

Baker v Waller Capital Corp.

2023 NY Slip Op 30531(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 655859/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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GARRETT M. BAKER,

Plaintiff,

INDEX NO. 655859/2017

MOTION DATE 08/26/2022,
09/21/2022

- v -

WALLER CAPITAL CORP., WALLER CAPITAL
PARTNERS, LLC, JOHN W. WALLER

MOTION SEQ. NO. 005 006

Defendants.

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98, 99, 100, 101, 111, 113, 114, 118, 120, 122, 124, 126, 128

were read on this motion to SEVER.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 115, 119, 121, 123, 125, 127, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 141

were read on this motion to AMEND CAPTION/PLEADINGS.

Plaintiff Garrett M. Baker (“Plaintiff”) moves to sever those portions of the Complaint’s (NYSCEF 2)¹ First Cause of Action for Breach of Contract as to which he was awarded summary judgment so that he may enforce a judgment against Defendants Waller Capital Corp., Waller Capital Partners, LLC and John W. Waller III (“Waller Defendants”). Plaintiff also moves to file a Second Amended Complaint adding Stifel, Nicolaus & Company, Incorporated and Stifel Financial Corp. (collectively “Stifel”), supplementing his factual allegations and adding claims for conversion, fraudulent conveyance, tortious interference and successor

¹ Following summary judgment, Plaintiff filed a First Amended Complaint (NYSCEF 82) and moved to file a Second Amended Complaint. The severed judgment directed in this order shall be deemed to apply to the Plaintiff’s First Cause of Action for Breach of Contract in the proposed Second Amended Complaint (NYSCEF 105).

liability. For the reasons that follow, Plaintiff's motion to sever is GRANTED and Plaintiff's motion to amend is GRANTED IN PART to the extent that Plaintiff may add fraudulent conveyance and conversion claims against the Waller Defendants.

A. The Motion to Sever is Granted

This case concerns an Employment Agreement (NYSCEF 2 [Cplt. Ex. A]). On December 20, 2021, the Court granted in part and denied in part the parties' motions for summary judgment (NYSCEF 93, 94 [the "Order"]). Relevant here, the Order granted, in part, Plaintiff's First Cause of Action under the Employment Agreement for Guaranteed Payments in the amount of \$437,500.00 and Additional Guaranteed Payment for Fiscal Year 2015 in the amount of \$625,000.00 for a total award of \$1,062,500.00 plus interest.

Those issues not resolved in the Order were reserved for trial. Notice of Entry was served on December 27, 2021 (NYSCEF 95, 96). No appeal from the Order was taken. The Waller Defendants do not assert any counterclaims (Amended Answer [NYSCEF 85]). Trial is scheduled to commence in May of 2023.

Plaintiff moves (NYSCEF 98) to sever the claims awarded on summary judgment so that he may begin to collect the amounts awarded in the Order. Plaintiff argues that he should have been paid the amounts awarded in the Order more than six years ago and that further delay is unfair and unwarranted (Moving Brief at 4-6 [NYSCEF 99]). The Waller Defendants argue that Plaintiff seeks severance to create "settlement leverage" and that severance would result in "piecemeal litigation" (Opposition Brief at 1 [NYSCEF 122]).

CPLR 3212(e) provides, in relevant part:

summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action;

CPLR 5012 provides:

The Court, having ordered a severance may direct judgment upon a part of a cause of action or upon one or more causes of action as to one or more parties.

The Court has discretion under Section 3212(e) to grant severance to a prevailing party on summary judgment absent prejudice to the opposing party (*Robert Stigwood Org., Inc. v Devon Co.*, 44 NY2d 922, 924 [1978] [“The record in this case is completely bare of any indication that plaintiff would be in any way prejudiced if defendant is allowed to enforce its partial summary judgment”]). On these facts, the Court concludes that severance is warranted because Plaintiff has been adjudged to be entitled to specific payments that should have been made under the Employment Agreement more than six years ago and Defendants have not demonstrated that any undue prejudice will result (*Lapidus v 1050 Tenants Corp.*, 138 AD3d 783, 786 [2d Dept 2016] [citing *id.*]; *Sheehan v Andrew Cone Gen. Adv. Agency*, 176 Misc 882, 884 [App Term 1st Dept 1941]).

B. The Motion to Amend is Granted in Part

On September 21, 2022, Plaintiff moved to file a Second Amended Complaint adding Stifel, Nicolaus & Company, Incorporated and Stifel Financial Corp. (collectively “Stifel”), supplementing his factual allegations and adding claims for conversion, fraudulent conveyance, tortious interference and successor liability (NYSCEF 106 [redline proposed Second Amended Complaint]). Defendants were granted leave to file a sur-reply (NYSCEF 138).

On February 2, 2022, counsel for Plaintiff submitted a letter withdrawing the motion to the extent it seeks to add Stifel and associated claims for tortious interference as well as

successor liability because Plaintiff does not want to risk delaying the May 1, 2023 trial date (NYSCEF 141). Plaintiff wishes to pursue the motion with respect to the fraudulent conveyance and conversion claims against the Waller Defendants only (*id.*). Plaintiff does not seek further discovery in aid of the proposed amended claims (*id.*).

CPLR 3025(b) provides, in relevant part, that a “party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court ... Leave shall be freely given upon such terms as may be just...” Leave to amend should be granted so long as the amendment “is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

The Court finds that the proposed amendment, as limited by Plaintiff’s letter, is not “palpably insufficient” or “devoid of merit,” and will not cause undue prejudice or lead to additional discovery. It simply adds an additional theory of recovery, which Plaintiff must pursue and prove (if he can) based on the existing discovery record. Leave to file a Second Amended Complaint to add these claims is granted.

* * * *

Accordingly, it is

ORDERED that Plaintiff’s motion to sever those portions of the First Cause of Action on which summary judgment was granted pursuant to CPLR 3212(e) is **GRANTED** and the Clerk is directed to enter judgment in Plaintiff’s favor in the amount of:

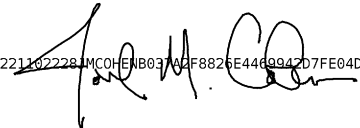
- a. \$437,500.00, with pre-judgment interest to be calculated at the statutory rate of nine percent (9%) per annum commencing as follows: \$62,500 from December 15, 2015; \$62,500 from January 15, 2016; \$62,500 from February 15, 2016;

\$62,500 from March 15, 2016; \$62,500 from April 15, 2016; \$62,500 from May 15, 2016; and \$62,500 from June 15, 2016; and

b. \$625,000.00, with pre-judgment interest to be calculated at the statutory rate of nine percent (9%) per annum commencing January 15, 2016; and it is further

ORDERED that Plaintiff's motion to amend is **GRANTED IN PART** to the extent that Plaintiff may file and serve through NYSCEF a Second Amended Complaint including the proposed fraudulent conveyance and conversion claims against Waller Defendants within five (5) business days of this decision and order and Waller Defendants shall file an answer to the amended claims within twenty-one (21) days of service.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

2/21/2023
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE