

Stagen v Neu

2023 NY Slip Op 30946(U)

March 24, 2023

Supreme Court, New York County

Docket Number: Index No. 654161/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

THOMAS N. STAGEN

Plaintiff,

- v -

AMY W. NEU,

Defendant.

-----X

INDEX NO. 654161/2022

MOTION DATE 03/23/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

Defendant’s motion to dismiss is granted.

Background

Plaintiff worked as the president of Eden Wood Realty LLC (“Eden”) from April 2017 through October 2022. He claims that his tenure was successful and the complaint details his purported accomplishments. Plaintiff alleges that in May 2022, defendant entered into a settlement agreement with her father, Richard Neu, in which they both agreed that upon Richard’s retirement, defendant would become president of Eden. This settlement agreement also provided that, until his retirement, Richard Neu had the sole discretion about whether to retain plaintiff as president of Eden and then, if plaintiff remained employed at the time of Richard’s retirement, plaintiff would stay on under the same terms.¹ It also permitted defendant

¹ The Court recognizes this apparent inconsistency – that this could be read to require that both plaintiff and defendant would be president at the same time, but that is not the issue here.

to remove plaintiff if she made a “good faith determination” that plaintiff could no longer perform his duties.

Plaintiff alleges that Richard retired in August 2022 (defendant attached a resignation letter from her father dated July 22, 2022) and that defendant sent him an email terminating him from his employment at Eden in October 2022. He contends that defendant could not possibly have made a good faith determination about plaintiff’s ability to do the job. He brings a single cause of action for breach of contract.

Defendant moves to dismiss on the grounds of documentary evidence and that the complaint fails to state a cause of action. She insists that the settlement agreement cited by plaintiff arose after years of litigation with her father and related to other businesses in addition to Eden. Defendant insists that plaintiff was no longer an employee of Eden as of the date of her father’s retirement and that another entity, Phyllis Cory Consulting Corp. (“Phyllis Consulting”) was actually paying plaintiff to provide services to Eden.

Defendant contends that the provision in the settlement agreement contains a condition precedent—namely that plaintiff remain employed by Eden—at the time of Richard’s retirement. She insists that because plaintiff was working for Phyllis Consulting, and not Eden, at the time of her father’s retirement, he cannot seek relief under the subject provision.

She also contends that the complaint fails to allege that plaintiff was an intended third-party beneficiary of the settlement agreement. Defendant argues that the settlement agreement does not mention Phyllis Consulting and so plaintiff cannot seek the benefit of an agreement given that Phyllis Consulting is the entity who paid him. Defendant also contends that the complaint only alleges a speculative theory of damages—that he intended to work for a least six more years.

In opposition, plaintiff contends that he has known Richard Neu for more than 40 years and points out that defendant commenced litigation against her father in 2017, which led to plaintiff's appointment as president of Eden. He acknowledges that he incorporated Phyllis Consulting in May 2019 for the purpose of providing services to Eden and insists that each year after, Eden issued a 1099 to Phyllis Consulting. Plaintiff argues that he continued to provide the same services as president of Eden after he created Phyllis Consulting.

Plaintiff argues that he has stated a cause of action for breach of contract. He claims the provision that cites him in the settlement agreement between defendant and her father specifically confers him with benefits and entitles him to bring this lawsuit. He claims he was employed by Eden at the time he was fired and that the provision does not prohibit him from using Phyllis Consulting as an intermediary. Plaintiff also claims the alleged damages are not speculative as he would have continued working for Eden for some period of time—his estimate was six years. He insists it is for a fact finder to make that ultimate determination.

In reply, defendant insists that Eden paid Phyllis Consulting for plaintiff's services and so there is no basis to find that plaintiff was working for Eden at the time her father retired, which eviscerates a condition precedent to the agreement. She adds that there is no evidence that Phyllis Consulting was the intended beneficiary of the agreement. And she argues that plaintiff was merely acting as an agent of the corporate entity, Phyllis Consulting.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the

documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

The key part of the agreement between defendant and her father provided that:

“After Richard chooses to retire in his sole and absolute discretion, or dies, Amy shall become the President of Eden Wood. Until that time, the decision whether to continue to employ Stagen by Eden Wood shall be Richard's alone. Thereafter, and assuming that as of that time Stagen remains employed by Eden Wood, Eden Wood shall continue to employ Stagen on terms no less favorable to Stagen than those in place on the date of Richard's retirement or death, unless and until Stagen voluntarily retires or Amy makes a good faith determination that Stagen is no longer capable of performing his employment duties competently” (NYSCEF Doc. No. 3, ¶ 6).

The central issue in this motion is the interplay between plaintiff and his company, Phyllis Consulting. There is no dispute that plaintiff was paid only by his company and that the company was paid by Eden. Defendant seems to have acknowledged this as her termination email expressly references that the “consultancy agreement is terminated” (NYSCEF Doc. No. 4).

The problem for this Court is that at the time defendant and her father entered into the agreement (in May 2022)², Eden had issued 1099 forms to Phyllis Consulting for both 2020 and 2021 (NYSCEF Doc. Nos. 22 and 23). In other words, it would have been cleaner (and clearer) if Richard acknowledged somewhere in the agreement that when he referenced plaintiff, he was actually referring to plaintiff and his company (the entity to which Eden was sending checks [see NYSCEF Doc. No. 28]). However, Richard only referenced plaintiff by name and not his company, thus leaving a clear discrepancy.

² The Court recognizes that it is unclear whether defendant, who was seemingly not part of Eden at the time of the settlement agreement, knew about the existence of Phyllis Consulting. Plaintiff alleged that he replaced defendant in 2017 and the settlement agreement contemplates defendant's appointment with Eden once again.

That the agreement does not reference Phyllis Consulting creates an insurmountable problem for plaintiff in this case because *plaintiff*, not Phyllis Consulting, is seeking recovery as a third-party beneficiary. Therefore, the Court grants the motion to dismiss only on the ground that plaintiff cannot recover—because the documentary evidence shows that he was not employed by Eden at the time Richard Neu retired.

As plaintiff points out in his affidavit in opposition, he incorporated Phyllis Consulting so that he would pay less income tax (NYSCEF Doc. No. 27, ¶ 7). Plaintiff cannot receive payments solely from his own company (and thereby receive the benefits of the corporate form) in order to save on taxes and then ask this Court to overlook the existence of Phyllis Consulting for purposes of determining his employment status. Plaintiff readily admits that Eden started paying Phyllis Consulting in October 2019 for the services that plaintiff provided.

Plus, even if plaintiff was employed in some way for Eden, he would have no damages (an element of a breach of contract claim) because his salary was solely from Phyllis Consulting. In other words, because plaintiff had not been paid by Eden for many years at the time of his termination, he has no standing to seek damages in his personal capacity from Eden.

The Court does not opine about the sufficiency of a case brought by Phyllis Consulting; it merely asserts that plaintiff cannot seek recovery as an employee of a company for which he admits he received no direct payments. The admissions in his affidavit make clear that he was not an employee of Eden and instead worked for Phyllis Consulting.


That there may have been some sort of mutual mistake (and a claim that Phyllis Consulting was the intended third-party beneficiary) when defendant and her father referred to plaintiff in their settlement agreement, or some other theory, may be advanced in a potential future case. Here, the Court finds that the settlement agreement clearly contained a condition

precedent—that plaintiff be employed by Eden at the time Richard retired—and there is no dispute that this condition was not met. Therefore, plaintiff cannot seek benefits under an agreement that required him to be employed by Eden at the time Richard retired. The question for the next case, assuming there is one, is whether Phyllis Consulting can seek the benefits on the basis that Richard actually meant plaintiff’s company in the agreement.

Summary

The Court recognizes that plaintiff alleges that despite the way in which he was paid, he still continued to perform the duties as president of Eden. But this Court must respect the corporate form. Although plaintiff was entitled to set up a corporate entity and a consultancy arrangement for tax purposes, he cannot reap the benefit of that setup when it’s convenient and then simultaneously insist he remained an employee for a company that did not pay him. Plaintiff attached no documentation, such as employment agreement, to suggest that he remained an employee of Eden. The corporate resolution (NYSCEF Doc. No. 29) in which plaintiff was reappointed as president in October 2020 is of no moment. On these papers, and without Phyllis Consulting being a plaintiff here, the Court cannot make a factual determination that the corporate form doesn’t matter.

Accordingly, it is hereby ORDERED that defendant’s motion to dismiss is granted and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

<u>3/24/2023</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input 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