

Frances v Klein

2023 NY Slip Op 30978(U)

March 28, 2023

Supreme Court, New York County

Docket Number: Index No. 151000/2020

Judge: Louis L. Nock

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

BENJAMIN FRANCES,

Plaintiff,

- v -

JUDA KLEIN, PARKVIEW MANAGEMENT, INC., and THE
329, LLC,

Defendants.

-----X

INDEX NO. 151000/2020

MOTION DATE 09/01/2022,
09/02/2022

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 123, 125, 126, 127, 128, 144, and 147

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 124, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, and 146

were read on this motion/for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

In this action for breach of contract and unpaid wages, plaintiff Benjamin Frances (“Frances”) moves for summary judgment on his first cause of action for unpaid wages pursuant to Labor Law §§ 193, 198, and for summary judgment dismissing defendants Juda Klein (“Klein”), Parkview Management, Inc. (“Parkview”), and The 329 LLC’s (“329”) counterclaims for breach of a noncompete provision in the employment agreement between the parties, and for breach of the duty of loyalty (Mot. Seq. No. 007). Defendants, in turn, move for summary judgment dismissing the Labor Law causes of action, as well as the remaining causes of action for breach of contract, quantum meruit, and unjust enrichment (Mot. Seq. No. 008). Motion

sequence numbers 007 and 008 are consolidated for disposition in accordance with the following memorandum decision

Background

Pursuant to an employment agreement dated February 16, 2016, Parkview hired Frances for a number of tasks, “including but not limited to: accounting, management of property and construction projects, and related tasks” (employment agreement, NYSCEF Doc. No. 88, ¶ 1). He was given a salary of \$70,000, as well as other benefits (*id.*, ¶ 3). A noncompete provision was included in the agreement, purporting to prevent Frances from working for, or investing in, “any business in competition with the Company, or with any of its subsidiaries or affiliates,” subject to certain exceptions, for a period of six months following Francs leaving Parkview (*id.*, ¶ 5). The term “competition” is not defined.

Parkview was the project manager for a project referred to by defendants as the “329 Broadway Project” (Klein EBT tr, NYSCEF Doc. No. 92 at 37). As part of that project, Parkview needed to obtain a Status Update Letter (“SUL”) from the New York City Landmarks Preservation Committee (“LPC”) because part of the work impacted a landmarked building next to the building located at 329 Broadway, Brooklyn, New York (*id.* at 164-165). In June 2018, Klein placed Frances in charge of the process for obtaining the SUL (Klein EBT tr, NYSCEF Doc. No. 93 at 16-18, 25-26). Frances asserts that Klein promised him additional compensation upon successfully obtaining the SUL (Frances EBT tr, NYSCEF Doc. No. 94 at 71-72).

There is no meaningful dispute as to whether Frances performed the necessary work to obtain the SUL; but the parties differ as to the course of negotiation regarding his compensation. Frances testified at his deposition that the parties agreed on an amount of \$250,000 on January 14, 2019; but conceded that the payment mechanism and when and how he would be paid

remained open items (*id.* at 99-100, 199-200). Klein confirmed, at minimum, that \$250,000 was the number being discussed; but testified that he had never finally agreed that Parkview would pay him (Klein EBT tr, NYSCEF Doc. No. 93 at 25-29, 68-69). Parkview successfully obtained the SUL from the LPC (SUL, NYSCEF Doc. No. 100), and the parties continued to discuss the terms of their alleged agreement. Frances sent Klein two proposed promissory notes (promissory notes, NYSCEF Doc. Nos. 113, 114), which Klein rejected on the grounds that they contained terms that had not been agreed to or discussed during the January 14, 2019, meeting (Klein aff., NYSCEF Doc. No. 109, ¶¶ 58-62). Klein then sent Frances a counter-draft on March 20, 2019 (counter promissory note, NYSCEF Doc. No. 115). It is notable that when discussing the counter-draft with Frances, Klein stated that he agreed to pay \$250,000 (March 20, 2019 WhatsApp Messages, NYSCEF Doc. No. 99). On April 28, 2019, Frances resigned without being paid the \$250,000 (April 28, 2019 WhatsApp Messages, NYSCEF Doc. No. 101).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court

should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

As an initial matter, plaintiff's motion for summary judgment on the Labor Law claims is denied, and defendants' cross-motion for summary judgment seeking their dismissal is granted. Labor Law § 193, upon which Frances relies, provides that "[n]o employer shall make any deduction from the wages of an employee." Historically, the Appellate Division, First Department, interpreted this statute as not applying to claims of a wholesale failure to pay wages (e.g., *Kolchins v Evolution Markets, Inc.*, 182 AD3d 408, 409 [1st Dept 2020]; *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). Subsequent to both the alleged failure to pay and the commencement of this action, the Legislature amended the statute to include a new subdivision providing that "[t]here is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements" (Labor Law § 193[5], as amended by L 2021, Ch 397, § 3). "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]). Here, the language of the amendment neither expressly nor impliedly requires a retroactive reading.

Defendants' cross-motion is also granted to the extent of dismissing the common law causes of action for breach of contract, unjust enrichment, and quantum meruit against 329 and

Klein in his individual capacity. These claims are proper, if at all, against Frances' former employer, Parkview. Klein and 329 were not parties to the employment agreement between Frances and Parkview, and there is no indication that the asserted separate agreement that forms the basis of this action was with any party other than Parkview. Without a contract between the parties there can be no claim for breach (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Further, there is no evidence in the record upon which the court might conclude that Klein should be liable in his personal capacity, as Parkview does not appear to have disregarded corporate formalities or abused the privilege of doing business in the corporate form (*Morris v. New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141-42 [1992]). Moreover, neither Klein nor 329 enriched themselves at Frances' expense (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]); nor did Klein derive any personal benefit from Frances' work for the benefit of Parkview (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 410 [1st Dept 2011]). Finally, as Frances' work was done at Parkview's behest, he "must look to [Parkview] for recovery" in quantum meruit, if such recovery is available to him (*Heller v. Kurz*, 228 AD2d 263 [1st Dept 1996]).

The cross-motion must be denied against Parkview, however, with respect to the common law causes of action. Parkview asserts that there was never a definitive agreement, yet the record indicates that Klein agreed to at least the amount of \$250,000 (March 20, 2019, WhatsApp Messages, NYSCEF Doc. No. 99). While Klein states in his affidavit that any agreement needed to be reduced to writing (Klein aff., NYSCEF Doc. No. 109, ¶¶ 56, 66), his earlier deposition testimony contradicts this, as he stated therein that he had never asked for the agreement to be reduced to writing (Klein EBT tr, NYSCEF Doc. No. 93 at 40). That the parties exchanged drafts of a potential agreement is not, under the circumstances, an indication that the parties

intended only to be bound by a fully executed writing (*Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009]). Parkview also argues that the work of obtaining the SUL is covered by the employment agreement's broad scope of activities for which Frances was being compensated (employment agreement, NYSCEF Doc. No. 88, ¶ 1). Even if a separate oral agreement is ultimately not proven at trial, Klein's stated promise of the amount of \$250,000 in exchange for obtaining the SUL may be sufficient to enable Frances to recover in quasi-contract if such work was in fact outside of the scope of his duties under the employment agreement (*El-Nahal v FA Mgt., Inc.*, 126 AD3d 667, 668 [2d Dept 2015] ["Where the existence of a contract is in dispute, the plaintiff may allege a cause of action to recover for unjust enrichment as an alternative to a cause of action alleging breach of contract"]). At minimum, issues of fact in the record regarding the scope of Frances' employment pursuant to the employment agreement and Klein's promise to pay \$250,000 preclude resolution of these issues on summary judgment.

Finally, so much of Frances' motion as seeks summary judgment dismissing defendants' counterclaims is granted. Nothing in the employment agreement operates to prohibit Frances' alleged assistance to other Parkview employees in obtaining higher salaries from Parkview, as alleged as part of the first counterclaim for breach of contract and the second counterclaim for breach of the duty of loyalty. Moreover, the record does not establish any fiduciary duty running from Frances as employee to Parkview as employer (*HF Mgt. Servs. LLC v. Pistone*, 34 AD3d 82 [1st Dept 2006]). Defendants offer no opposition to this portion of plaintiff's motion.

The remaining portion of the first counterclaim for breach of contract asserts that Frances breached the noncompete provision of the employment agreement by going to work for a competing real estate developer within six months of leaving Parkview. Defendants' reading of the provision is overly broad, as they seek to bar Frances from working anywhere in the real

estate industry in New York City, asserting that the company plaintiff went to work for “competes” with Parkview because that company – Fortis Property Group (NYSCEF Doc. No. 85, ¶ 62) – has an office in Brooklyn and is in the real estate business. Klein testified, however, that he could not recall any projects or jobs that Parkview had lost out on because of Frances going to work for another company (Klein EBT tr, NYSCEF Doc. No. 92 at 121-122, 137-138). Accordingly, Parkview cannot allege damages caused by Frances’ purported breach of the noncompete provision. “[N]oncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests” (*Morris v Schroder Capital Mgt. Intern.*, 7 NY3d 616, 620 [2006]). Here, defendants fail to identify any valid business interest protected by the noncompete provision, or any damages arising therefrom.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted to the extent of dismissing defendants’ counterclaims, and otherwise denied; and it is further

ORDERED that defendants’ counterclaims are severed and dismissed; and it is further

ORDERED that defendants’ cross-motion for summary judgment is granted to the extent of awarding defendants summary judgment dismissing the first cause of action for violations of Labor Law § 193 against all defendants, and the second cause of action for breach of contract, third cause of action for quantum meruit, and fourth cause of action for unjust enrichment against defendants Juda Klein and The 329 LLC, and otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Juda Klein and The 329 LLC dismissing the action against them; and it is further

ORDERED that the second through fourth causes of action against defendant Parkview Management, Inc., are severed and continued; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be scheduled for trial.

This constitutes the decision and order of the court.

ENTER:



<u>3/28/2023</u>			<hr/>	
DATE			LOUIS L. NOCK, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE