

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BLAGRAVE	:	CIVIL ACTION
	:	
v.	:	
	:	
NUTRITION MANAGEMENT	:	
SERVICES CO., et al.	:	NO. 05-6790

MEMORANDUM

Bartle, C.J.

July 8, 2008

Plaintiff Richard Blagrove ("Blagrove") brings this action against his former employer, Nutrition Management Services Co. ("NMSC"), as well as against Joseph Roberts ("Roberts"), NMSC's co-founder and Chief Executive Officer, and Kathleen Hill ("Hill"), NMSC's co-founder and President. He asserts claims for: (1) retaliation for reporting mail and wire fraud and securities fraud under the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, *et seq.*; (2) violations of Pennsylvania's Wage Payment and Collection Law ("WPCL"), 43 Pa. Stat. Ann. § 260.1, *et seq.*; (3) fraudulent misrepresentation under Pennsylvania Common Law; and (4) piercing of the corporate veil against defendant Roberts.¹ Now pending before the court is the motion of defendants for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure.

1. In addition, Blagrove initially brought a claim for intentional infliction of emotional distress under Pennsylvania law, but he has since withdrawn that claim.

I.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); see Fed. R. Civ. P. 56(c). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). After reviewing the evidence, the court makes all reasonable inferences from the evidence in the light most favorable to the non-movant. In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004).

II.

For purposes of the pending motion for summary judgment, the following facts are undisputed.

In May, 2004, Blagrove and NMSC began discussions which resulted in NMSC offering Blagrove employment as its Senior Vice President of Operations. Though Blagrove declined the initial offer, the two sides entered into negotiations with respect to Blagrove's salary, bonus, and other terms of his contract. At the conclusion of these negotiations, NMSC finalized its offer of employment and sent Blagrove a letter to that effect. The offer letter concludes: "Please formally acknowledge your acceptance of our offer by signing this letter and [the attached] Management Agreement and returning the originals prior to start date."

Blagrove signed the letter on June 30, 2004 and began employment with NMSC six days later, on July 6, 2004.²

Blagrove worked at NMSC for approximately five months, until December, 2004. During this time, there were a number of disagreements between Blagrove and defendant Roberts. As a result, Blagrove alleges that he was relieved of a number of his professional responsibilities over the course of his employment. In early December, 2004, NMSC informed Blagrove that they did not have a signed copy of his Management Agreement in his file, as NMSC internal policies required. A few weeks later, Blagrove attended a meeting with defendant Hill and a human resources employee. At that meeting, Blagrove stated that he was unwilling to sign a Management Agreement because it contained a covenant not to compete that was unduly long and he was concerned that NMSC would quickly terminate him and leave him unable to pursue other work in his profession. Blagrove was informed that he would be terminated unless he signed the Management Agreement. He again refused to sign the Agreement and resigned.

Three months after leaving NMSC, Blagrove filed a SOX complaint with the Department of Labor ("DOL"). On May 25, 2005, after concluding an investigation, the DOL ruled that there was "no reasonable cause to believe that [NMSC] violated SOX." It dismissed Blagrove's complaint on the grounds that his separation

2. It is disputed as to whether Blagrove also signed the Management Agreement at that time.

of employment occurred because he refused to sign the Management Agreement. Blagrove then filed the present action on December 29, 2005.³

III.

In Count I of his complaint, Blagrove alleges that defendants retaliated against him for reporting mail, wire and securities fraud under SOX. Section 806 of SOX, codified at 18 U.S.C. § 1514A, provides whistleblower protection for employees of publicly-traded companies. Pub. L. No. 107-204, 116 Stat. 745, 802-04 (2002); Livingston v. Wyeth, Inc., 520 F.3d 344, 351 (4th Cir. 2008); Allen v. Admin. Review Bd., 514 F.3d 468, 475 (5th Cir. 2008). Specifically, § 1514A(a) provides in relevant part that:

(a) No [publicly-traded company], or any officer [or] employee ... of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes [mail fraud, wire fraud, bank fraud or securities fraud], any rule or regulation

3. On December 23, 2005, Blagrove also filed a qui tam complaint in this court alleging that NMSC had defrauded Medicare, Medicaid and other government programs by not disclosing rebates it received from manufacturers and vendors to customers which were reimbursed by those government programs. Blagrove voluntarily dismissed that action on December 3, 2007, after the government declined to intervene. Blagrove v. Nutrition Mgmt. Servs. Co., Civ. A. No. 05-6724 (E.D. Pa. Dec. 3, 2007).

of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)[.]

An employee's belief that the reported conduct constitutes fraud must be objectively and subjectively reasonable. Allen, 514 F.3d at 477. Here, all parties agree that defendants Roberts and Hill were the only NMSC employees with supervisory authority over Blagrove.

Blagrove must first demonstrate a prima facie violation of § 1514A. He must establish by a preponderance of the evidence that: (1) he engaged in protected activity or conduct by providing information or a complaint to a NMSC supervisor or to one authorized to investigate and correct misconduct; (2) NMSC knew or suspected that Blagrove engaged in the protected activity; (3) Blagrove suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. § 1980.104; Allen, 514 F.3d at 476. If Blagrove establishes these four elements, NMSC can nonetheless avoid liability if it can "demonstrate[] by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's

protected behavior or conduct." 29 C.F.R. § 1980.104; Allen, 514 F.3d at 476. Defendants challenge Blagrove's ability to meet each of the four elements of a prima facie case and additionally assert that they would have taken the same unfavorable personnel action in any event.

Blagrove sets forth in the complaint, either specifically or generally, a total of seventeen alleged violations of § 1514A, which he divides into five broader categories. First, he alleges that defendants committed mail and wire fraud based on a scheme to defraud customers by making false statements and representations in client proposals with respect to: (1) the provision of specific personnel and programs; (2) the Meal Tracker program; (3) NMSC's cook/chill operations; (4) NMSC's booster and formed puree programs; and (5) charges of 40.9% in addition to an employee's salary for payroll and other administrative expenses. Second, Blagrove contends the NMSC engaged in a kickback scheme wherein NMSC received rebates from manufacturers or vendors but did not accurately disclose those rebates to customers which, in his view, is also mail and wire fraud. Third, Blagrove asserts mail and wire fraud violations stemming from a mischarging scheme under which defendants defrauded four customers: (1) St. Joseph's Hospital; (2) New Courtland; (3) Montgomery School; and (4) St. Vincent's. Fourth, Blagrove maintains that defendants perpetrated a fraud on union locals and on their New York employees such that they engaged in mail or wire fraud. Finally, Blagrove alleges a securities fraud

scheme accusing defendants of: (1) understating NMSC's payables by systematically failing to process vendor bills in a timely manner and making misrepresentations on financial records to understate amounts owed by customers New Courtland, United Methodist, Presbyterian Homes and Plymouth House; (2) inflating NMSC's receivables by overstating the amount owed by customers and understating "bad debt" reserves; (3) inflating NMSC's receivables by overbilling clients; and (4) misrepresenting NMSC's expenses by paying personal expenses for Roberts, and recording such as a legitimate business expense. Blagrove argues that there exist disputed issues of material fact as to each of these alleged violations of § 1514A such that it would be improper to grant the motion of defendants for summary judgment as to any of them.

In determining whether Blagrove points to sufficient evidence to raise a disputed issue of material fact, we must address whether we may properly consider as evidence the Declaration of Richard Blagrove attached to plaintiff's brief in opposition to defendants' motion for summary judgment. The Declaration and plaintiff's opposition brief were both dated June 2, 2008. The Declaration states that Blagrove's purpose in submitting it was "to further amplify and clarify [his] deposition testimony" and "to support [his] Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment." Blagrove Decl. at ¶¶ 3 and 2. The Declaration's factual averments consist primarily of details regarding complaints that Blagrove made to

Roberts or Hill with respect to some of the alleged violations of SOX. In addition, there are a small number of averments pertaining to Blagrove's claim for fraudulent misrepresentation. Defendants counter that Blagrove's Declaration must be disregarded under the "sham affidavit doctrine."

As articulated by our Court of Appeals, the sham affidavit doctrine directs district courts to disregard a subsequent affidavit from a witness who has given prior testimony when "the affidavit comes in later to explain away or patch up [earlier testimony] in an attempt to create a genuine issue of material fact." In re CitX Corp., Inc., 448 F.3d 672, 679 (3d Cir. 2006); Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991). "A sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment." Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 253 (3d Cir. 2007). Thus, "if it is clear that an affidavit is offered solely for the purpose of defeating summary judgment, it is proper for the trial judge to conclude that no reasonable jury could accord that affidavit evidentiary weight and that summary judgment is appropriate." Id.

We conclude that Blagrove's Declaration cannot be considered competent evidence and is being offered solely to defeat the motion of defendants for summary judgment. Blagrove was deposed twice in this matter, first on October 12, 2005 and again on March 28, 2008. In each of these depositions, Blagrove

was asked about the details of the complaints he made to Roberts and Hill. He was not forthcoming with the information described for the first time in his Declaration. In addition, defendants' written interrogatories, answered by Blagrove on March 15, 2008, asked him specifically to identify with respect to each of defendants' alleged violations of SOX:

[A]ny and all comments, notes, complaints, and/or communications by Blagrove to any individual at [NMSC] ... including:

(a) The date, time, and place of each comment, note, complaint, and/or communication;

(b) The person(s) to whom Blagrove made each comment, note, complaint and/or communication;

(c) The content and substance of each and every comment, note, complaint, and/or communication made by Blagrove;

(d) The method by which Blagrove conveyed his comment, note, complaint, and/or communication (e.g., letter, electronic mail, telephone, in-person communication, etc.); and

(e) Identify any documents that evidence, refer, or relate to Blagrove's comment, note, complaint, and/or communication.

Defs.' First Set Interrogs. at Nos. 8, 10, 12, 14, 16. Blagrove did not provide in his answers the information now belatedly provided in his Declaration. He has offered no explanation as to why the information set forth in his Declaration was not disclosed in his answers to detailed questions asked of him at his two depositions or in response to the defendants' detailed

interrogatories. Under these circumstances, no reasonable jury could accord the Declaration evidentiary weight, and we will not do so either.

Blagrove does not point to any record evidence other than his Declaration with respect to the following claims under SOX: (1) the provision of nutrition care management services with specific personnel and programs (Pl.'s Compl. at ¶ 15(1)); (2) the cook/chill operations (Pl.'s Compl. at ¶ 15(3)); (3) St. Joseph's Hospital (Pl.'s Compl. at ¶ 24); (4) St. Vincent's (Pl.'s Compl. at ¶ 27; (5) NMSC's New York Employees (Pl.'s Compl. at 28); (6) Presbyterian Homes; and (7) Plymouth House. Furthermore, Blagrove has failed to cite to any evidence to show that he complained to Roberts or Hill regarding the following claims: (1) NMSC's booster and formed puree programs (Pl.'s Compl. at ¶ 15(4)); (2) securities fraud allegations that clients were overbilled (Pl.'s Compl. at ¶ 30(3)); and (3) securities fraud allegations that NMSC misrepresented its expenses by paying personal expenses for Roberts (Pl.'s Compl. at ¶ 30(4)). We will therefore enter summary judgment against Blagrove and in favor of defendants on his SOX claim insofar as he relies on the above factual support.

With respect to the remainder of Blagrove's claim under SOX, we find that there exist genuine issues of material fact as to whether Blagrove is able to make out a prima facie case and as to whether defendants would have taken the unfavorable personnel action regardless of whether Blagrove had engaged in protected

action. The motion of defendants for summary judgment as to the remainder of this claim will be denied.

IV.

Count II of Blagrove's complaint alleges that NMSC breached an oral agreement to reimburse him for certain of his COBRA payments and other employment-related expenses, in violation of Pennsylvania's Wage Payment and Collection Law, 43 Pa. Stat. Ann. § 260.1, *et seq.* Pl.'s Compl. at ¶ 42. Because the existence of such an oral agreement is a disputed issue of material fact, we will deny defendants' motion with respect to this claim.

V.

Count III alleges a claim for fraudulent misrepresentation under Pennsylvania common law. Both parties agree that to establish his claim for fraudulent misrepresentation under Pennsylvania law Blagrove must prove:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) (citation omitted)

Blagrove maintains that various statements regarding NMSC's bonus policy made to him by Roberts were false and were intended to induce Blagrove to begin working with NMSC. Specifically, the complaint alleges that Roberts made three false

statements to Blagrove that: (1) eighty-nine percent (89%) of all eligible NMSC employees received annual bonuses; (2) every employee who received a bonus received ninety to one hundred percent (90-100%) of the amount he or she was eligible to receive; and (3) Blagrove would receive a bonus totaling thirty-six (36%) of his base pay.⁴ The only record evidence to which Blagrove cites in support of his contention that Roberts made these statements is ¶ 5 of his Declaration, which we have already concluded cannot be properly considered. Accordingly, we will grant summary judgment for the defendants as to Count III of the complaint.

VI.

Finally, Count IV seeks to pierce the corporate veil and hold defendant Joseph Roberts, who is the majority shareholder of NMSC, personally liable for all claims against the corporation. Because a shareholder is generally not personally liable for the obligations of a corporation, "the corporate veil is pierced only when the corporation was an artifice and a sham to execute illegitimate purposes and an abuse of the corporate fiction and immunity that it carries." Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994) (citations

4. In his brief in opposition Blagrove appears to concede that this third statement was not falsely made, and instead hinges his argument on Roberts' statements which misrepresented NMSC's history of paying bonuses to management. Pl.'s Mem. in Opp'n at 32-33.

and internal quotations omitted), aff'd 514 U.S. 938 (1995).

This extraordinary remedy is only justified if it is

shown that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors. In short, the evidence must show that the corporation's owners abused the legal separation of a corporation from its owners and used the corporation for illegitimate purposes.

Id. (citation omitted). In determining whether a shareholder should be personally liable, courts may consider the following:

[F]ailure to observe corporate formalities, non-payment of dividends, insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant shareholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

Id. (citations and quotations omitted).

In the instant matter, the complaint alleges that:

51. Defendant Roberts is the majority shareholder and Chief Executive Officer of NMSC. Roberts exercised near complete control over the affairs of NMSC and personally guaranteed NMSC's line of credit. At Roberts' direction, NMSC has paid and is paying Roberts excessive amounts of remuneration through companies owned or controlled by Roberts.

52. Roberts has used NMSC funds to pay personal expenses for himself rather than paying NMSC's creditors and vendors in a timely manner. Roberts has engaged in mismanagement and waste of NMSC's corporate assets and engaged in a pattern of mismanagement.

Pl.'s Compl. at ¶¶ 51, 52. These allegations remain entirely unsubstantiated. Blagrove points to evidence showing at most that NMSC made payments to a corporation, Ocean 7, which was wholly owned by Roberts and which owned a beach house at the New Jersey shore that was used by Roberts, among others.⁵ This evidence is insufficient as a matter of law to meet Blagrove's heavy burden of showing that the corporate form was a "sham" constituting Roberts' "alter ego." Kaplan, 19 F.3d at 1521. We will therefore grant the motion of defendants for summary judgment as to this claim.

VII.

In sum, we will grant the motion of defendants for summary judgment and deny it in part. We will enter judgment in favor of the defendants and against the plaintiffs as to the SOX claim in Count I insofar as it relies on: (1) the provision of nutrition care management services with specific personnel and programs; (2) the cook/chill operations; (3) St. Joseph's Hospital; (4) St. Vincent's; (5) NMSC's New York Employees; (6) Presbyterian Homes; (7) Plymouth House; (8) NMSC's booster and formed puree programs; (9) securities fraud allegations that clients were overbilled; and (10) securities fraud allegations that NMSC misrepresented its expenses by paying personal expenses for Roberts. We will likewise grant the motion of defendants for

5. Roberts stated that the property is "used for employees. It is used for customers and it is used a couple of weeks a year by myself." Roberts Decl. of April 28, 2008 at 8:11-16.

summary judgment as to Counts III and IV. Defendants' motion is otherwise denied. We will dismiss Count V of the complaint, as that claim has been withdrawn by Blagrove.

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v.	:	
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NUTRITION MANAGEMENT	:	
SERVICES CO., et al.	:	NO. 05-6790

ORDER

AND NOW, this 8th day of July, 2008, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants Nutrition Management Services Co., Joseph Roberts and Kathleen Hill for summary judgment is GRANTED in part and DENIED in part;

(2) the motion of defendants for summary judgment is GRANTED insofar as plaintiff relies on the following allegations to support his claim in Count I of the complaint: (1) the provision of nutrition care management services with specific personnel and programs; (2) the cook/chill operations; (3) St. Joseph's Hospital; (4) St. Vincent's; (5) NMSC's New York Employees; (6) Presbyterian Homes; (7) Plymouth House; (8) NMSC's booster and formed puree programs; (9) securities fraud allegations that clients were overbilled; and (10) securities fraud allegations that NMSC misrepresented its expenses by paying personal expenses for Roberts;

(3) the motion of defendants for summary judgment is GRANTED as to Counts III and IV of the complaint;

(4) the motion of defendants for summary judgment is otherwise DENIED because of the existence of genuine issues of material fact; and

(5) Count V of the complaint is DISMISSED.

BY THE COURT:

/s/ Harvey Bartle III
C.J.