

Minuto v Longo

2010 NY Slip Op 31468(U)

June 9, 2010

Sup Ct, NY County

Docket Number: 115932/2009

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT

JANE S. SOLOMON

PART 55

Index Number : 115932/2009

MINUTO, ANTHONY

vs

LONGO, VINCENT

Sequence Number : 002

DISMISS

INDEX NO. 5

MOTION DATE 5/19/10

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

1-3

4-6

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

*NB 7-19-10 P.C. set at
end*

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/9/10

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55**

ANTHONY MINUTO,
Plaintiff,

-against-

VINCENT LONGO, VINCENT LONGO INC.,
VINCENT LONGO ON 57TH INC., CARLO
LONGO, ROBERT B. CHAVEZ and SUSAN
ALEXANDRA WEAVER A/K/A SIGOURNEY
WEAVER,

Defendants.

INDEX NUMBER 115932/2009
Motion Sequence 002
DECISION & ORDER

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Defendants Vincent Longo (Longo), Vincent Longo (the Company) and Vincent Longo on 57th Inc. (VL57) (together as Defendants) move to dismiss the complaint against them pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7). Plaintiff Anthony Minuto (Plaintiff or Minuto) cross-moves for leave to amend the complaint. Longo is the chief executive officer (CEO) of and majority shareholder in the Company, which manufactures various make-up products and accessories.

In the original complaint, Plaintiff claimed that he loaned \$50,000 to Longo in 1994 to help start the Company and, beginning in October 2008 for a period of 11 months, he made several loans to Longo and/or the Company for a total of approximately \$500,000, in exchange for 25% of the Company's shares, the position of co-CEO, a monthly salary of \$15,000, and various employment benefits, including healthcare coverage. In the spring of 2009, when the Company's fortunes had allegedly

* 3]

improved, Plaintiff asked for the return of his \$500,000, without success. Additionally, he stated that the promised healthcare coverage was not provided, and about \$10,500 in checks from the Company to him were returned for insufficient funds and never made good. Plaintiff also alleged that, after June 2009, Longo cut him off from active involvement in the Company's affairs. The original complaint asserted causes of action for (1) a declaratory judgment that Plaintiff is a 25% shareholder and co-CEO of the Company, (2) breach of contract, (3) breach of good faith and fair dealing, (4) fraud, (5) conversion, (6) breach of fiduciary duty, (7) an accounting, (8) unjust enrichment, (9) an injunction against conduct inconsistent with the best interests of the Company, (10) piercing the corporate veil, and (11) defamation. Plaintiff acknowledges that he named defendants Chavez and Weaver only because they allegedly are minority shareholders, and directors of the Company.

"Permission to amend pleadings should be 'freely given' (CPLR 3025, subd [b])" (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]), but "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Weinstock v. Handler*, 254 AD2d 165, 171 [1st Dept 1998]). "The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt." *Daniels v. Empire-Orr, Inc.*, 151 AD2d 370, 371 (1st Dept 1989).

The proposed amended complaint adds Fontainebleau Holdings Inc. (Fontainebleau) and Debra S. Minuto (Ms. Minuto) as plaintiffs and annexes affidavits from Plaintiff's son, Marco, an officer of Fontainebleau Holdings Inc., and Ms. Minuto, Plaintiff's wife, who state that they wrote checks to Defendants at Plaintiff's direction and in his behalf. Where the original complaint states that "Minuto loaned approximately \$500,000" to defendants, the proposed amended complaint asserts that Plaintiffs "paid and/or loaned, in the aggregate, a sum in excess of \$400,000" to Defendants and that "these funds would be used solely for the benefit of the Company." Causes of action numbers six, seven and nine, more appropriate to a shareholder's derivative action, are removed, and the remaining eight renumbered. Exhibit A attached to Notice of Cross Motion. All but the defamation claim are based on the alleged financial relationship between Plaintiff and Defendants. Although the proposed amended complaint is unclear as to whether Plaintiff lent money to the Company or purchased its shares, there is sufficient merit to many of the allegations it contains to permit amendment of some causes of action. Leave is granted to amend the complaint only to the extent described below.

Examining the proposed amended complaint covers the same issues raised in Defendants' motion to dismiss. The proposed amended complaint does not change the character of the claims, and Defendants' opposition is rooted in contentions that

[*5]

apply to Plaintiffs' allegations in the proposed amended complaint. Accordingly, Defendants' motion to dismiss the complaint is denied as moot in light of the decision on the cross motion for leave to amend the complaint.

The proposed amended complaint includes a copy of an e-mail message appearing to be from Longo to 14 recipients, all but one having "vincentlongo.com" in their address, dated July 16, 2008.¹ The message states that Longo has "asked Anthony Minuto, whom some of you have already met, to come on board Vincent Longo Cosmetics in the role of Co-CEO, working directly with me." The proposed amended complaint also attaches photocopies of checks and wire transfer documents from Fontainebleau and Ms. Minuto, at the same address, to the Company in amounts ranging from \$8,000 to \$105,940.05.² As indicated, these assertions are supported by affidavits.

In support of their motion, Defendants provide an e-mail message from Plaintiff to Longo, dated December 18, 2008. Exhibit 2 attached to Affirmation in Support. In relevant part, it reads:

"After speaking to Larry I feel he is really trying to be fare [sic] to both of us.
I as well as Larry feel that the paragraph Max has

¹Chavez and Weaver are not included among the addressees.

²A wire transfer of \$105,940.05, from Fontainebleau, appears to replace a check from Fontainebleau in the same amount that did not clear. Adjusting for this, the total funds from Fontainebleau and Ms. Minuto equals \$281,215.85. Plaintiffs also allege that cash payments were made.

prepared for us to sign is really one sided. We both agree that the proper terminology must be as follows. That Mr. Minuto purchased 25% of the stock of Vincent Longo Inc, for 400,000.00 of which the balance of 100,000.00 will be paid when Mr. Longo returns from vacation. At that time the stock will be formally transferred to Mr. Minuto."

Plaintiffs contend that e-mail messages are not the sort of documentation contemplated by CPLR 3211 (a) (1) and object to Defendants' use of this e-mail message. There is no need to examine the evidentiary issue posed by Plaintiffs, however, because the proposed amended complaint's first cause of action seeks a declaratory judgment regarding Plaintiff's stockholder status, just as Defendants assert this e-mail message attempts to prove. In fact, this e-mail message is the only tangible evidence produced so far regarding the nature of the agreement between Minuto and the Company. The first cause of action for a declaratory judgment, therefore, shall continue.

The second cause of action, for breach of contract, shall continue. It is supported by the e-mail messages of July 16, 2008, announcing Plaintiff's employment, and December 18, 2008, apparently negotiating a contract, and the series of payments made allegedly in Minuto's behalf to the Defendants.

The third cause of action, for conversion, is stricken. See *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 (2002) ("Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights") (interior quotation marks

[*7]

omitted). The proposed conversion claim is based on the undisputed transfer of funds to Defendants by Plaintiffs, and the allegations that Plaintiffs relied upon Longo's representations in entrusting funds to the Defendants in exchange for 25% of the Company's shares, which were never delivered, while the funds have been diverted to Longo's personal accounts and/or VL57. On the whole, it repeats the breach of contract claim with additional allegations concerning the use of the funds after they were given to Defendants for the purchase of shares. The alleged wrongful conduct is the failure to return the funds and/or deliver the shares. Diversion of the funds by an employee, including the CEO, would be the basis of an action by or in behalf of the Company, not a cause of action by Plaintiffs in this instance.

The fourth cause of action, for breach of good faith and fair dealing, states that "[b]y reason of the parties' agreement, Plaintiffs were entitled to have Longo and the Company exercise good faith and fair dealing in the performance of their contractual obligations," which Defendants breached by "ousting Plaintiff Minuto from the Company, failing to transfer 25% of the shares to Minuto, precluding Minuto from participating in the management of the Company and by failing to remit any portion of the funds owed to Plaintiffs." Proposed Amended Complaint ¶¶ 70-71. This repeats the breach of contract claim, and is struck as duplicative.

The fifth cause of action, for fraud, adds the necessary element of knowing falsity to the allegations of Plaintiffs' conversion claim, and, thus, is properly pled. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages"). Additionally Plaintiffs allege that Minuto was induced to continue working for the Company by receiving \$10,500 in bad checks over the period October 2008 through June 2009, even though he was supposed to be receiving \$15,000 monthly according to the alleged contract.

The sixth cause of action, for unjust enrichment, is supported by the allegations that Defendants have retained Plaintiffs' funds, as well as not compensating Minuto as promised. If there was no contract between the parties, a claim for unjust enrichment is reasonable. *Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 (2005) ("The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement").

The seventh cause of action, piercing the corporate veil against VL57, appears to be presented backwards. VL57 is identified as a New York-based company, with Longo as sole shareholder, officer and director, which may have improperly received some of Plaintiffs' funds from Longo. "The doctrine of

[*9]

piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (footnote omitted). *Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 (1993); see also *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 (2d Dept 2009) ("A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the Company exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff") (citation omitted). Plaintiffs nowhere suggest a corporate obligation by VL57 to them, nor reference any transaction between them and VL57. It seems that Plaintiffs wish to pursue VL57 in order to pursue Longo, who is already a direct defendant. "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the Company; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Morris*, 82 NY2d at 141. Whether as a matter of form or content, the seventh cause of action, for piercing the corporate veil, is stricken.

As to the cause of action for defamation, there now is

sufficient detail to support a claim. It is alleged that Longo spoke to Randy Kornblatt, a mutual business acquaintance, on the corner of Bleecker Street and Leroy Street, in Manhattan's West Village, in or about September 2009, and he falsely "called Plaintiff Minuto 'a crook,' 'a criminal' and stated that Plaintiff 'stole and embezzled money from the Company.'" Amended Complaint ¶ 109. The elements of defamation "are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Plaintiffs charge Longo with defamation per se, because of Minuto's "excellent reputation for his dealings in business." Amended Complaint ¶ 111; *Liberman v Gelstein*, 80 NY2d 429, 435 (1992) ("[Defamation per se includes statements] that tend to injure another in his or her trade, business or profession"). Quoting an individual word or two is not adequate in itself. *American Preferred Prescription, Inc. v Health Mgmt.*, 252 AD2d 414, 420 (1st Dept 1998) ("As drafted, the complaint thus reveals that plaintiff was merely paraphrasing the statements, notwithstanding the quotations marks around the word 'murderers', and the claim, insofar as based on the above-mentioned comments, should therefore be dismissed"). However, the allegation that Plaintiff "stole and embezzled money from the Company" is particular enough to satisfy the heightened

pleading requirement of CPLR 3016 (a). *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 (1st Dept 2009) (“[Plaintiff] pleads the underlying defamation with the required specificity, setting forth the particular words that were said, who said them and who heard them, when the speaker said them, and where the words were spoken”).

Accordingly, it is

ORDERED that Defendants’ motion to dismiss the complaint against them is denied as moot in light of the decision herein on Plaintiff’s cross motion for leave to amend the complaint; and it is further

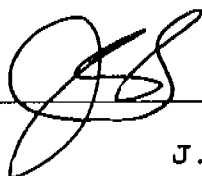
ORDERED that Plaintiff’s cross motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the first, second, fifth, sixth and eighth causes of action and, to this extent, the amended complaint in the form annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed third, fourth and seventh causes of action, respectively for conversion, breach of good faith and fair dealing, and piercing the corporate veil, and those causes of action are stricken; and it is further

ORDERED that Defendants shall answer the amended complaint within 20 days of said service; and all parties shall appear for a preliminary conference in Part 55 on July 19, 2010 at 11 AM. Plaintiff to notify any appearing party not participating on this motion.

DATED: June 9, 2010

ENTER:



J.S.C.

JANE B. SOLOVICH

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE