

Matter of Agostino v NO ALOHA, LLC

2023 NY Slip Op 34977(U)

May 18, 2023

Supreme Court, Kings County

Docket Number: Index No. 502253/2023

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 18th day of May 2023.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In the Matter of the Application of SONIA
AGOSTINO, directly and derivatively as a member of
NO ALOHA, LLC,

Petitioner,

Index No. 502253/2023

-against-

Cal. No. 1 MS 3

NO ALOHA, LLC and THERESA “TESSIE”
LUCILLE CARROLL, DAVID PATRICK
SHEEHAN, members of NO ALOHA, LLC,

Decision & Order

Respondents.

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The following e-filed papers read herein:
MS 3

NYSCEF Doc Nos.
3-25

Upon the foregoing papers, the motion by petitioner Sonia Agostino (“Sonia”), pursuant to CPLR 3211(a)(1) and (7), to dismiss the counterclaims asserted by respondent David Patrick Sheehan (“Patrick”), is decided as follows:

Background

Petitioner Sonia, respondent Patrick and respondent Theresa “Tessie” Lucille Carroll (“Tessie”) formed NO ALOHA, LLC (“LLC”) for the purpose of operating a bar and restaurant in Brooklyn. Sonia was allegedly in charge of branding, marketing, and social media. Tessie handled accounting, finances, and rent payments, and Patrick oversaw day-to-day operations. On January 23, 2023, Sonia commenced this action directly and derivatively on behalf of the LLC against

Patrick and Tessie for judicial dissolution of the LLC and asserted direct claims against Tessie for fraud and derivative claims against both Tessie and Patrick. Specifically, derivative claims were asserted against Patrick in the form of mismanagement, corporate waste, and breach of fiduciary duty. On April 4, 2023, Patrick filed an answer and asserted four counterclaims against Sonia, for (a) a hostile work environment; (b) breach of fiduciary duty; (c) mismanagement; and (d) tortious interference with business relations. By motion filed on February 14, 2023, Sonia moved for a judicial dissolution of the LLC. On April 16, 2023, by order of this Court, the LLC was judicially dissolved. Sonia now moves, under motion sequence three, for an order dismissing Patrick's counterclaims against her pursuant to CPLR 3211(a)(1) and (7).

Discussion

A party may move for judgment dismissing one or more causes of action asserted against it on the ground that a defense is founded upon documentary evidence, or the pleading fails to state a cause of action (CPLR 3211(a)(1) and (7)). A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211 (a)(1) may be granted only where the documentary evidence utterly refutes the petitioner's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). For purposes of a motion to dismiss, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions or mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 808 [2d Dept 2017]). Letters, emails, and affidavits do not meet the requirements for documentary evidence (*id.*)

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88). The facts as alleged in the complaint are accepted as true, a plaintiff is accorded the benefit of every possible favorable inference, and courts determine only whether the facts as alleged fit within any cognizable legal theory, without regard to whether the allegations can ultimately be established (*JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 980 [2d Dept 2016] [citation omitted]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), and the motion is not converted into one for summary judgment, ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, [] dismissal should not eventuate’” (*Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1272 [2d Dept 2019] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]]). A plaintiff may submit evidence of its own, and a complaint will not be dismissed for failure to state a cause of action where affidavits or other documentary evidence submitted by the plaintiff demonstrate that a cause of action may exist (*Johnson City Cent. School Dist. v Fid. and Deposit Co. of Maryland*, 263 AD2d 580 [3d Dept 1999]).

A hostile work environment

Sonia argues that Patrick’s allegation that “on numerous occasions, Petitioner used hostile, demeaning language towards employees, Respondent, Carroll, and others involved with NO ALOHA” and “repeatedly insulted and ridiculed employees, Respondent TESSIE, and Respondent PATRICK based on Petitioner’s view of their performance” are non-detailed allegations void of any specific dates and items. In addition, Sonia argues that the single incident Patrick alleged when

Sonia called Patrick a “small man” and told him he was “messaging with the wrong person” fails to state a claim because it is an isolated incident that is not severe or pervasive as to permeate the workplace. Further, Sonia argues that Patrick’s allegation that Sonia insisted that an employee who complained about sexual harassment by another employee should be fired does not amount to a hostile work environment because it is not alleged that Sonia sexually harassed the employee. At most, Sonia argues that a retaliation claim pursuant to Executive Law 296 could be asserted against her for firing the employee.

In opposition, Patrick argues that Sonia’s statements of “small man” and “messaging with the wrong person” implies that she will inflict some harm on him as a result of “messaging” with her. Patrick contends that such statement amounted to a threat, which clearly shows that a “hostile” and “abusive” environment was created. In addition, Patrick argues that a single incident with sufficient severity may give rise to the level of creating a hostile work environment and, in any event, his affidavit shows that this incident was not singular or isolated, but repetitive and persistently caustic. Moreover, Patrick argues that Sonia’s retaliatory firing created a hostile work environment in which no employee could feel comfortable bringing forward any issue or complaint they had at workplace. Further, Patrick argues that Sonia’s reliance on *Swartz v. Swartz*, 145 A.D.3d 818, 823 (2d Dept 2016) for her argument that non-detailed allegations void of any specific dates and items cannot withstand a motion to dismiss is misplaced. Patrick points out that the *Swartz* case is about a cause of action based on fraud which was subject to a heightened pleading standard.

In reply, Sonia argues that there is no allegation that she “insulted, ridiculed, or used hostile demeaning language” towards employees, partners, or others involved with the LLC based on their protected status of “age, race or nationality, or engaged in any other offensive of discriminatory

behavior” as required under New York law. Sonia contends that every case Patrick cites to is grounded in a petitioner’s protected status. In addition, Sonia argues that the alleged statements made by her are not severe enough to create a hostile work environment based on controlling caselaw. Further, Sonia submits that the alleged retaliation firing is defeated by documentary evidence. Specifically, text messages between the LLC partners and the general manager show that Sonia was going to fire the employee due to her unprofessional performance and stealing before the employee complained, and thus the firing was not in retaliation.

A hostile work environment exists where the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment (*La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918 [2d Dept 2015]). Various factors, such as frequency and severity of the discrimination, whether the allegedly discriminatory actions were threatening or humiliating or a mere offensive utterance, and whether the alleged actions unreasonably interfere with an employee's work are to be considered in determining whether a hostile work environment exists (*id.*). However, a hostile work environment claim, by its very nature, is predicated on a series of separate acts that collectively constitute an unlawful discriminatory practice (*Matter of Lozada v Hook*, 151 AD3d 860 [2d Dept 2017]). Here, Patrick failed to state a counterclaim for a hostile work environment. Accepting Patrick’s allegations as true, Sonia’s statements or actions do not qualify as an unlawful discriminatory practice under Executive Law 296 and NYC Administrative Code 8-107. Accordingly, Patrick’s counterclaim for a hostile work environment is dismissed.

Breach of fiduciary duty

Sonia argues that Patrick’s breach of fiduciary duty claim is conclusory and merely alleges that “Petitioner breached said fiduciary duty to NO ALOHA by irresponsibly and egregiously

mismanaging the business ... refuses to act in a manner necessary to mitigate the ongoing damages being incurred by the company and its members.” Additionally, Sonia argues that Patrick fails to offer support for his allegation that she breached said fiduciary duty by having discussions concerning proprietary information of the LLC with unvetted parties without involving him.

In opposition, Patrick argues that he successfully pleads a claim for breach of fiduciary duty. Specifically, Patrick argues that Sonia owed fiduciary duties to partners including him as a managing member of the LLC. Patrick also asserts that Sonia had no previous experience in the bar or restaurant industry which led to her egregious inability to perform her duties as a member of the LLC. Patrick further asserts that Sonia breached the fiduciary duty by (a) repeatedly refusing to perform functions consistent with an owner of a restaurant or bar establishment; (b) discussing the LLC’s proprietary information with unvetted parties without involving him; and (c) unilaterally deciding to close the business as a 28% owner when the operating agreement provides that all decisions relating to management and operation of the company shall be made by a majority in interest of the members.

In reply, Sonia argues that the business judgment rule “bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.” In addition, Sonia argues that Patrick’s allegations are confusing and lack particularity. Sonia contends that the allegation that she “repeatedly refused to perform functions consistent with an owner of a restaurant or bar establishment” has no detailed support. Moreover, Sonia contends that the allegation of “unilateral decision to close the business” fails because she did not file a certificate of voluntary dissolution of the LLC unilaterally, instead she petitioned for judicial dissolution and this Court determined that the LLC should be dissolved. Sonia further contends that the allegation of her “discussion concerning the LLC’s proprietary

information with unvetted parties” is not supported by any evidence. However, Sonia submits that she offered documentary evidence in a prior motion showing Patrick admitting to having unauthorized conversations with unvetted parties concerning proprietary information.

To state a cause of action to recover damages for breach of fiduciary duty, a plaintiff must allege: (a) the existence of a fiduciary relationship; (2) misconduct by the respondent; and (3) damages directly caused by the respondent's misconduct (*Parekh v Cain*, 96 AD3d 812 [2d Dept 2012]). A breach of fiduciary duty cause of action must be pleaded with the requisite particularity (*id.*; CPLR 3016(b)). Here, the counterclaim alleges that (a) Sonia owed a fiduciary duty to the LLC; (b) some misconduct of Sonia; and (c) damages caused to the LLC. These allegations are sufficient to state a claim for breach of fiduciary duty. Thus, Sonia’s motion to dismiss such claim is denied.

Mismanagement

Sonia argues that Patrick’s allegation of “gross mismanagement of the LLC in numerous aspects” and that “it negatively affected the company and severely impaired its members’ ability to operate as intended or to further its interest” is void of any specific dates and items and not supported by any documentary evidence.

In opposition, Patrick asserts that due to Sonia’s inexperience, she mismanaged the LLC. Specifically, that she was not familiar with the name of the building’s landlord; additionally, that she continued to operate the LLC despite the warning that the LLC was no longer able to pay the rent and other expenses, causing the LLC to run out of capital completely.

In reply, Sonia argues that not knowing the building’s landlord’s has no bearing on her role within the LLC, which was branding, marketing, and social media. In addition, Sonia argues that

nowhere in his opposition does Patrick state that Sonia did anything in violation of the business judgment rule.

Here, the allegation of the counterclaim for mismanagement is duplicative of the claim for breach of fiduciary duty warranting dismissal.

Tortious Interference with business relations

Sonia argues that Patrick failed to plead the elements of a claim for tortious interference with business relations under New York law. Sonia contends that there exists no third party that Patrick had a business relationship with because the instant action is an internal LLC member dispute not involving any outside third parties. Sonia further contends that it cannot be argued that she acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort by filing a legal petition for judicial dissolution.

In opposition, Patrick asserts that Sonia prevented him from securing a job offer at Troost Bar, thus interfering with his ability to generate additional income because he had no income at the LLC. Patrick further asserts that Sonia did so with the sole purpose of harming him because she continued her employment outside of the LLC in order to generate additional income. In addition, Patrick argues that Sonia unilaterally decided to close the business, as a result, he could no longer do business with the LLC.

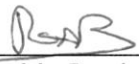
In reply, Sonia argues that Patrick impermissibly adds new facts in his opposition that she “prevented Patrick from securing the job at Troost Bar.” Even accepting this improperly added new fact as true for the purpose of a motion to dismiss, Sonia argues that Patrick still fails to state a claim as the opposition does not allege that Sonia directed any of the alleged “prevention” towards the alleged third party, Troost Bar. Sonia points out that under New York law, in order for

a party to state a claim for tortious interference with prospective economic advantage, the wrongdoer must direct some activities towards the third party.

To prevail on a claim for tortious interference with business relations, a plaintiff must prove it had a business relationship with third party, that defendant knew of that relationship and intentionally interfered with it, that defendant acted solely out of malice or used improper or illegal means that amounted to crime or independent tort, and that defendant's interference caused injury to the relationship with third party (*Joseph v Fensterman*, 204 AD3d 766 [2d Dept 2022]). Here, even accepting as true the allegation that Sonia interfered with Patrick's employment opportunity with Troost Bar, Patrick failed to state a claim as there is no reasonable inference of malice, nor is there any improper or illegal means that amounts to crime or an independent tort that has been alleged. Therefore, the counterclaim of tortious interference with business relations is dismissed.

Based on the foregoing, petitioner Sonia' motion to dismiss respondent Patrick's counterclaims is granted to the extent that the claims for a hostile work environment and tortious interference with business relation is dismissed. The motion is otherwise denied.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court
HON. REGINALD A. BODDIE
J.S.C.