, 126 AD2d 510, 510 NYS2d 628 [2d Dept.,

1987])). Further, the defamation cannot be non-actionable opinion (Colantonio v. Mercy Medical Center, 73 AD3d 966, 901 NYS2d 370 [2d Dept., 2010]).

However, "in the absence of special circumstances which add another meaning to the words, it is not defamatory to say that a person is dead" (see, Prosser & Keeton on Torts [5th edition], Defamation § 111, p. 774). Thus, in Cardiff v. Brooklyn Eagle, 190 Misc. 730 75 NYS2d 222 [Supreme Court Kings County 1947] the defendant newspaper printed an obituary the plaintiff had passed when in fact he was alive. The court dismissed a defamation action finding that the obituary did not expose the plaintiff to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their confidence and friendly intercourse in society...At its worst the publication might cause some amusement to plaintiff's friends. But it is difficult to see where his reputation would be impaired in the slightest degree and the law of defamation is concerned only with injuries thereto" (id).

Consequently, the motion seeking to dismiss this counterclaim is granted.

Thus, the only counterclaims that remain viable are the first and third counterclaims. The remaining counterclaims are

dismissed. Further, the motion seeking to amend the complaint is granted only pertaining to the first and third counterclaims. The remaining portion of the motion seeking to amend the complaint is denied.

So ordered.

ENTER:



DATED: February 7, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC