SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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CESAR RAMIREZ and ADRIANA RODRIGUEZ, individually and as stockholders of MANHATTAN FARE CORP., and in the right of MANHATTAN FARE CORP.,

Plaintiff, Decision and order

- against - Index No. 521206/2023

MONEER ISSA, MANHATTAN FARE CORP., and 431 FOOD MARKET CORP.,

Defendants, October 16, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3,4,7,9

The defendants have moved seeking to dismiss the first, third, fourth and fifth causes of action. The plaintiff has moved seeking to disqualify defendant's counsel. In addition there is a motion and cross-motion seeking sanctions based on the failure of an individual, Andrew Glenn Esq. to respond to subpoenas. All the motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint, the defendant Manhattan Fare Corp., operated a restaurant called Chef's Table at Brooklyn Fare, which is located at 431 West 37th street, in New York County. The plaintiff was employed as an executive chef by the defendants since 2009 and as of 2022 received twenty-five of all profits representing a twenty-five percent ownership interest in Manhattan Fare Corp. The complaint alleges that on July 1, 2023

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the plaintiff was essentially fired without any justification. The complaint alleges the plaintiff has not been paid his salary since February 2022 and is owed approximately $885,747. The plaintiff commenced this action and has asserted causes of action for violations of Labor Law §190 et. seq., breach of contract, conversion, diversion of corporate assets, defamation, breach of a fiduciary duty and the breach of the covenant of good faith and fair dealing. The defendants have now moved seeking to dismiss the Labor Law claims, the conversion claim, the diversion of corporate assets claim and the defamation claim. As noted the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211

motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

Concerning claims premised upon Labor Law §§ 191, 193, 194 and 195. Labor Law §191 only protects manual workers, railroad workers, commissioned salespersons and clerical and other workers who earn less than $900 per week (see, Labor Law §19(7)). Since the plaintiff's salary was greater than $900 a week the plaintiff cannot pursue this claim.

Labor Law §193 permits a cause of action if wages are summarily reduced without explanation. Even though the plaintiff is a twenty-five percent owner of the company, he had no ability to contest any salary decisions made about him. Thus, the fact he was entitled to profits is unrelated to his added position as a mere employee (cf., Golizio v. Antonine Holding Inc., 1007 WL 47781 [Eastern District of Louisiana 1997]). Furthermore, there had been a split among various cases whether only a reduction in salary is actionable pursuant Labor Law §193 or even a wholesale withholding of payment can sustain a cause of action pursuant to Labor Law §§ 193 (see, Perella-Weinberg Partners LLC v. Kramer, 153 AD3d 443, 58 NYS3d 384 [1st Dept., 2017] and Zinno v. Schlehr, 175 AD3d 843, 107 NYS3d 220 [4th Dept., 2019]). In any event, a recent amendment to the statute has clarified the law in this regard. Thus, Labor Law §193(5) which was amended in August 2021 states that "there is no exception to liability under this

section for the unauthorized failure to pay wages, benefits or wage supplements" (id). Thus, notwithstanding any retroactivity arguments which are not relevant in this case (Boutsikakis v. Tri-Borough Home Care, Ltd., 2023 WL 3620646 [E.D.N.Y. 2023]) the plaintiff has surely adequately asserted a violation of this statute.

Labor Law §194 permits an employee to assert claims he was paid a different rate based upon a protected class. That statute is wholly inapplicable to the facts of this case.

Labor Law §195 requires accurate record keeping concerning wages. Although it appears duplicative of the breach of fiduciary duty cause of action in the same regard, at this juncture it has merit.

Thus, the motion seeking to dismiss the first cause of action is granted to the extent that all claims pursuant to the Labor Law are dismissed except for claims brought pursuant to Labor Law §193 and Labor Law §195.

The third cause of action alleges conversion. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone,

intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred.

The complaint alleges the plaintiff purchased "very high end and expensive equipment, furnishings and accoutrements [sic] suitable for the most elegant, luxurious and discriminating gourmet tastes" (see, Verified Complaint, ¶21 [NYSCEF Doc. No. 1]). The defendant does not dispute this contention but moves seeking dismissal on the grounds the items that have allegedly been converted by the defendant have not been specified. To be sure, the continuation of the lawsuit will necessarily require the plaintiff to specify and itemize the supplies and equipment allegedly taken. However, at this juncture the allegation is proper. Consequently, the motion seeking to dismiss this claim is denied.

The fourth cause of action alleges diversion of corporate

assets. In order to assert any derivative claims the person must be a shareholder of the corporation (Marx v. Akers, 88 NY2d 189, 644 NYS2d 121 [1996]). There is no requirement the remaining shareholders of the corporation have to agree with the derivative lawsuit. Indeed, the purpose of a derivative action "is to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers'" (see, Espinoza ex rel. JPMorgan Chase & Company v. Dimon, 797 F3d 229 [2d Cir. 2015]). Thus, in New York, the "essence of waste is the diversion of corporate asserts for improper or unnecessary purposes" (see, In re Firestar Diamond Inc., 634 B.R. 265 [S.D.N.Y. 2021]). Consequently, the claims of waste, misuse and misappropriation require violations of a fiduciary duty owed by a corporate officer (Ho Myung Moolsan Co., Ltd., v. Manitou Mineral Water Inc., 665 F.Supp2d 235 [S.D.N.Y. 2009]).

In this case the diversion cause of action was filed individually by the plaintiff. Of course, a shareholder cannot assert derivative claims when the individual merely maintains individual claims not shared by all the shareholders. In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from an individual claim the court must engage in two inquiries. First, whether any harm was suffered by the corporation or an individual

stockholder and whether the corporation or the individual stockholder would receive the benefit of any recovery. As the court stated "if there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action…On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]).

In this case the alleged diversion surely affect the entire corporation and is consequently a derivative claim. Therefore, the motion seeking to dismiss the cause of action is granted. The plaintiff shall be given an opportunity to replead this cause of action.

The fifth cause of action alleges defamation. To establish a cause of action for defamation, the party must allege that there was a "[1] false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged by, at a minimum, a negligence standard, and [4] it must either cause special harm or constitute defamation per se'" (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). Further, to successfully plead defamation the complaint must provide the time, place and manner of the defamation

(Buffolino v. Long Island Savings Bank FSB, 126 AD2d 510, 510 NYS2d 628 [2d Dept., 1987]). Further, the defamation cannot be non-actionable opinion (Colantonio v. Mercy Medical Center, 73 AD3d 966, 901 NYS2d 370 [2d Dept., 2010]).

The cause of action alleges specific statements made by the defendant that were published to other employees. Specifically, the complaint alleges the defendant signed a letter which accused the plaintiff of "having engaged in a sustained campaign to steal Company Property (referring to Manhattan Fare Corp.) with a value exceeding $100,000.00" (see, Verified Complaint, ¶21 [NYSCEF Doc. No. 33]). Further, the defendant was also accused of stating that "Cesar has taken dishware, oven parts and wine (including, but not limited to, two cases of Domaine de la Romanee-Conti, which alone have a value of nearly $30,000.00)" (id).

While those specific allegations will be tested through discovery, at this juncture they sufficiently allege defamation. Consequently, the motion seeking to dismiss this claim is denied.

Turning to the motion seeking to disqualify defendant's counsel, the plaintiff seeks to disqualify Andrew Glenn Esq., and his firm on the grounds that Mr. Glenn represented the plaintiff in 2014. The 2014 lawsuit was filed against the plaintiff by an employee alleging racial discrimination.

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that

such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Royner v. Rantzer, 145 AD3d 1016, 44 NYS3d 172 [2d Dept., 2016]).

The former client conflict of interest rule is codified in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client..." (Id). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray

v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept., 2016]).

Thus, in interpreting the prior rule DR 5-108(A)(1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial relationship between the current litigation and the prior one (Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999]).

Thus, concerning this substantial relationship prong, in Spano v. Tawfik, 271 AD2d 522, 705 NYS2d 659 [2d Dept., 2000], the court held disqualification improper where the plaintiff's attorney suing defendant for breach of contract once represented the defendant in a trademark infringement action when plaintiff and defendant were the sole shareholders of the corporation that settled that trademark action. The court noted there was insufficient evidence the matters were substantially related. Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same'

(Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1st Dept., 1994]).

In this case there has been no evidence presented the matters are the same in any significant way. Indeed, the two matters have nothing whatsoever to do with each other at all. Therefore, the motion seeking to disqualify counsel is denied.

Further, Rule 3.7 of the New York Rules of Professional Conduct prohibits an attorney from representing a party where it is likely the attorney will be called as a witness on behalf of the client regarding a "significant issue" (id). Thus, to disqualify counsel the party seeking such disqualification must demonstrate that the testimony of the counsel will be necessary to pursue its own claims (Arons v. Charpentier, 8 AD3d 595, 779 NYS2d 242 [2d Dept., 2004]). Alternatively, even if not strictly necessary, disqualification would be proper where the testimony of counsel would be prejudicial to his or her own client (Daniel Gale Associates, Inc., v. George, 8 AD3d 608, 779 NYS2d 573 [2d Dept., 2004]).

Thus, the crucial question which must be addressed is whether the testimony of defendant's counsel is 'necessary' and even if not necessary whether such testimony will prejudice any of the defendants.

For testimony to be deemed necessary thereby requiring disqualification of counsel, it must be demonstrated that counsel

is 'likely to be a witness' (Rule 3.7) and the testimony cannot be garnered from other sources, is not cumulative and is vital to prove the allegations of the case (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64, 747 NYS2d 441 [1st Dept., 2002]).

In this case the basis for the need to call Mr. Glenn as a witness are statements he made, via email, to plaintiff's counsel about the plaintiff's alleged removal of supplies and kitchen equipment and recordings substantiating such removal. First, the emails were written to plaintiff's counsel and are thus documents and statements made during the course of litigation which cannot be subject to any testimony at all. Moreover, those statements, even if made, do not support the plaintiff's causes of action at all. The plaintiff has sued the defendant for various causes of action. It is curious the plaintiff would seek to disqualify counsel for statements counsel made impugning the plaintiff's integrity. Furthermore, if such videos exists they will surely be required to be produced during discovery. Any questions can be raised to any party or any non-party that has any information about the formation of those videos, their context and their authenticity. There is absolutely no basis to depose the defendant's counsel in this regard.

Likewise, any statements made in any emails about the plaintiff's behavior do not advance the plaintiff's claims at

all. Further, they are surely duplicative of any other witnesses who could be called to speak to those allegations. Therefore, it is not necessary to depose Mr. Glenn. Consequently, the motion seeking to disqualify Mr. Glenn is denied.

Lastly, the motion seeking to require Mr. Glenn to respond to a subpoena and the motion made opposing that request are both denied.

So ordered.

ENTER:

DATED: October 16, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC