

Nelson v Patterson

2010 NY Slip Op 31799(U)

July 12, 2010

Sup Ct, NY County

Docket Number: 100948/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

GEOFFRY W. NELSON

Plaintiff,

- v -

Berry Paterson.

Defendant.

INDEX NO.: 100948/09

MOTION DATE:

MOTION SEQ. NO.: 02

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

This motion and cross motion are decided in accordance with the attached Memorandum Decision + Order.

Dated:

July 12, 2010

FILED
JUL 19 2010
J.S.C.
NEW YORK
COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
GEOFFREY W. NELSON, JR. and GARFIELD
CAPITAL MANAGEMENT, LLC,

Plaintiffs,

-against-

Index No. 100948/09

BARRY PATTERSON, ROBERT FARRINGTON,
INGLOBALVEST, INC., GLOBALVEST
PARTNERS LLC, MCLAUGHLIN & STERN, LLP
and MARC C. ROSENBERG,

Defendants.

-----X

FILED
JUL 19 2010
NEW YORK
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Joan A. Madden, J.:

Defendants Barry Patterson, Robert Farrington, Inglobalvest, Inc., and Globalvest Partners LLC, an Inglobalvest subsidiary (collectively, the Inglobalvest defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the first amended complaint dated November 17, 2009 on the ground that it does not comply with this court's prior decision and order dated October 29, 2009 (the October order). Plaintiffs Geoffrey W. Nelson, Jr. and Garfield Capital Management, LLC cross-move, pursuant to CPLR 3025 (b), for leave to amend the original complaint and assert a contract claim against Patterson and a claim for quantum meruit relief against Patterson and Globalvest as set forth in a proposed second amended complaint.¹

¹Plaintiffs originally cross-moved for leave to amend the complaint dated January 16, 2009. However, by interim order dated April 1, 2010, issued during oral argument of the pending motions, this court granted plaintiffs' cross motion to the extent of directing plaintiffs to submit a proposed second amended complaint.

The proposed second amended complaint was submitted by plaintiffs in compliance with this court's prior interim order dated April 1, 2010 (the April interim order) and the October order resolving the Inglobalvest defendants' prior motion to dismiss the original complaint. In the October order, this court severed and dismissed Nelson's fraud claim and plaintiffs' negligent misrepresentation claim, permitted Nelson to add a cause of action for breach of the consulting agreement against Globalvest, and directed plaintiffs to serve and file an amended complaint in accordance with the order. At issue, here, is whether plaintiffs should be permitted to add as set forth in their proposed amended complaint ^a contract claim against Patterson and a claim for quantum meruit relief against Patterson and Globalvest, claims which were not at issue in the first motion to dismiss by the Inglobalvest defendants.

In the proposed second amended complaint, plaintiffs allege that Patterson and Farrington fraudulently induced Garfield Capital, a company engaged in brokering private investment transactions, to loan a total of \$125,000 to Inglobalvest, and its related entities, in a series of short-term private bridge loan transactions. Plaintiffs further allege that Patterson, the principal and managing member of Inglobalvest and Globalvest, and Farrington, an officer or employee of these companies, both falsely represented to Nelson, Garfield Capital's principal and managing member, that the loan proceeds would be used to fund Globalvest's purchase of common stock in nonparty SpatiaLight, Inc. Plaintiffs allege that Patterson and Farrington intentionally concealed from Nelson that Inglobalvest and its related entities were on the verge of insolvency, that the loaned sums would be used to fund Inglobalvest's own operating expenses and to repay its debt, and that the SpatiaLight transaction would be funded by other investors, who would receive the financial benefits of the transaction, while plaintiffs would not.

The loans are memorialized in two unsecured promissory notes: the first is dated July 19, 2006 and bears the face amount of \$75,000, and the second is dated August 24, 2006 and bears the face amount of \$50,000. Each note requires Inglobalvest to repay the principal amount, together with interest at 8%, after 90 days. Plaintiffs allege that Inglobalvest failed to timely repay either loan, but that it eventually repaid Garfield Capital \$102,000, leaving an unpaid principal balance of \$23,000, plus accrued interest.

Plaintiffs allege that, following Inglobalvest's default, Patterson and Farrington intentionally falsely represented to Garfield Capital's principal investor, nonparty Leon Frankel, that Inglobalvest had repaid \$115,392.45 on the loans, when, in fact, it had paid \$13,392.45 less than this amount. Plaintiffs further allege that this misrepresentation caused Frankel to refuse to enter into certain transactions with Nelson that would have produced profits for Nelson totaling \$700,000.

Plaintiffs further allege that the additional amount had been paid by Globalvest to Nelson, pursuant to a verbal consulting agreement between the two. Nelson alleges that the agreement required Nelson to locate potential investors and transactions for Globalvest for a period of one year, commencing in June 2006, and obligated Globalvest to pay Nelson \$120,000 in exchange for Nelson's services. Nelson alleges that Globalvest also agreed to enroll him in its employee health insurance program. Nelson alleges that, several months after entering into the agreement, Globalvest stopped paying him the consulting fee and failed to provide him with insurance coverage, and that, therefore, he stopped providing services to it in early 2007.

On these allegations, Garfield Capital asserts a contract claim against Inglobalvest for breach of the promissory notes, and a fraudulent inducement claim against the Inglobalvest

defendants. Garfield Capital and Nelson assert a claim for tortious interference with prospective economic advantage against the Inglobalvest defendants. Nelson asserts a contract claim for breach of the verbal consulting agreement and a quantum meruit claim against Patterson and Globalvest.

Nelson also asserts legal and professional malpractice, breach of fiduciary duty, and negligence claims against defendants McLaughlin & Stern, LLP and Marc C. Rosenberg on allegations that they failed to adequately advise Nelson, failed to protect Nelson's interests in the loans, and improperly simultaneously represented Nelson, Patterson, and Inglobalvest and related entities on the SpatiaLight transaction.

Plaintiffs now seek to assert new claims by Nelson for breach of the verbal consulting agreement against Patterson and for quantum meruit against Patterson and Globalvest, contending that they arise from the same underlying facts as do the breach of contract claims, that the Inglobalvest defendants do not contend that they will suffer any prejudice as a result of the amendments, and that discovery has not yet commenced.

In opposition, the Inglobalvest defendants contend that the new claims impermissibly exceed the leave granted in the October order and the April interim order and are contradicted by plaintiffs' prior statements.

"A motion for leave to amend a pleading is committed to the sound discretion of the trial court. Generally, leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted" (*Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assocs., LLC*, 4 AD3d 290, 293 [1st Dept 2004] [internal citations omitted]; see CPLR 3025 [b]), "unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Matter of Rouson*, 32

AD3d 956, 958 [2d Dept 2006]). Moreover, "[m]ere lateness, unless coupled with prejudice, does not bar an amendment" (*id.*). A party "cannot legitimately claim surprise or prejudice, where the proposed amendments [are] premised upon the same facts, transactions or occurrences alleged in the original complaint" (*Janssen v Incorporated Village of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008]).

No prejudice can accrue to the Inglobalvest defendants, as a result of the proposed amendment. The court also notes that the Inglobalvest defendants have not served and filed an answer and that discovery has not yet begun. Moreover, plaintiffs first allege the existence of a verbal consulting agreement between Nelson and Globalvest in the original complaint (*see* Original Complaint, ¶ 29). Plaintiffs further allege that the agreement obligated Globalvest to pay Nelson a consulting fee of \$120,000 from June 2006 to June 2007, in exchange for Nelson's services in procuring potential investors for private placement securities transactions in which the Inglobalvest defendants were involved, and that Globalvest paid Nelson \$13,392.45 under the agreement, and then ceased the payments (*see id.*). In addition, plaintiffs allege that Patterson is the principal and managing member of Inglobalvest, that Globalvest is an Inglobalvest subsidiary or affiliate, and that Patterson frequently communicated directly with Nelson regarding the various transactions that are the subject of this action (*see id.*, ¶¶ 2, 6, 7, 12-16, 21, 22).

In the proposed second amended complaint, plaintiffs allege additional facts in support of the contract claim against Globalvest and Patterson, including Nelson's entry into the verbal consulting agreement "with Patterson and Globalvest jointly" and Patterson's failure to pay Nelson more than \$106,000 in breach of the agreement (*see* Proposed Complaint, ¶¶ 4, 59, 60). Plaintiffs also allege that the partial payments made to Nelson under the agreement were not

made by Globalvest, but were, instead, made by another entity controlled by Patterson, nonparty Monarch Partners LLC (*see id.*, ¶ 59; Geoffrey W. Nelson, Jr. Apr. 8, 2010 Aff., ¶ 24-6; Monarch Check, Dec. 14, 2006). These factual allegations are sufficient to state a claim for breach of contract against Patterson (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *Ledain v Town of Ontario*, 192 Misc 2d 247, 250 [Sup Ct, Wayne County 2002], *affd for reasons stated* 305 AD2d 1094 [4th Dept 2003]).

For the foregoing reasons, leave is granted to Nelson to assert the proposed sixth cause of action for breach of the consulting agreement against Patterson, as well as Globalvest.

Leave to assert the proposed seventh cause of action for quantum meruit relief by Nelson against Patterson and Globalvest is also granted. In general, "the existence of an express agreement ordinarily precludes recovery in quantum meruit" Tesser v Allboro Equipment Co., ___ AD2d ___, 2003 WL 558499, *1 (2d Dept 2003); West End Interiors, Ltd. v Ajm Constr. & Contr. Corp., 286 AD2d 250, 252 (1st Dept 2001). However, when, as here, "a bona fide dispute as to the ... application of a contract is demonstrated, a plaintiff ... 'will not be required to elect his or her remedies.'" See Wilmoth v Sandor, 259 AD2d 252, 254 (1st Dept 1999)(citation omitted); see also, Waldman v Englishtown Sportswear, Ltd., 92 AD2d 833 (1st Dept 1983).

Last, the Inglobalvest defendants' request for the imposition of sanctions equal to legal fees incurred in connection with the prior motion to dismiss and the instant motion to dismiss is denied.

Accordingly, it is

ORDERED that the motion to dismiss the first amended complaint is denied as moot; and it is further

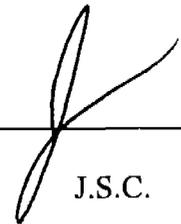
ORDERED that the cross motion for leave to amend the first amended complaint is granted and the proposed second amended complaint in the form submitted by letter dated April 9, 2010 shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall answer the second amended complaint within 20 days from the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 351, 60 Centre Street, on August 19, 2010, at 9:30 a.m.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: July 10, 2010

ENTER:


J.S.C.

FILED
JUL 19 2010
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