von Hurwitz v Kocharov
2024 NY Slip Op 34441(U)
December 5, 2024
Supreme Court, New York County
Docket Number: Index No. 150021/2023
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

----------X

LON G. VON HURWITZ, TERREA R. VON HURWITZ,

Plaintiff,

- v -

MICHAEL KOCHAROV, NEW CARE VENTURES, LLC,DIABETES RELIEF CENTER OF THE BRONX MSO LLC

Defendant.

----------X

INDEX NO. 150021/2023

MOTION DATE 03/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - DEFAULT.

In December 2022, plaintiffs Lon G. von Hurwitz (hereinafter, "L.G.") and Terrea R. von Hurwitz ("T.R.") commenced this breach of contract action against defendants Michael Kocharov, New Care Ventures ("New Care"), and the Diabetes Relief Center of the Bronx "Diabetes Relief Center"), alleging that defendants withheld salary owed pursuant to their respective employment contracts. In this motion sequence, plaintiffs move for default judgments under CPLR 3215 against each defendant for failing to timely appear per the CPLR. Defendants have interposed an opposition and cross-move for dismissal of the complaint pursuant to CPLR 3211 (a) (3), (a) (7), and (a) (8). For the following reasons, plaintiffs are not entitled to a default judgment and defendants' cross-motion is granted in part.

BACKGROUND

In their verified complaint, plaintiffs allege that L.G. and New Care entered into a written employment agreement in December 2016, under which L.G. agreed to serve as the company's President with a base salary starting at $175,000 per year and increasing ten percent each year. (NYSCEF doc. no. 1 at ¶ 5,7, complaint.) In June 2019, L.G. and New Care agreed to a new employment contract to supersede their previous one. (NYSCEF doc. no. 21, 2019 employment contract.) This agreement's term began immediately and was to continue for a three-year period or until L.G died or either party terminated the relationship. (*Id* at ¶ 3.1.) It further provided, "the Company may terminate [L.G.'s] employment without Cause, or the employee may resign, by providing thirty (30) days advance written notice." (*Id*.) If New Care were to terminate L.G.'s employment for cause, however, it was required to deliver written notice stating the basis for the termination and would be effective upon delivery. (*Id*.) Moreover, should the agreement be terminated—whether with or without cause or by resignation—L.G. would be entitled to his salary up to the date of termination, including any pay that had accrued to that date and any

"expenses incurred before the date of termination that are required to be reimbursed pursuant to Section 2.2 (the 'Accrued Obligations"). (*Id*. at ¶ 3.2, entitled "Termination payments.")

Although it is unclear from plaintiffs' complaint when L.G. ceased working for New Care, he alleges that New Care did not send him either the 30-day advanced written notice of its intent to terminate or, if for cause, then a notice with the basis of such termination. (NYSCEF doc. no. 1 at ¶ 10, 11.) Thus, plaintiffs aver that New Care owes L.G. $136,800.21 for unpaid wages. In addition to this unpaid wage claim, L.G. avers that New Care owes him approximately $91,500 under Section 2.2 as reimbursement for cash advances he made on behalf of the company to cover operating costs such as payroll and other taxes (NYSCE doc. no. 1 at ¶ 12, 15) and $65,633.27 based on New Care's failure to pay withholding taxes, which the New York Department of Taxation and Finance has assessed against him personally (*id*. at ¶ 16.) With respect to T.R., she alleges that, while employed by Diabetes Relief Center as its Chief of Staff in 2018, it failed to pay wages between August 31, 2018, and December 10, 2018.

Lastly, L.G. advances these same causes of action against Kocharov and Diabetes Relief Center, alleging that both are jointly and severally liable for the money New Care owes as they are parties with a one-hundred percent ownership interest in New Care. (NYSCEF doc. no. 1 at ¶ 13.)

DISCUSSION

Legal Standard

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A court's inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether, from facts alleged and inferences drawn therefrom, plaintiff has stated the elements of a cognizable cause of action. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Motion for a Default Judgment

Before addressing the parties' substantive arguments under CPLR 3211, the Court notes that plaintiffs' motion for a default judgment is, on its face, procedurally defective and must be denied. CPLR 3215 (g) (3) (i) provides, in relevant part, "when a default judgment based upon non-appearance is sought against a natural person in an action based upon nonpayment of a contractual obligation, an affidavit shall be submitted that additional notice has been given by or on behalf of plaintiff at least twenty days before the entry of such judgment." Here, since plaintiffs (1) seek back salary under their employment contracts, and (2) admit that they did not effectuate this additional notice on Michael Kocharov, they are not entitled to said judgment against him. (*See 231st Riverdale LLC v 7 Star Home Furniture Inc.*, 198 AD3d 524, 525 [1st Dept 2021].) Additional service is also required under CPLR 3215 (g) (4) where "a default judgment is based upon non-appearance [] against a domestic or authorized foreign corporation

which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law." (*See* CPLR 3215 [g] [4]; *Bank of N.Y. v Willis*, 150 AD3d 652, 654 [2d Dept 2017].) Again, plaintiffs have failed to submit evidence of this additional service on both New Care Ventures and the Diabetes Relief Center. In reply, plaintiffs do not address their failure to provide notice upon Kocharov and, as to Business Corporation Law § 306, it only argues that "service of process on such corporation shall be complete when the secretary of state is so served"—an argument elides the issue of what proofs are needed to obtain a default judgment. As such, the motion for a default judgment is denied. (*See also Sterk-Kirch v Upton Communications & Elec., Inc.*, 124 AD3d 413, 414 [1st Dept 2015].)

Defendants' Motion to Dismiss

Lack of Personal Jurisdiction over Defendant Kocharov

CPLR 3211 (a) (8) permits a court to dismiss an action against a defendant on the ground that "the court has no jurisdiction of the person of the defendant." As raised here, plaintiffs attempted to serve Kocharov via CPLR 308 (2) at "305 East 51st Street, Unit RU26B, New York, NY 10023" on January 6, 2023, at his "dwelling house (usual place of abode)." (NYSCEF doc. no. 4, affidavit of service.) Plaintiffs' process server avers that he left a copy of the summons and complaint with "Christian S. (doorman), a person of suitable age and discretion" and mailed a true and correct copy to that address. (*Id*.) Further, plaintiffs have attached an additional affidavit of service, wherein their process server avers that he left a copy of the summons and complaint at Kocharov's "dwelling house (usual place of abode)," at the "Four Seasons Private Residences 55 Scollard Street, Toronto" on February 14, 2023. (NYSCEF doc. no. 23, second affidavit of service.) This process server avers that he left the complaint with "Jeffrey R. (concierge), a person of suitable age and discretion."

CPLR 308 (2) provides, in relevant part, that service upon a natural person may be made "by delivering the summons within the state to a person of suitable age and discretion at . . . [the] dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served as his or her last known residence." [1] Kocharov contends that neither of the two attempts to serve him were proper. First, in his affidavit, he attests that he does not have a residence at the 305 East 51st Street address listed on the January 6th affidavit of service (NYSCEF doc. no. 18 at ¶ 21-24); second, in reply, he avers that he does not have a dwelling or place of abode at the 55 Scollard Street address in Toronto per the February 14 affidavit of service (NYSCEF doc. no. 30 at ¶ 3-7.) Further, as he points out, the second process server does not aver that he sent the summons and complaint via first class mail to the 55 Scollard Street address.

Under these circumstances, the Court finds that a traverse hearing is necessary to resolve whether Kocharov was properly served during either attempt. As described above, that he is a Toronto resident—which plaintiffs implicitly recognized through their second attempt—raises an issue of fact as to whether the 305 East 51st address may be considered a dwelling or place of

[1] With respect to the second attempt at service, the affidavit lists an out-of-state Toronto address as the place in which service was completed. CPLR 313 permits "service without the state giving personal jurisdiction" in the same manner as service within the state, including of a natural person under CPLR 308 (2).

abode. As to the second affidavit of service, it is deficient on its face as (1) the server does not state that he mailed the summons and complaint, and (2) he does not attest that the concierge of the Four Seasons with whom he left the complaint, or any other staff member, denied him access to Kocharov's specific apartment as required when process is left with a building's doorman (*see Menkes v Beth Abraham Health Servs.*, 120 AD3d 408, 409 [1st Dept 2014].) Accordingly, a traverse hearing is warranted. (*Federal National Mtge. Assn. v David*, 172 AD3d 572, 573 [1st Dept 2019].)

Plaintiff's Capacity to Hold Kocharov and Diabetes Relief Center Liable on New Care's Obligations

Whether the Court considers this branch of the motion as one brought under CPLR 3211 (a) (3) or 3211 (a) (7), defendants Kocharov and Diabetes Relief Center assert that they may not be held individually liable on plaintiffs unpaid wages and compensation claims against New Care. In their view, the New York Legislature amended Limited Liability Corporation Law §609 in December 2019 (effective February 10, 2020) by adding language to subsection (c) that permits certain categories of plaintiffs to recover on wage claims against *members* of foreign limited liability corporations, i.e., not just against the LLC itself. Accordingly, § 609 (c) now provides, in relevant part:

> "[T]he ten members with the largest percentage ownership interest…of any foreign limited liability company, when the unpaid services were performed in the state, shall jointly and severally be personally liable for all debts, wages, or salaries due and owing to any of its laborers, servants or employees, for services performed by them for such limited liability company." (NY LLC Law § 609 [c].)

Prior to this amendment, defendants argue, members of a foreign LLC—like themselves—could not be held liable for the company's obligations solely by virtue of their status as members thereof. (*See* NY LLC Law § 609 [a]; *Collins v E-Magine, LLC*, 291 AD2d 350, 350 [1st Dept 2002] [affirming dismissal of plaintiff's breach of employment contract claim against members and managers of defendant limited liability company]; *Moshan v PMB, LLC*, 141 AD3d 496, 497 [1st Dept 2016] ["defendant Mager must be dismissed from the action. Plaintiff has not alleged that he was employed by Mager *directly*, nor has he alleged any facts that support piercing [employing defendant LLC]'s corporate veil"]; *Singh v Nadlan, LLC*, 171 AD3d 1239, 1240 [2d Dept 1239].) Thus, while plaintiffs may recover against New Care, defendants contend that they cannot be held jointly and severally liable on L.G.'s wage and compensation claims under his June 2019, pre-amendment employment contract.

The Court only partially agrees. The language of § 609, pre-amendment, and the case law cited above establish that members and managers of New Care may not be held separately liable for any of the company's obligations pre-February 10, 2024—whether for L.G.'s unpaid salary or New Care's obligation to reimburse L.G. for payments he made to support the company. Moreover, plaintiffs' opposition does not rebut this conclusion as none of their citations address an LLC member's liability for unpaid wages. (*See Pokoik v Pokoik*, 115 AD3d

428, 429 [1st Dept 2014] [holding managing member of LLC owed a non-managing member a fiduciary duty]; *Salm v Feldstein*, 20 AD3d 469, 470 [2d Dept 2005] ["the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts"]; *Lio v. Zhong*, 10 Misc. 3d 1068(A) [Sup. Ct., N.Y. County 2006] ["Courts recognize the right of a member of an LLC to sue other managing members based upon claims of breach of fiduciary duty"].) [2] Nonetheless, since the complaint does not identify the precise months or a time period during which New Care allegedly owes L.G. wages, compensations, and/or reimbursements, Kocharov and the Diabetes Relief Center are entitled to dismissal only for those claims that arise before February 2020. Put differently, as plaintiffs contend, to the extent that L.G.'s claims postdate February 10, 2020, they are not subject to dismissal. By contrast, T.R.'s claims for unpaid salary, however, accrued entirely before § 609 was amended and are dismissed as such. (*See* NYSCEF doc. no. 1 at ¶ 17.)[3]

Remaining Grounds for Dismissal

Defendants are entitled to dismissal of plaintiffs' breach of fiduciary duty cause of action. Plaintiffs have asserted an employer-employee relationship with, respectively, New Care and Diabetes Relief Center. More specifically, they allege by failing to adhere to the terms of the Agreement between plaintiff [L.G.] and defendant New Care, pay plaintiff [T.R.] her unpaid wages and negotiate in 'good faith' to resolve this matter amicably and in a timely manner." (NYSCEF doc. no. 1 at ¶¶ 29-31.) However, in the context of LLCs, it is axiomatic that a fiduciary duty runs between partners and/or members of the LLC—not between partners and employees. (*Rather v CBS Corp.*, 68 AD3d 49, 55 [1st Dept 2009]; *Fisher v Maxwell Communications Corp.*, 205 AD2d 356, 357 [1st Dept 1994 ["New York does not recognize tort claims for…wrongful discharge by at-will employees, whether denominated as breach of an implied covenant of good faith and fair dealing or prima facie tort."].)

Likewise, defendants are entitled to dismissal of plaintiffs' claims for conversion and breach of the implied covenant of good faith and fair dealing. Plaintiffs have not asserted any property right of theirs that defendants exercised unlawful ownership over to their exclusion, as required to plead a claim for conversion. (*See Vigilant Ins. Co. of America v. Housing Auth. of the City of El Paso, Texas*, 87 NY2d 36 [1995]; *Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008] ["a cause of action (for conversion) cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability"], citing *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003].) As to their breach of good faith claim, "generally, a breach of contract of good faith and fair dealing is a breach of the contract itself" (*Parlux Frangrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72, 91 [1st Dept 2022]). Thus, a cause of action for breach of the covenant cannot be maintained when "it is premised on the same conduct that underlies a breach of contract cause of action and it is intrinsically tied to the damages allegedly resulting from a breach of contract." (*Id.*, quoting *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011].)

[2] Plaintiffs' citations address one LLC member's fiduciary duty to another member. Plaintiffs do not allege that L.G. was a member of New Care such that defendants owed them said duty.
[3] Because L.R.'s claims are dismissed, the Court does not need to address defendants' argument that the claims of L.G. and L.R. must be severed.

Plaintiffs do not oppose the branches of defendants' motion to dismiss the causes of action for economic duress, unjust enrichment, and quantum meruit. Regardless, plaintiffs have not alleged facts that could compose said claims. (*See Melcher v Apollo Med. Fund. Mgt., LLC*, 105 AD3d 15, 27-28 [1st Dept 2013] ["the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recover in quasi contracts for events arising out of the same subject matter"]; *Beltway 7 Props., Ltd. v Blackrock Realty Advisors, Inc.*, 167 AD3d 100, 105 [1st Dept 2018] [unlike here, where plaintiff does not allege specific facts save that defendants refused to pay plaintiffs, "economic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will."].)

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for a default judgment pursuant to CPLR 3215 is denied; and it is further

ORDERED that defendants' cross-motion for dismissal pursuant to CPLR 3211(a) (7) is granted as plaintiffs' second, third, fourth, fifth, sixth, and seventh causes of action; and it is further

ORDERED that defendants' cross-motion for dismissal of plaintiffs' first cause of action pursuant to CPLR 3211 (a) (7) is granted as against Michael Kocharov and the Diabetes Relief Center of the Bronx to the extent plaintiffs' seeks to hold them jointly and severally liable for New Care's obligations that pre-date February 10, 2020; and it is further

ORDERED that a traverse hearing shall take place on January 7, 2025, at 2:30 p.m. in Part 34; and it is further

ORDERED that the parties shall exchange a witness list for the traverse hearing at least seven (7) days before the hearing; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

20241220161750DRAMSEUR2828D5EB6AEA45359F6B628440FE2BEA

12/5/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**X**	**NON-FINAL DISPOSITION**		
		GRANTED	**DENIED**		**GRANTED IN PART**	**X**	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**