

**Roy v Mortensen**

2023 NY Slip Op 31185(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 650921/2022

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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SOUMYA MR. ROY, SCOTT MR. KRESSNER, NICOLA MS. HARTE	INDEX NO. <u>650921/2022</u>
Plaintiff,	MOTION DATE <u>01/19/2023</u>
- v -	MOTION SEQ. NO. <u>004</u>
RUNE MR. MORTENSEN, BASIS NEW YORK LLC, BASIS RESEARCH LTD,	<b>DECISION + ORDER ON MOTION</b>
Defendant.	
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HON. ANDREW BORROK

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 194, 195, 196, 197, 198, 199, 200 were read on this motion to/for DISMISS.

Upon the foregoing documents, the defendants' motion to dismiss (Motion Seq. No. 004) the First Amended Complaint (the **FAC**; NYSCEF Doc. No. 110) is granted to the extent that the claims sounding in defamation (fourth cause of action) must be dismissed because the alleged statements made by Basis NY (hereinafter defined) that the Plaintiffs (hereinafter defined) were terminated for "engaging in illegal transgressions" is an imprecise statement of opinion and therefore is not actionable (*see Cardali v Slater*, 167 AD3d 476, 477 [1st Dept 2018]; *Aronson v Wiersma*, 65 NY2d 593 [1985]). It also must be dismissed against all defendants other than Basis NY because no allegedly defamatory statements are attributable to any other defendants.

The breach of fiduciary duty claims (third cause of action) must also be dismissed to the extent that they are predicated on Rune Mortensen's failure to disclose preliminary negotiations that

had not ripened into a deal that affected the Plaintiffs' interest as minority interest holders in Basis NY because those claims are not actionable as a breach of fiduciary duty (*cf. KDW Restructuring & Liquidation Services LLC v Greenfield*, 874 FSupp2d 213, 219 [SD NY 2012]).

The defendants are not however entitled to dismissal of the breach of fiduciary duty claims to the extent that they are predicated on diversion of business and revenue that belonged to Basis NY to Basis UK (hereinafter defined) to deprive the Plaintiffs of the benefit of that business because the Plaintiffs were shareholders of Basis NY and not Basis UK.

Nor are the defendants entitled to dismissal of the claims sounding in breach of contract (first cause of action) or breach of the covenant of good faith and fair dealing (second cause of action). These claims are predicated on Mr. Mortensen's alleged fabrication of reasons for terminating the Plaintiffs' employment and the manner in which such termination was effectuated – *i.e.*, to avoid paying them a distribution that was scheduled to be made a few months later. The breach of contract claim seeks damages for the loss of equity generally and the breach of the implied covenant of good faith and fair dealing claim appears to seek damages predicated on the bonus or other share of profits as deferred.

### **The Relevant Facts and Circumstance**

As set forth in the FAC, this case involves (i) Rune Mortensen's scheme to inappropriately inflate the value of Basis UK at the expense of Basis NY, and (ii) the wrongful termination of the Plaintiffs by Mr. Mortensen "for cause" where no cause existed when the Plaintiffs questioned Mr. Mortensen about certain decisions that he was making that enhanced the value of Basis UK

to the detriment of Basis NY. This they allege was part of an overall plan to avoid having Basis NY, in which Mr. Mortensen was a minority interest owner, sold without Basis UK in which Mr. Mortensen owns a much larger share. To wit, among other things, rather than have Basis NY hire additional researchers to do work, Mr. Mortensen had the work performed by Basis UK, allocating money away from Basis NY and Basis Chicago to Basis UK. Subsequently, after fabricating reasons for terminating their employment, Mr. Mortensen is alleged to have defamed the Plaintiffs by telling others that they were fired because they “engaged in illegal transgressions” (NYSCEF Doc. No. 110, ¶ 64).

More specifically, in May 2018 and pursuant to a Limited Liability Company Agreement (the **Operating Agreement**; NYSCEF Doc. No. 135)<sup>1</sup> for Basis NY LLC (**Basis NY**), Soumya Roy, Scott Kressner, and Nicola Harte (Ms. Harte, together with Mr. Roy and Mr. Kressner, hereinafter, collectively, the **Plaintiffs**) and Basis Research Ltd. (**Basis UK**), a research company interested in having a presence in specialized pharmaceutical market research (*id.* at ¶ 9) in which Mr. Mortensen held a substantial equity position through Basis, Inc., formed Basis NY which would focus on providing sophisticated marketing services to pharmaceutical companies (NYSCEF Doc. No. 110, ¶ 8).

The Plaintiffs held a 44% interest in Basis NY. The defendants owned a 56% interest in Basis NY (*id.*, ¶ 10). Pursuant to the terms of the Operating Agreement, Mr. Mortensen was the Managing Director and approved profit goals and budgets for Basis NY, and Mr. Roy and Mr.

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<sup>1</sup> Ms. Harte and Mr. Roy each signed Joinder Agreements whereby they became a party to and bound to comply with the Operating Agreement (NYSCEF Doc. Nos. 141, 144).

Kressner were given significant autonomy to the run the business within an approved budget (*id.*, ¶ 14).

Pursuant to the Operating Agreement, Basis Inc., a subsidiary of Basis UK, was named the Managing Member, Mr. Mortensen, the Managing Director, and Mr. Kressner the Managing Partner (NYSCEF Doc. No. 135, §§ 4.1, 6.1).

Pursuant to Section 6.2 of the Operating Agreement, the parties agreed that Basis Inc. could hire employees that Basis NY deemed were necessary and that Basis Inc. would be responsible for establishing the salaries and the compensation of all employees:

**Section 6.2 Employees.** The Company may, in the discretion of [Basis Inc.], hire such employees from time to time as [Basis Inc.] shall deem to be necessary or desirable for such purposes and may pay such compensation, including without limitation any employee benefit then in effect, as [Basis Inc.] shall determine

(*id.*, § 6.2).

When they were hired, the Plaintiffs each signed employment agreements and Restricted Unit Agreements, which governed their equity in Basis NY (NYSCEF Doc. Nos. 138-40, 142-43, 145). The employment agreements give Basis NY the right to terminate Plaintiffs' employment "for cause" in the event of a material breach of the Operating Agreement (*e.g.*, NYSCEF Doc. No. 140, at 3-4). The Restricted Unit Agreements provide that in the event of termination "for cause", "all of the Restricted Units shall automatically be canceled and forfeited immediately upon the date of termination ... and shall revert back to the Company without any payment of any kind to the Recipient" (*e.g.*, NYSCEF Doc. No. 145, § 2[a]).

Over a period of approximately three to four years, the Plaintiffs determined salaries and bonuses for all Basis NY's employees, including themselves (NYSCEF Doc. No. 110, at ¶ 18) and in fact gave themselves incremental salary increases from time to time without disclosing the amount of such salaries in budgets that Mr. Mortensen is alleged to have approved (*id.*, ¶ 19). Indeed, in April 2021, December 2021, and February 2022, the Plaintiffs gave themselves salary raises totalling \$355,000 (NYSCEF Doc. No. 151).

During this time, Basis UK maintained full control over Basis NY's accounting (NYSCEF Doc. No. 110, ¶ 20). Basis UK also prepared the Plaintiffs' K-1 statements, which detailed compensation, dividends, and benefits (*id.*, ¶ 21). All payroll information was relayed to Basis UK with all wages and salary increases fully reflected in profit and loss statements which Mr. Mortensen controlled (*id.*).

The growth of Basis NY over time entitled the Plaintiffs to receive annual distributions from Basis NY (NYSCEF Doc. No. 135, § 3.4.2). Despite Basis NY's fiscal year ending on March 31, it was common practice for distributions to be made several months after (NYSCEF Doc No. 151).

In late January 2022, Mr. Roy and Mr. Kressner learned that Mr. Mortensen had been planning on selling Basis UK and Basis NY and had already had several meetings with potential buyers without informing the Plaintiffs (NYSCEF Doc. No. 110, ¶ 30). Concerned about being excluded, Mr. Roy and Mr. Kressner asked Mr. Mortensen to explain the terms being discussed for any potential sale (*id.*, ¶ 32). Mr. Mortensen is alleged to have given only brief, ambiguous

details but repeatedly sought Mr. Roy and Mr. Kressner's "unqualified commitment" to support a sale even though they were being left out of any discussions (*id.*, ¶ 33). Mr. Roy and Mr. Kressner told Mr. Mortensen that they were willing to consider a sale but would need further information and involvement before being able to commit to one (*id.*, ¶ 36).

Sometime thereafter, Mr. Mortensen cut off Mr. Roy and Mr. Kressner's access to Basis NY's business, including their business email (*id.*, ¶ 49). Mr. Mortensen told Mr. Roy and Mr. Kressner that he was putting them on "an immediate leave of absence to investigate conduct that the Company believes could be cause to terminate [their] employment" and ordered them not to communicate with any Basis NY employees or clients (*id.*).

On February 21, 2022, based on certain alleged "unauthorized salary increases," Mr. Mortensen fired Mr. Roy and Mr. Kressner "for cause" (*id.*, ¶ 58). Three days later, Mr. Mortensen fired Ms. Harte, also "for cause", citing Ms. Harte's refusal to come to work or perform her duties (*id.*, ¶ 59). As a result of terminating the Plaintiffs "for cause", all remaining equity they held in Basis NY was returned to Basis NY without Basis NY having to pay the Plaintiffs any distributions for the fiscal year ending March 31, 2022 (*id.*, ¶¶ 60-61).

On March 2, 2022, after meeting with Basis UK's officers, Basis NY partner Nicole Citron contacted one of Plaintiffs' long-term clients and informed them that "the official line" is that the Plaintiffs were fired because they "engaged in illegal transgressions" (*id.*, ¶ 65).

Following termination, the Plaintiffs sued Mr. Mortensen and Basis NY, alleging breach of contract, breach of implied covenant of good faith & fair dealing, interference with contract, and defamation (NYSCEF Doc. No. 1). The defendants moved to dismiss the complaint. Pursuant to a Decision and Order (NYSCEF Doc. No. 107), dated November 2, 2022, his Court granted the motion to dismiss to the extent that (i) the defamation claim was dismissed without prejudice and (ii) the interference of contract claim was dismissed with prejudice. The Plaintiffs then filed the FAC alleging breach of contract, breach of implied covenant of good faith & fair dealing, breach of fiduciary duty, and defamation (NYSCEF Doc. No. 110). The defendants now move to dismiss the FAC.

### **Discussion**

On a motion to dismiss, the pleading is to be afforded a liberal construction, and the court is to accept the facts as alleged as true, accord the non-moving party the benefit of every favorable inference, and determine only whether the facts alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

I. *Defendants' motion to dismiss the breach of contract claim must be denied*

Under Delaware law, waiver of contractual rights requires knowledge of all material facts and the intent to waive must be clear and unequivocal in nature (*Simon-Mills II, LLC v Kan Am United States XVI Ltd. P'ship*, 2017 WL 1191061 at \*34 [Del Ch 2017]). Silence and “mere inaction” cannot establish an intent to waive a contractual right (*Kallop v McAllister*, 678 A2d 526, 532 [Del 1996]). The defendants are however not entitled to dismissal of the breach of contract claim based on their assertions that (i) the termination of the Plaintiffs' employment was

based on the Plaintiffs' unauthorized salary raises and (ii) as a factual matter, the Plaintiffs can not establish a "waiver." As alleged, the defendants were not only aware of the salary increases but actually prepared partnership tax documents which reflected such salary increases such that their intent to waive their right to set the salaries was allegedly clear and unequivocal (*See, Fitzpatrick*, 2013 WL 709048 at \*29 [SDNY 2013]).

II. *The claim for breach of the implied covenant of good faith and fair dealing claim is also not ripe for dismissal*

The defendants' argument that the breach of the implied covenant of good faith and fair dealing claim must be dismissed because as a factual matter the profit distribution was not to occur for months fails. It does not matter that documentary evidence exists to demonstrate that previous profit distributions occurred in June/July and the termination was in March – days before the quarter was ending – *i.e.*, when the distribution would have accrued (*cf. Caniglia v Chicago Tribune–New York News Syndicate*, 204 AD2d 233, 233–234 [1st Dept 1994]; *Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). If the termination was effectuated to deprive them of an expected profits distribution and Mr. Mortensen knowingly fabricated a basis for termination (as alleged) to avoid having to make these payments – this would be sufficient (*Keene Corp. v Bogan*, 1990 WL 1864 at \*14 [SD NY 1990]).

III. *The breach of fiduciary duty claim must be dismissed in part*

A claim for a breach of fiduciary duty requires (i) the existence of a fiduciary duty and (ii) a breach of that duty (*Metro Storage Int'l LLC v Harron*, 275 A3d 810, 840-41 [Del Ch 2022]). As the Managing Director of Basis NY, Mr. Mortensen owed the Plaintiffs fiduciary duties. The Plaintiffs allege two bases for breach. First, the Plaintiffs allege that Mr. Mortensen was

required to engage them in the process of selling Basis NY. Second, the Plaintiffs allege that Mr. Mortensen could not divert business from Basis NY to Basis UK – a company they had no interest in and in which Mr. Mortensen had an interest. The Plaintiffs are partially correct.

Mr. Mortenson was not required to disclose to the minority interest members preliminary negotiations regarding the sale of the company (*KDW Restructuring & Liquidation Services LLC*, 874 FSupp2d at 221-22). He was only required to engage them when the negotiations became material and substantial and likely would lead to the consummation of a transaction that would affect their interests. However, Mr. Mortenson could not divert the use of resources to Basis UK to artificially increase the engagement (and profit) of Basis UK at Basis NY's expense to ensure that Basis UK would be part of any sale of Basis NY. Nor could he effectively keep profits from such diversions on the books of Basis UK when they would have (should have) been distributed to the Plaintiffs had they been properly recorded on the books of basis NY. Additionally, he could not cause the sum to be worth more than the parts when the sum only benefitted him and did not benefit the Plaintiffs to whom he owed fiduciary duties.

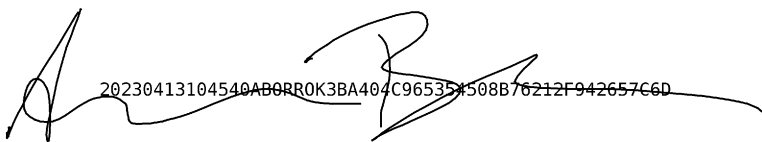
IV. *The defamation claim must be dismissed*

Absent special damages, slander claims are not sustainable unless they fall under one of the following four categories of slander per se: (i) charging plaintiff with a serious crime, (ii) statements that tend to injure another in his or her trade, business, or profession, (iii) statement that plaintiff has a loathsome disease, or (iv) statement that imputes unchastity to a woman (*Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]). The original complaint did not allege special

damages and neither does the FAC. In the original complaint, the Plaintiffs alleged that statements were made that they were no longer with Basis NY because of “behaviors not acceptable and not in the direct interest of the company.” This the Court ruled were not defamatory *per se* and thus required the pleading of special damages. The FAC alleges that Ms. Citron told Dylan Johnson, a long-term client of Basis NY and the Global Insights Lead at Takeda Pharmaceutical Co., that the Plaintiffs were fired because of “illegal transgressions.” (NYSCEF Doc. No. 110, ¶ 64). This too does not constitute defamation *per se* because it is an imprecise statement of opinion (*see Cardali*, 167 AD3d at 477; *Aronson*, 65 NY2d 593). The court notes that additionally the defamation claims must necessarily be dismissed as against all defendants other than Basis NY because no allegedly defamatory statement was attributed to any defendant other than Basis NY.

It is hereby ORDERED that the defendants’ motion to dismiss is granted to the extent of dismissing the cause of action for defamation and the claims for breach of fiduciary duty to the extent that they are predicated on Mr. Mortensen’s failure to disclose preliminary negotiations for the sale of Basic NY, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference May 10, 2023, at 11:30am.



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4/12/2023  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
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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
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