Ramirez v Issa
2024 NY Slip Op 35000(U)
January 2, 2024
Supreme Court, Kings County
Docket Number: Index No. 521206/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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,

January 2, 2024

PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #11

The defendants have moved seeking to dismiss the first, fourth, eighth, ninth and tenth causes of action of the amended verified complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision, 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 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 amended the complaint and

has asserted causes of action pursuant to Labor Law §190 et. seq., diversion of corporate assets, loss of equity interests, false arrest and infliction of emotional distress. The defendants have now moved seeking to dismiss these claims. 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 (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The court already held that allegations pursuant to Labor Law §193 and §195 adequately pleaded causes of action. Any supplemental language contained in the amended verified complaint does not alter that analysis. Thus, those are the only causes of action pursuant to the Labor Law the plaintiff may pursue. Therefore, the motion seeking to dismiss the first cause of action is denied.

The fourth cause of action of the amended verified complaint allege diversion of corporate assets. In the prior

order the court held that the allegations of such diversion were sufficient, however, the court dismissed the claim, with permission to re-plead, on the grounds that the plaintiff, as an individual, could not assert derivative claims.

There is no question that allegations of diversion of funds are harms to the corporation. There might also be harms to the plaintiff, however, those harms suffered are derivative in nature. Therefore, any action must be pursued by the corporation on its behalf in a shareholder derivative action (see, HSM Holdings LLC v. Mantu I.M. Mobile Ltd., 2021 WL 918556 [S.D.N.Y. 2021]). The cases cited by the plaintiff merely hold that individual claims may be pursued where the individual alleges a breach of duty owed that is independent of any duty owed to the corporation (see, Higgins v. New York Stock Exchange Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Alternatively, an individual shareholder may maintain a direct action if the injury suffered was distinct from the injury suffered by the corporation (see, Strougo v. Bassini, 282 F3d 162 [2d Cir. 2002]). The cause of action of diversion of assets asserts that the defendant misappropriated $400,000 of corporate funds. The amended verified complaint alleges that misappropriation constituted a breach of fiduciary duty owed to the plaintiffs "separate and apart from the fiduciary obligations owed by the defendant Issa to the Manhattan Fare Corp." (see,

Amended Verified Complaint, ¶28 [NYSCEF Doc. No. 167]). However, "if a corporation is injured those who own the corporation are injured too" (Strougo, supra). Thus, the misappropriation of funds is a harm to the corporation. That harm devolves upon the plaintiff as well by virtue of his ownership of the corporation. There is no harm that is unique only to the plaintiff that is not also suffered by the corporation. Nor is the injury suffered by plaintiff distinct from the injuries suffered by the corporation. The misappropriation of corporate funds by its very nature harms the corporation and naturally harms the individual members of the corporation thereby. For these very reasons there are no diversion of corporate asset claims that are direct. Consequently, the motion seeking to dismiss the fourth cause of action of the amended verified complaint is granted.

The eight cause of action alleges a loss of equity. There is no cause of action in New York for the loss of equity. In any event, the substance of the cause of action is adequately represented in other causes of action, specifically, breach of contract. Moreover, many of the allegations contained herein could be the subject of other causes of action if properly pleaded. Essentially, this alleged cause of action asserts the defendant stole money from the corporation and that theft has led to the harms enumerated above. Moreover, this alleged cause of action asserts the plaintiff has been excluded from any decision

making and from profits to his detriment. As noted, these allegations are contained in other causes of action of the amended verified complaint. The motion seeking to dismiss the eight cause of action is granted.

The ninth cause of action alleges false arrest. It is well settled that to establish a cause of action for false arrest/false imprisonment, plaintiff must allege that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement which he or she did not consent to and that the confinement was not privileged (Martinez v. Schenectady, 97 NY2d 78, 735 NYS2d 868 [2001]). Moreover, one cannot be liable for false imprisonment if one presented evidence to a police officer who then used his or her own judgment in effectuating an arrest based upon that information (Lowmack v. Eckerd Corp., 303 AD2d 998, 757 NYS2d 406 [4th Dept., 2003]), unless it is shown that the defendant instigated the arrest, or persuaded the officer to arrest the plaintiff (Du Chateau v. Metro-N. Commuter R. Co., 253 AD2d 128, 688 NYS2d 12 [1st Dept., 1999], Donnelly v. Morace, 162 AD2d 247, 248, 556 NYS2d 605 [1st Dept., 1990]).

In this case a complaint was made to the New York Police Department, who in turn, used its own judgment to arrest the plaintiff based upon these complaints. Further, the amended verified complaint does not allege the defendant urged or

pressured the police to arrest the plaintiff or did any improper action to facilitate the arrest. Thus, Plaintiff has failed to state a cause of action for false arrest and the motion seeking to dismiss this cause of action is granted.

The tenth cause of action alleges infliction of emotional distress. The tort of intentional infliction of emotional distress requires the following four elements: extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing, severe emotional distress; a causal connection between the conduct and injury; and severe emotional distress (Howell v New York Post Co., Inc., 81 NY2d 115, 596 NYS2d 350 [1993]). Whether conduct is so outrageous as to fall within this cause of action is a matter which must be resolved in the first instance by the court (Cavallaro v. Pozzi, 28 AD3d 1075, 814 NYS2d 462 [4th Dept., 2006]). The satisfaction of these elements are quite difficult to fulfill (Howell, supra) and require the specific component that the defendant intended to cause such emotional distress (Argyll v. International Security Bureau Inc., 16 AD2d 921, 229 AD2d 467 [1st Dept., 1962]) or was substantially certain that such would follow (Caballero v. First Albany Corp., 237 AD2d 800, 654 NYS2d 866 [3rd Dept., 1997]).

Thus, it has been held that allegations someone has committed crimes does not constitute the intentional infliction of emotional distress (Cunningham v. Security Mutual Security

Co., 260 AD2d 983, 689 NYS2d 290 [3rd Dept., 1999]).

The entire basis for this cause of action is the allegation the defendant orchestrated the plaintiff's arrest. However, even if that would be true that does not substantiate the allegation of any intentional infliction of emotional distress (see, Shapiro v. County of Nassau, 202 AD2d 358, 609 NYS2d 234 [1st Dept., 1994]). Further, while physical injury is not required, the cause of action "must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety" (Daluise v. Sotille, 40 AD3d 801, 837 NYS2d 175 [2d Dept., 2007]). There is no allegation that any of the defendant's conduct unreasonably endangered the plaintiff's safety.

Therefore, the motion seeking to dismiss this cause of action is granted.

So ordered.

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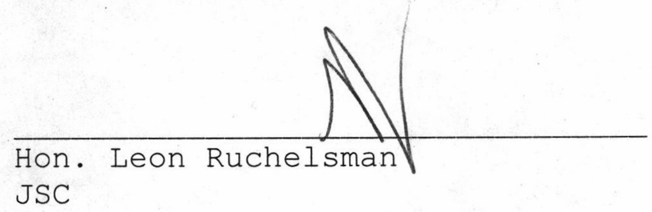

DATED: January 2, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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