

Hopwood v Infinity Contr. Servs., Corp.

2021 NY Slip Op 34189(U)

September 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 721926/2020

Judge: Leonard Livote

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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE Commercial Division Part A
Supreme Court Justice

MARTIN M. HOPWOOD, JR. and
MMH DEVELOPMENT COMPANY, INC.,
Plaintiff,

Index Number 721926 2020

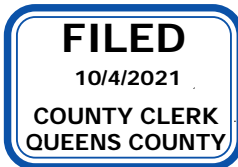
- against-

Motion Date May 18, 2021

INFINITY CONTRACTING SERVICES, CORP.
and SHIRLEY WU,
Defendant

Motion Seq. No. 1

The following numbered papers read on this motion by plaintiffs Martin M. Hopwood, Jr., and MMH Development Company, Inc. (collectively referred to as plaintiffs), for an order pursuant to CPLR § 3211(a)(1) and (7), dismissing the counterclaims filed by defendant Infinity Contracting Services, Corp., (Infinity), based upon documentary evidence and for failure to state a cause of action, and pursuant to 22 NYCRR § 130-1.1¹, to impose sanctions against defendants, and awarding plaintiffs costs and reasonable attorneys' fees incurred in connection with the instant motion.



Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF 8-17
Answering Affidavits - Exhibits	EF 23-24
Reply Affidavits	EF 27

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action sounding in breach of contract, quantum meruit/unjust enrichment,

¹ The court notes that in the Notice of Motion, plaintiffs moved pursuant to 22 NYCRR § 103-1.1, but addressed the correct rule in the motion papers.

and promissory estoppel, alleging the violations of Article 6 of the New York State Labor Law, of the New York State Human Rights Law and the New York City Human Rights Law, and seeking to enforce shareholder liability pursuant to New York Business Corporation Law. Plaintiff Martin M. Hopwood, Jr. (Hopwood), has alleged that he was a former employee of Infinity who worked as its general counsel and operations manager from 2014 to 2020. Hopwood has alleged that he was an attorney who was the principle and sole shareholder of plaintiff MMH Development Company, Inc. (MMH), that in or about April 2014, he agreed to work on a full-time basis for Infinity, under the job title of General Counsel and Operations Manager, and that he directed Infinity to make all payments for his services to MMH. He has alleged that defendant Shirley Wu (Wu) was the principal and sole shareholder of Infinity, and that she served as its Chief Executive Officer and acted as Hopwood's direct and immediate supervisor.

Hopwood has further alleged that Infinity agreed to allow Hopwood, among other things, to be entitled to access to the open labor market, commissions, annual bonuses, and to severance pay. He has alleged that, as an employee of Infinity, he performed his job in a satisfactory manner and had no performance issues, and that he generated significant business opportunities for Infinity. Hopwood has alleged that he was subject to derogatory comments about his age, that in March 2020, Infinity terminated its employment agreement with plaintiffs without cause, effective April 1, 2020, that Wu intended to replace Hopwood with a younger individual to perform the same work, and that his employment was terminated because of his age. Hopwood has further alleged Infinity's termination was specifically designed to unlawfully cut off all bonuses and commissions that were due to him, that Infinity failed to pay Hopwood certain earned commissions, and that, in a breach of its employment agreement with him, Infinity failed to pay Hopwood reasonable severance.

As a result, Hopwood has commenced this action seeking to recover unpaid earned commissions, bonuses, and severance pay and has alleged age discrimination and wrongful termination. Following commencement of the action, defendants filed an answer containing various affirmative defenses, within which, Infinity alleged counterclaims against Hopwood for: 1) legal malpractice, 2) breach of fiduciary duty, and 3) negligence.

Plaintiffs have now moved to dismiss Infinity's three counterclaims pursuant to CPLR § 3211(a)(1) and (7), based upon documentary evidence and for failure to state a cause of action. CPLR § 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede*

Professional Prods., 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Bonavita v Govt. Employees Ins. Co.*, 185 AD3d 892, 893 [2d Dept 2020]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

CPLR § 3211 (a)(7) provides that a party may move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR § 3211, the complaint is to be afforded a liberal construction” (*Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]; CPLR § 3026; see *Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). “In reviewing a motion pursuant to CPLR § 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Benitez v Bolla Operating LI Corp.*, 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; see *Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d at 704).

With regard to the first counterclaim for legal malpractice, plaintiffs have argued that Infinity has not alleged facts that satisfy any of the required elements to sustain a claim for legal malpractice. Plaintiffs have argued that Infinity has failed to set forth facts that show that plaintiffs were negligent, that Infinity failed to allege any facts which demonstrate that Hopwood’s advice was unreasonable, that Infinity failed to allege that it would have received a more advantageous result, would have prevailed in the underlying action, or would not have sustained some actual and ascertainable damage, but for plaintiffs’ negligence, and that this cause of action should be dismissed based upon documentary evidence.

“A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant’s negligence, the plaintiff would have been successful in the underlying action” (*Denisco v Uysal*, 195 AD3d 989 [2d Dept 2021], quoting *4777 Food Servs. Corp. v Anthony P. Gallo, P.C.*, 150 AD3d 1054, 1055 [2d Dept 2017]).

After a thorough review of the allegations contained in the answer, affording those allegations a liberal construction, accepting the facts alleged to be true, and granting Infinity the benefit of every possible favorable inference, the court has concluded that, under the particular circumstances in this matter, Infinity’s counterclaim was sufficient to allege a

cause of action for legal malpractice (CPLR § 3013; *see Denisco v Uysal*, 195 AD3d at 989).

Furthermore, the court has reviewed the documentary evidence presented and has determined that plaintiff's evidence has not resolved "all factual issues as a matter of law," and has not conclusively disposed of Infinity's counterclaim for legal malpractice (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900, quoting *Nevin v Laclede Professional Prods.*, 273 AD2d at 453). Therefore, in light of the above, plaintiffs have failed to satisfy their burden as to the first counterclaim for legal malpractice.

As to the second counterclaim for breach of fiduciary duty, plaintiffs have argued that the breach of fiduciary duty counterclaim is duplicative of the legal malpractice counterclaim, that this counterclaim lacks sufficient detail to clearly inform plaintiffs with respect to the incidents complained of and any related damages, and that it contains only bare and conclusory allegations, which fails to satisfy the requirements of CPLR § 3016 (b). "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017], quoting *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]).

Based upon a careful review of the allegations contained in defendants' answer, the court has determined that this counterclaim is not duplicative of the legal malpractice counterclaim inasmuch as it has been based upon different allegations and seeks different relief. Furthermore, affording the allegations in the answer a liberal construction and accepting them to be true, as well as by giving Infinity the benefit of every possible favorable inference, the court has concluded that Infinity has sufficiently alleged facts to constitute the elements of a counterclaim for breach of fiduciary duty (CPLR §§ 3013, 3016[b]; *see Litvinoff v Wright*, 150 AD3d at 715). The court notes that plaintiffs have failed to address this counterclaim with regard to the branch of their motion brought pursuant to CPLR § 3211 (a)(1). Therefore, based upon the above, plaintiffs are not entitled to the dismissal of Infinity's second counterclaim for breach of fiduciary duty.

With regard to the third counterclaim for negligence, plaintiffs have argued that this counterclaim is devoid of any allegations that plaintiffs breached a duty owed to Infinity or that plaintiffs did, or failed to do anything that fell below a standard of reasonable care, and that Infinity failed to allege damages resulting from plaintiffs' conduct. "In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *see Rampersaud v Hsieh Hsu Mach. Co., Ltd.*, 196 AD3d 612 [2d Dept 2021]).

Upon a thorough review of the allegations contained in defendants' answer, affording those allegations a liberal construction, accepting those factual allegations to be true, and granting Infinity the benefit of every possible favorable inference, the court has concluded that Infinity's counterclaim was sufficient to allege the elements of a cause of action for negligence (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d at 825). Additionally, the court has determined that plaintiffs' documentary evidence has not resolved "all factual issues as a matter of law," nor has it conclusively disposed of Infinity's counterclaim for negligence (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900, quoting *Nevin v Laclede Professional Prods.*, 273 AD2d at 453). Therefore, plaintiffs are not entitled to dismissal of the third counterclaim for negligence.

Lastly, plaintiffs have moved pursuant to 22 NYCRR § 130-1.1, for the imposition of sanctions against defendants and for an award of costs and reasonable attorneys' fees incurred in connection with the instant motion. Plaintiffs have argued that Infinity's legal malpractice counterclaim is completely without merit in law and fact, that it was undertaken primarily to delay or prolong the resolution of the instant litigation, and that the remaining counterclaims for breach of fiduciary duty and negligence are without merit, insufficient, conclusory, and are not supported by any evidence.


Sanctions are permitted pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a), which provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (c), conduct is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

After careful consideration, the branch plaintiffs' motion for sanctions is denied. The court finds that plaintiffs have failed to satisfy their burden (Rules of the Chief Administrator of the Courts [22 NYCRR] § 130-1.1 [a], [c]). Therefore, plaintiffs are not entitled to the relief sought on this branch of their motion.

Accordingly, the motion is denied in its entirety.

Dated: September 30, 2021



J.S.C.

