

Diakonikolas v New Horizons Worldwide Inc.

2010 NY Slip Op 32008(U)

July 21, 2010

Supreme Court, New York County

Docket Number: 112565/09

Judge: Joan A. Madden

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

PRESENT:

Index Number : 112565/2009

DIAKONIKOLAS, ANTHONY

vs

NEW HORIZONS WORLDWIDE INC

Sequence Number : 001

DISMISS ACTION

PART 11

INDEX NO. _____

MOTION DATE 3/4/10

MOTION SEQ. NO. _____

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

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached Memorandum Decision + order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 21, 2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
ANTHONY DIAKONIKOLAS, on behalf of
himself and all other consumers similarly situated
who opt-in to this civil action,

Plaintiff,

-against-

Index No. 112565/09

NEW HORIZONS WORLDWIDE INC., NEW
HORIZONS EDUCATION CORP., COMPUTER
LEARNING CENTER OF METROPOLITAN NEW
YORK INC., and MARK A. MILLER,

Defendants.

FILED
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
JOAN A. MADDEN, J.:

The defendants New Horizons Worldwide Inc. (New Horizons Worldwide), New Horizons Education Corp. (New Horizons Education), Computer Learning Center of Metropolitan New York Inc. (Learning Center) and Mark A. Miller (Miller) move: for an order, pursuant to CPLR 3211 (a) (1), dismissing the second and third causes of action against all defendants as barred by documentary evidence; for an order, pursuant to CPLR 3211 (a) (5), dismissing the first and third causes of action against all defendants on the ground that the causes of action are time-barred; for an order, pursuant to CPLR 3211 (a) (7), dismissing the first and second causes of action against the defendants Miller, New Horizons Worldwide, and New Horizons Education, and the third cause of action against all defendants, for failure to state a cause of action.

Background

From March 2002 through September 2004, the plaintiff Anthony Diakonikolas (plaintiff) was a student at the Learning Center, an unlicensed computer certification school allegedly

owned and operated by New Horizons Education, and its parent New Horizons Worldwide. The defendant Miller is the principal of New Horizons Worldwide.

Plaintiff Diakonikolas answered the defendants' advertisement for a job interview, which was found by the The New York State Education Department Bureau of Proprietary School Supervision (BPSS) to be false and misleading. Instead of a job interview, plaintiff was sold classes and job placement services. The BPSS oversees and monitors non-degree granting proprietary schools in New York State. Diakonikolas obtained loans totaling \$16,466.95 and in exchange he alleges that he received unauthorized courses and non-existent job placement services.

The first cause of action in the complaint alleges a breach of Education Law § 5004. The second cause of action is for breach of contract. The third cause of action is for fraud in the inducement. The three causes of action are against all of the defendants. The complaint, pled as a class action, seeks damages in the sum of \$16,466.95 together with attorneys' fees, costs, disbursements and interest.

At oral argument, plaintiff conceded that the fraud cause of action was not viable and that the second cause of action only states a claim as against the Learning Center. Accordingly, the court will address the motion to dismiss as it relates to the first cause of action and the second cause of action against the Learning Center.

Defendants argue that first cause of action must be dismissed as to all defendants as time barred as the action was commenced after the expiration of the three-year statute of limitations applicable to an action created by statute under CPLR 214(2). Defendants also assert that the first cause of action must be dismissed as against Miller since Education Law § 5003(8) creates a

private right of action “against the owner or operator of a private school or registered business school” and plaintiff has not and cannot allege any ownership or operation of the Learning Center by Miller. Next, defendants argue that while Education Law § 5004(6) allows for “full recovery” on a contract for enrollment, plaintiff cannot recover from Miller, New Horizons Worldwide or New Horizons Education since the complaint alleges that plaintiff paid the moneys to Learning and not to the other defendants.

As for the second cause of action, defendants argue that the express terms of the contract contradict the allegations that there existed an enforceable contract for Defendant to provide job placement after training and that damages are sought in excess of what is recoverable since the contract claim is based only on the alleged failure to provide job placement.

In opposition, the plaintiff argues that the first cause of action is timely as it is based on a contractual obligation and thus a six-year statute of limitations period is applicable under CPLR 213. In addition, plaintiff argues that the first cause of action states a claim against Miller as it alleges that Miller, in his official capacity as the Chief Executive Officer and President of New Horizons Educational Corporation and through his various corporate veils, operated the Learning Center. Next, plaintiff asserts that there is no requirement in Education Law § 5004(5) that the tuition money be paid to each corporate entity in the chain of ownership of the private school to state a claim under the statute.

With respect to the second cause of action, plaintiff asserts that the documentary evidence and the contractual language, including that the Learning Center would provide plaintiff with a 30-day temporary assignment and that the outplacement team would use its best efforts to obtain him permanent employment, and allegations that the Learning Center did not met these

obligations are sufficient to state a claim for breach of contract.

Plaintiff also argues that the breach of contract claim does not seek excessive damages but rather reflects the amount needed to compensate plaintiff for the \$16,466.95 he paid in exchange for classes that were not approved by New York State and no job placement or temporary assignment. In addition, plaintiff asserts that whether he is entitled to the full damages he seeks is an issue for trial.

Discussion

On a motion pursuant to CPLR 3211 (a) (5), to dismiss a claim on the ground that it is barred by the applicable statute of limitations, the movant bears the initial burden of establishing, prima facie, that the time within which to sue has expired. The burden then shifts to the plaintiff to allege evidentiary facts establishing an exception to the statute of limitations (*Swift v New York Med. College*, 25 AD3d 686 [2d Dept 2006]). The defendants argue that the action was untimely commenced more than three years beyond the statute of limitations applicable to actions to recover a liability, penalty or forfeiture created by statute.

Education Law § 5003 creates a private right action for students. Education Law § 5003 (8) provides:

Private right of action. A student injured by a violation of this article may bring an action against the owner or operator of a licensed private school or registered business school for actual damages or one hundred dollars, whichever is greater. A court may, in its discretion, award reasonable attorney's fees to a prevailing plaintiff.

Education Law § 5004 permits a student to make a full recovery on a contract for instruction, if the person paid to procure the student either was unlicensed, or made fraudulent claims.

* 6]
Education Law § 5004 (5) provides, in relevant part:

full recovery shall be made on any contract for or in connection with any instruction if the student or enrollee was procured, solicited or enrolled outside or on the school premises by a person paid to procure, solicit or enroll students but not having a valid private school agent's certificate pursuant to the provisions of this section at the time that the contract was negotiated or executed or the sale of the instruction was made, or by a person who holds such a certificate but has made fraudulent or improper claims.

CPLR 214 (2) provides a three-year statute of limitations where the action is “to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215.” On the other hand, CPLR 213 (2) provides a six-year statute of limitations where the action is one based “upon a contractual obligation or liability, express or implied ...” Where, as here, the action is based upon both a “contractual obligation” and upon a “liability, penalty or forfeiture created or imposed by statute,” the longer, six-year statute of limitations, as provided in CPLR 213 (2), is applied to the exclusion of the three-year statute of limitations provided in CPLR 214 (2) (*Mandarino v Travelers Property Casualty Ins. Co.*, 37 AD3d 775 [2d Dept 2007]). This conclusion is consistent with the language of CPLR 214 (2), which specifically excepts from its coverage actions based either on a contractual obligation (CPLR 213 [2]), or on fraud (CPLR 213 [8]).

Here, the plaintiff timely commenced this action on September 2, 2009, less than six years after he graduated in September 2004. Therefore, the first cause of action for violation of Education Law § 5004 is timely.

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980]). The pleading is to

be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 [2005]). The credibility of the parties is not under consideration (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]). Where the allegations are ambiguous, we resolve the ambiguities in plaintiff's favor (*Snyder v Bronfman*, 13 NY3d 504 [2009]). However, claims consisting of bare legal conclusions with no factual specificity, are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358 [2009]).

Under this standard, the complaint adequately alleges that New Horizons Education and New Horizon World Wide are liable for damages under Education Law 5003(8) as the owner and operator of the school and contrary to defendants' position, there is no requirement on the statute that the money be paid directly to the owner or operator in order for there to be a claim against these entities. On the other hand, the complaint does not sufficiently allege a cause of action against Miller, who is not alleged to be an owner or operator of the Learning Center but rather is purported to be the principal and Chief Executive Officer of New Horizons Worldwide. In general, both the controlling individual and any affiliated corporations, are treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete domination and control (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]). In addition, although a complaint must be construed liberally and in a light most favorable to the plaintiff on a motion to dismiss, the complaint must allege the material elements of each cause of action asserted, and conduct

* 8]

constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation (*Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 142 [1993]). In this case, not only does the complaint fail to assert that it seeks to pierce the corporate veil to hold Miller liable, it fails to allege sufficient facts to even reasonably suggest that Miller's conduct was an abuse of the corporate form of doing business. Accordingly, the first cause of action must be dismissed as against Miller.

Next, contrary to defendants' position, the second cause of action is not subject to dismissal based on documentary evidence. Dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" (*Acquista v. New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001], quoting, *Guggenheim v. Ginzburg*, 43 NY2d 268, 275 [1977]). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]; see *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Here, the language of the relevant contract reveals that the complaint adequately alleges a claim for breach of contract against the Learning Center based the Learning Center's alleged failure to met its obligations under the the contract attached as Exhibit B to the complaint.

Paragraph 6 of the contract provides that:

Your temporary assignment is for 30-days only. This contract does not guarantee employment with New Horizons, any of its affiliates, the Company where you are placed, or with any company at any

time in the past, present or future. However, New Horizons onsite placement team will make every effort in assisting you in finding full time employment opportunities.

While this paragraph does not guarantee plaintiff's employment with New Horizons or the Company to which the plaintiff was temporarily assigned, it does obligate the Learning Center to provide plaintiff with a 30-day temporary assignment and requires that the Learning Center use its best efforts to place plaintiff permanently. Thus, plaintiff has a viable claim for breach of contract based on the alleged failure of the Learning Center to fulfill these obligations.¹

Additionally, it cannot be said at this stage of the litigation that the damages sought in connection with this claim are excessive. The complaint adequately alleges a basis for recovery of the \$16,466.95 in damages sought since plaintiff allegedly paid this amount for job training and job placement but did not get anything of value in return. In any event, any dispute as to the amount of damages raises an issue for trial and is not a basis for dismissing the breach of contract claim.

Accordingly, it is

ORDERED that the motion is granted to the extent of dismissing (1) the first cause of action against defendant Mark A. Miller only, (2) the second cause of action against defendants New Horizons Worldwide Inc., New Horizons Education Corp., and Mark A. Miller, and (3) the third cause of action against all the defendants; and it is further

ORDERED that within 30 days of this decision and order, the remaining defendants shall

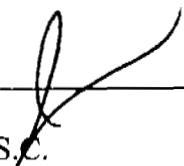
¹It is also alleged that the contract was evidenced by the advertisement noting the procurement of a "Paid Internship" once plaintiff completed training (Complaint, ¶ 39); however, based on plaintiff's opposition papers, the advertisement is are not the focus of plaintiff's breach of contract claim.

serve and file a responsive pleading; and it is further

ORDERED that a preliminary conference shall be held in on September 17, 2010 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

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

.Dated: July 21, 2010



J.S.C.

FILED
JUL 29 2010
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