

Agbo v Constantin Assoc., LLP

2023 NY Slip Op 32206(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 653803/2020

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

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ADRIANA AGBO,

Plaintiff,

- v -

CONSTANTIN ASSOCIATES, LLP, JEAN-FRANCOIS
SERVAL INDIVIDUALLY AND IN HIS CAPACITY AS A
PARTNER OF CONSTANTIN ASSOCIATES, LLP

Defendant.

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INDEX NO. 653803/2020

MOTION DATE 06/08/2023

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 173, 174, 175, 176, 177, 178, 179, 196, 197, 198, 199, 200 were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 201 were read on this motion to/for SUMMARY JUDGMENT.

Motion Sequence numbers 004 and 005 are consolidated for disposition.

Defendants’ motion (MS004) for summary judgment to dismiss plaintiff’s first, third, fourth and fifth causes of action against defendant Constantin Associates LLP (“Constantin”), for summary judgment dismissing the first, second, third and fifth claims against defendant Serval and for leave to amend the answer to add two more affirmative defenses is granted in part and denied in part.

Plaintiff’s motion (MS005) for summary judgment in her favor on each of her five causes of action, for declaratory relief, for an award of damages “in accordance with the evidence” and for the imposition of a constructive trust is granted in part and denied in part.

Background

Plaintiff is a certified public accountant and used to work for defendant Constantin Associates, LLP (“Constantin”) as a partner. Constantin is a public accounting firm. Plaintiff contends that she worked for Constantin under an employment agreement and was given a 65% interest in Constantin; 50% was to be in trust and the remaining 15% was an ownership interest. She contends that this agreement contemplated that the parties were going to enter into a partnership agreement but that this never happened.

Plaintiff claims that she left Constantin effective on December 31, 2020. She argues that her departure was precipitated by disciplinary charges brought against her for work she did not perform. Plaintiff alleges that she received discipline from the applicable organization of accountants because she was the only licensed certified public accountant in the office, and therefore was the only person who could be subject to discipline. Purportedly, the firm faced discipline relating to 401K audits performed without meeting peer review requirements.

Plaintiff maintains that she gave defendants notice about her departure on November 26, 2019 and set a resignation date for the end of 2020. She contends she did this so Constantin would have more than a year to prepare and to properly compensate her. Plaintiff insists that defendants failed to pay her in accordance with her interest in the firm upon her withdrawal from the partnership. In this action, she seeks the value of her percentage of ownership in the partnership, the balance in her capital account, and a bonus for her final year working for Constantin (2020).

Defendants admit that they made missteps while plaintiff was working for Constantin. They acknowledge that they did not make timely installment payments due to plaintiff under a Compensation and Loan Agreement and that they did not file the 2009 executed Exchange

Agreement so that it was readily available in 2019 when plaintiff announced her resignation. But defendants emphasize that they have not stolen any money from plaintiff and that plaintiff herself has violated her fiduciary duties to defendants.

Defendants point out that in 2017, there was a regulatory proceeding in which the American Institute of Certified Public Accountants (“AICPA”) disciplined plaintiff based on Constantin’s delayed 2015 peer review and for other deficiencies related to a client’s financial statements. They admit that plaintiff was not the point person for either failure but that she took the fall and essentially accepted the discipline on behalf of Constantin because she was the only AICPA member working for Constantin. Defendants claim that they entered into the Compensation and Loan Agreement in 2019 to compensate plaintiff for this and agreed to pay her \$215,050 in installments through May 22, 2020. They insist that cash flow problems delayed the payments and complain that plaintiff later commenced this action. Defendants also complain that plaintiff withheld the Exchange Agreement (that contained the terms of her withdrawal) from defendants until 2021.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

First Cause of Action

Both plaintiff and defendants move for summary judgment on this claim, under which plaintiff seeks to recover under the terms of the Exchange Agreement (the agreement that contains *inter alia* the procedure for compensating plaintiff upon her withdrawal from Constantin).

Defendants insist that this claim should be dismissed because plaintiff failed to satisfy certain conditions precedent to receive her interest in the partnership. They observe that the agreement required the parties to mutually select a nationally recognized valuation firm and that this firm would produce a fair market value of plaintiff's interest in the firm. Defendants insist that plaintiff is to blame for not looking into finding or selecting a firm to do the valuation. They also question why plaintiff withheld the agreement from defendants for so long (they claim she did not disclose it until well after this case was commenced) and suggest this was part of an effort to extract more money. Defendants insist that the Exchange Agreement does not obligate

Constantin to pay plaintiff a bonus or her partnership account balance “other than as part of payment of her interest in the firm.”

The Court grants the branch of plaintiff’s motion for summary judgment with respect to this claim but only as to liability. The Exchange Agreement provides that

“If AA [plaintiff] ceases to be a partner in CA for any reason after the third anniversary of the Closing Date, CA shall repurchase the CA Interest at a price equal to (A) the value determined pursuant to the new CA Partnership Agreement referred to in Section 3.6, as executed by JFS and AA, or (B), if no new CA Partnership Agreement has been executed by JFS and AA, the fair market value of the CA Interest, as determined pursuant to Section 3.3(a)(i)(B) (2)” (NYSCEF Doc. No. 138 at 3).

It also provides that “if no new CA Partnership Agreement has been expected by JFS [defendant Serval] and AA, 15% of the fair market value of the CA Interest, as determined by a nationally-recognized valuation firm experienced in valuing accounting practices, mutually selected by CA and AA” (*id*).

Based on these provisions, the Court finds that plaintiff is clearly entitled to receive some amount of compensation from Constantin upon her departure from the firm. Defendants’ argument that she failed to meet the conditions precedent (relating to the selection of a nationally recognized valuation firm) does not compel the Court to deny plaintiff’s request for relief on this issue. Those provisions merely concern how the amount is to be calculated; they are not a defense to plaintiff’s claim that she is entitled to receive compensation based on her partnership interest. In other words, even if plaintiff failed to suggest the valuation firm, there is no basis to find that such a failure would result in plaintiff getting nothing when she left Constantin.

That plaintiff may not have immediately turned over the Exchange Agreement is not a basis upon which the Court can ignore its terms. Constantin received the benefit of this contract (plaintiff’s interest in another accounting firm) and then, allegedly, misplaced its copy of the

agreement. Sloppy record keeping does not absolve Constantin's obligation to comply with the terms of this agreement.

However, the vague and confusing provisions prevent the Court from making any findings about the percentage plaintiff is due or what constitutes plaintiff's interest. Plaintiff insists she is due 65% while defendants claim she is due 15%. While the agreement explains that Constantin was receiving plaintiff's interest in another accounting firm in exchange for a 65% partnership interest in Constantin, the agreement then states that "It is understood that AA receives 15% as ownership interest and the remaining 50% in custody" (*id.* at 1). Later, in the agreement, it states that plaintiff's "holding of sixty-five percent (65%) interest in CA comprising 50% held in trust and 15% of owned interest - shall not be reduced or diluted in any manner whatsoever to less than a fifteen percent (15%) interest without AA's prior written consent" (*id.* at 2-3).

The Court has no idea, based on these provisions, whether plaintiff is entitled to 15%, 65%, or something else. The multiple references to the 50% "in custody" or 50% "held in trust" are not defined in the agreement. The Court cannot guess as to what this means based solely on the text of the agreement. Clearly, even though the parties seek summary judgment based on their preferred interpretations, this issue is not appropriate for a summary judgment motion.

The Court also makes no finding about whether the interest to be awarded to plaintiff includes a bonus and the amount remaining in her partnership account. The Exchange Agreement makes no mention of a bonus or what happens to a partner's account.

The Court recognizes that plaintiff insists that she was entitled to receive the 65% because she was the only licensed CPA in the New York office. But this Court cannot make factual findings based on likelihoods.

Plaintiff's insistence that the agreement violates New York's Education Law also does not entitle her to receive 65%. While the statutory provision plaintiff cites does prohibit an unlicensed employee from receiving 35% of the annual net income (and Serval is not a licensed accountant), that does not mean that plaintiff is automatically entitled to get 65% as that is not what the agreement states. Plaintiff cannot have it both ways. She cannot insist that the Court enforce an agreement that she thinks entitles her to get 65% and then claim that the agreement should be disregarded in part. The fact is that the agreement mentions 50% to be held in trust or custody and the Court is unable to make a conclusion about that part as a matter of law on this record.

The Court also observes that this agreement entitles plaintiff to recover reasonable legal fees under the agreement (NYSCEF Doc. No. 138 at 5).

Second Claim

The second cause of action is based on plaintiff's assertion that she did not receive the full amount of the \$215,050 specified in the Compensation and Loan Agreement. The parties both agree that there is \$5,123.11 due. However, they disagree about the interest to be awarded. Defendants assert that they "oppose her request for "statutory interest" in the absence of any discussion of her entitlement to such interest or provable entitlement to the same."

The Court finds that plaintiff is entitled statutory interest on this claim, pursuant to CPLR 5001(a) and 5004, at the rate of nine percent to run from May 22, 2020—the date that plaintiff was supposed to be repaid in full under this agreement (NYSCEF Doc. No. 156).

Third Cause of Action-Breach of Good Faith and Fair Dealing

Plaintiff argues that defendants breached the covenant of good faith and fair dealing by not paying her the balance of her undistributed retained earnings upon her withdrawal from Constantin.

The Court grants the branch of defendants' motion for summary judgment dismissing this cause of action because it is duplicative of plaintiff's breach of contract claim. "[A] claim for breach of implied duty of good faith and fair dealing cannot be maintained where, as here, the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Bd. of Managers of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507, 984 NYS2d 17 [1st Dept 2014]).

Plaintiff even admits that some facts between these two claims (the first and third causes of action) "overlap" but asserts that defendants acted in "bad faith" by not paying her what she is owed. That does not state save this cause of action or provide a basis for recovery separate and apart from the breach of contract claim.

Constructive Trust and Accounting

The Court grants the branch of defendants' motion to dismiss the constructive trust claim. "A constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment. To obtain the remedy of a constructive trust, a party is generally required to establish four factors, or elements, by clear and convincing evidence: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment flowing from the breach of the promise" (*Sanxhaku v Margetis*, 151 AD3d 778, 779, 56 NYS3d 238 [2d Dept 2017]).

Plaintiff failed to raise a material issue of fact for why this equitable remedy should be imposed here. She did not show that there was a transfer in reliance on some promise by

defendants sufficient to sustain this part of the cause of action. This case is about Constantin's failure to pay plaintiff her interest in the partnership. Moreover, the complaint demands that "Constantin has a duty to account and transfer, or cause to be accounted and transferred to Plaintiff *all of the property, assets and funds now remaining in its possession*" (NYSCEF Doc. No. 122, ¶ 83 [emphasis added]). Plaintiff certainly did not state a basis under which she is entitled to receive all of the property, assets, and funds in Constantin's possession.

In other words, the Court finds that this equitable remedy is simply inappropriate where there is no suggestion that Constantin is no longer a going concern or unable to pay plaintiff her partnership share (whatever that is determined to be). Plaintiff certainly speculates that Constantin won't be able to continue its work in New York. But that unsupported assertion is not a basis to impose a constructive trust. To the extent that Constantin is unable to satisfy a judgment obtained by plaintiff, plaintiff will of course be entitled to seek post-judgment remedies.

However, the Court grants the branch of this cause of action that seeks an accounting. It is undisputed that plaintiff was a partner with Constantin. "In order to enlist the aid of a court of equity in vindicating the right to an accounting, a plaintiff must show a demand for an accounting and a failure or refusal by the partner with the books, records, profits or other assets of the partnership in his possession to account to the other partner or partners" (*Conroy v Cadillac Fairview Shopping Ctr. Properties (Maryland), Inc.*, 143 AD2d 726, 533 NYS2d 446 [2d Dept 1988]).

Defendants failed to raise a material issue of fact to defeat summary judgment on this branch of the cause of action. As plaintiff points out, the parties never mutually selected a national recognized valuation firm to produce a fair market value of plaintiff's interest in the

firm. Therefore, plaintiff is entitled to an accounting as it is undisputed that she never received any portion of her interest in Constantin.

Breach of Fiduciary Duty

The Court also dismisses the fifth cause of action as it is duplicative of the breach of contract cause of action. “A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand” (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173, 703 NYS2d 439 [1st Dept 2000]). The allegations for this cause of action in the amended complaint arise out of the same set of facts as the breach of contract claim—namely that she did not receive the value of her interest in the partnership upon her withdrawal from Constantin.

To the extent that this cause of action seeks relief based upon the disciplinary issues with the AICPA, the Court observes that the Compensation and Loan Agreement specifically referenced that plaintiff was to receive compensation as part of this episode (*see* NYSCEF Doc. No. 142 at 1). In this Court’s view, that forecloses plaintiff’s ability to assert that she suffered damages as part of this alleged breach of fiduciary duty (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 700, 924 NYS2d 77 [1st Dept 2011] [noting that suffering damages is an essential element of a breach of fiduciary duty claim]). Plaintiff did not sufficiently explain why she should be entitled to receive additional compensation in light of this agreement.

Claims against Serval

For the reasons stated above, the Court dismisses the third and fifth causes of action as against Serval as these are duplicative of the first cause of action for breach of contract.

However, the Court grants the branch of plaintiff's motion for summary judgment on her first claim for breach of contract against Serval. The Exchange Agreement contains a provision under which Serval personally guaranteed Constantin's obligations under this agreement (NYSCEF Doc. No. 138 at 4). Therefore, Serval is bound by the Exchange Agreement in his personal capacity.

Defendants' argument that there is no note yet—because there has not yet been a valuation of plaintiff's ownership interest—is without merit. Under that theory, defendants could simply refuse to do the valuation and then Serval is somehow absolved of his obligation to personally guarantee Constantin's obligation. That strained reading of the agreement contradicts the entire purpose of the agreement and creates an exception where none exists.

Proposed Amended Answer

Defendants also move to amend their answer to add two affirmative defenses, both of which relate to the fourth cause of action. They insist that the doctrine of unclean hands bars plaintiff's recovery and that plaintiff failed to join an indispensable party for the fourth cause of action (defendant Serval).

The Court finds that the doctrine of unclean hands is wholly inapplicable to this case. “To charge a party with unclean hands, it must be shown that said party was guilty of immoral or unconscionable conduct directly related to the subject matter” (*Citibank, N.A. v Am. Banana Co., Inc.*, 50 AD3d 593, 594, 856 NYS2d 600 [1st Dept 2008]).

Defendants position is that plaintiff has “unclean hands” by not disclosing the exchange agreement—the agreement that discusses, in part, what happens when plaintiff left the partnership. Plaintiff asserts that she did not have the exchange agreement in her possession when she asked for her interest in the partnership, but located it while engaging in discovery. As

plaintiff correctly points out, defendants never located their copy of the agreement (which they do not dispute they signed). Defendants' shoddy record keeping of an agreement they entered into compels the Court to reject the request to add this affirmative defense. Of course, plaintiff eventually disclosed the agreement after she purportedly claimed she found it.

And even if plaintiff's belated disclosure of this agreement was part of some strategy, it does not constitute an unclean hands affirmative defense whereby defendants can raise a defense to the accounting cause of action (the fourth claim) or any other cause of action. The fact is that the doctrine of unclean hands is an equitable defense (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190, 806 NYS2d 480 [1st Dept 2005]) and equity does not suggest that plaintiff should get nothing from her partnership based on a purportedly delayed disclosure of a document defendants should have possessed.

The other affirmative defense that defendants seek to add is similarly without merit. They insist that defendant Serval is an indispensable party and the fact that he was not included in the fourth cause of action (as stated above, plaintiff asserted four other claims against him) compels the Court to deny this claim. The Court has already dismissed the portion of the fourth cause of action for a constructive trust. And the Court sees no reason to include Serval in the accounting portion of the claim as plaintiff is entitled to an accounting from Constantin, not from Serval's personal or individual accounts at this time (if plaintiff obtains a judgment against Serval, then she might be entitled to that information in supplementary proceedings).


Accordingly, it is hereby

ORDERED that defendants' motion (MS004) for summary judgment and for leave to amend is granted only to the extent that the third cause of action, the branch of the fourth claim

that seeks a constructive trust and the fifth cause of action are severed and dismissed and denied with respect to the remaining requests for relief; and it is further

ORDERED that plaintiff’s motion (MS005) for summary judgment is granted only to the extent that her first cause of action for breach of contract is granted as to liability only as against both defendants, the second cause of action is granted, and the portion of her fourth claim for an accounting is granted.

The Court observes that the second claim contained a specific amount; however, the Court must award a single judgment in a case and so that amount will be included in the ultimate judgment obtained by plaintiff.

<u>6/30/2023</u>					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" 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
			<input type="checkbox"/>	DENIED	