CRC Ins. Servs., Inc. v Kullman
2023 NY Slip Op 35017(U)
December 7, 2023
Supreme Court, Westchester County
Docket Number: Index No. 57257/2019
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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CRC INSURANCE SERVICES, INC.,

Index No. 57257/2019

Plaintiff,

DECISION AND ORDER

-against-

ALEXANDER KULLMAN,

Defendant.

———————————————————————X

The following papers numbered 1 to 9 were read on the motion (seq. no. 2) by defendant/counterclaim-plaintiff Alexander Kullman ("defendant") for an Order pursuant to CPLR § 3212 granting defendant summary judgment: (1) dismissing as a matter of law the Complaint of plaintiff CRC Insurance Services, Inc. ("plaintiff"); and (2) in favor of defendant on his counterclaims and awarding defendant a judgment against plaintiff in the amount of $1,581,156 plus pre-judgment interest, attorneys' fees and costs:

Papers	Numbered
Notice of Motion	1
Affidavit, Affirmation and Exhibits	2
Defendant's Memorandum of Law	3
Defendant's Statement of Undisputed Material Facts	4
Affidavit and Affirmation in Opposition	5

PROCEDURAL BACKGROUND

This action arises from a dispute regarding defendant's alleged failure to pay plaintiff amounts owed pursuant to a promissory note. Specifically, the Complaint alleges that plaintiff is an insurance brokerage company and that in April 2012, plaintiff's parent company, non-party Branch Banking and Trust Company ("BB & T") purchased the parent company of non-party Crump Insurance Services, Inc. ("CIS") (*see* NYSCEF Doc. No. 1 at ¶¶ 1-15). It alleges that CIS, which employed defendant at the time, merged with plaintiff on April 1, 2013, and that defendant accordingly became an employee of plaintiff (*id.*). The Complaint further alleges that defendant, who was at all relevant times employed by plaintiff as a Senior Broker until his involuntary termination for cause on October 8, 2018, had borrowed the sum of $3,750,000 from CIS pursuant to a promissory note dated June 28, 2012 (the "Promissory Note") (*id.*). It alleges that between June 28, 2013 and June 28, 2018, plaintiff, which had replaced CIS as a party to the Promissory Note in connection with their merger, subtracted from

defendant's balance thereunder annual loan forgiveness installments in the amount of $535,714.29 per year, resulting in a balance of $535,714.26 on the Promissory Note (*id.*). The Complaint further alleges that defendant was terminated by plaintiff for cause on October 8, 2018, and that such "For Cause" termination constituted an Event of Default under the Promissory Note, such that defendant's outstanding balance plus interest thereon became immediately due (*id.*). It alleges that defendant has made no payments on the outstanding balance or interest since his termination, and that as of October 8, 2018, defendant owed plaintiff $537,246.85 pursuant to the Promissory Note, exclusive of interest at a rate of 4 percent per year (*id.*). Based upon the foregoing allegations, the Complaint asserts a first cause of action for breach of contract and a second cause of action for unjust enrichment (*id.* at ¶¶ 16-21; 22-26).

Following a lengthy stay of this action pending defendant's appeal of the Court's determination of plaintiff's motion (seq. no. 1) to compel the arbitration of defendant's original counterclaims (*see* NYSCEF Doc. Nos. 7-12; 17-33; 38; 41; 44-46), defendant furnished a First Amended Answer and Counterclaims (the "Answer") in which he, *inter alia*, denied the material allegations of the Complaint; raised ten affirmative defenses

thereto; and asserted three counterclaims (the "Counterclaims"), namely, a first counterclaim for breach of contract, a second counterclaim for breach of contract, and a third counterclaim for violation of Article 6 of the New York Labor Law (*see* NYSCEF Doc. No. 49). Plaintiff thereafter filed a Reply in which it, *inter alia*, denied the material allegations of the Counterclaims and asserted 12 affirmative defenses thereto (*see* NYSCEF Doc. No. 50).

Following joinder of issue, defendant made the instant motion (seq. no. 2) for an Order pursuant to CPLR § 3212 granting defendant summary judgment: (1) dismissing the Complaint as a matter of law; and (2) in favor of defendant on the Counterclaims and awarding him a judgment against plaintiff in the amount of $1,581,156 plus pre-judgment interest, attorneys' fees and costs (*see* NYSCEF Doc. Nos. 55-64). Plaintiff opposes the motion (*see* NYSCEF Doc. Nos. 67-70).

THE RELEVANT LEGAL STANDARD

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this [*prima facie*] burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action."

Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012), *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega*, 18 NY3d at 503.

Accordingly, "summary judgment is appropriate where only one conclusion may be drawn from the established facts" (*see Jones v Saint Rita's R.C. Church*, 187 AD3d 727, 792 [2d Dept 2020]), or where a cause of action and/or the type of damages sought "fails as a matter of law." *See Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 (2008) (reversing the denial of summary judgment where a plaintiff's cause of action "fails as a matter of law"); *accord BBCN Bank v 12th Ave. Rest. Group Inc.*, 150 AD3d 623, 624 (1st Dept 2017) (holding that the Supreme Court should have granted summary judgment dismissing a cause of action that "fails as a matter of law").

MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

With respect to the first cause of action for breach of contract, it is well-settled that "[t]he essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *Blank v Petrosyants*, 203 AD3d 685, 688 (2d Dept 2022), *quoting Liberty Equity Restoration Corp. v Yun*, 160 AD3d 623, 626 (2d

Dept 2018). To the extent that the Promissory Note states that it is governed by Texas law (*see* NYSCEF Doc. No. 58 at p. 5), the Court notes that the elements of a breach of contract claim are the same in Texas as in New York. *See, e.g., Pathfinder Oil & Gas, Inc. v Great W. Drilling, Ltd.*, 574 SW3d 882, 890 (Sup. Ct. Tex. 2019) (stating that "[b]reach of contract requires pleading and proof that (1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach").

Having reviewed the parties' submissions, the Court determines that defendant has met his *prima facie* burden of demonstrating entitlement to summary judgment dismissing the first cause of action for breach of contract. Specifically, by way of defendant's affidavit, which is based upon his personal knowledge, defendant has furnished *prima facie* evidence that he did not materially breach the terms of the Promissory Note, as his submissions reflect that defendant was not terminated "For Cause" as defined in the Promissory Note, such that there was not an "Event of Default" that would trigger the requirement that defendant immediately pay to plaintiff the Promissory Note's entire remaining unforgiven principal balance and all

accrued interest. *See* NYSCEF Doc. Nos. 56; 58; *see also Fortuna Design & Constr., Inc. v 888 Crescent, LLC*, 2023 N.Y. App. Div. LEXIS 6046, **2-3 (2d Dept Nov. 22, 2023) (holding that "[t]he defendants demonstrated, *prima facie*, that Ho did not breach the contract by submitting, *inter alia*, an affidavit from Ho"); *Shapiro v John T. Mather Hosp. of Port Jefferson, N.Y., Inc.*, 208 AD3d 913, 914 (2d Dept 2022) (stating that "the [defendant] Hospital demonstrated, *prima facie*, that it did not breach any such agreement"); *Klein v Signature Bank, Inc.*, 204 AD3d 892, 896-897 (2d Dept 2022) (holding that "[c]ontrary to the plaintiffs' further contention, the [defendant] bank showed, *prima facie*, that it did not breach the agreement").

However, in opposition, plaintiff has cited triable issues of fact that preclude an award of summary judgment in defendant's favor dismissing as a matter of law the first cause of action. In particular, plaintiff has furnished the affidavit of Stefani Petty ("Petty"), which affidavit is based upon Petty's personal knowledge in having provided Human Resources support to plaintiff during the relevant times. *See* NYSCEF Doc. No. 70. Petty avers that in 2018 she conducted an investigation into defendant's alleged office misconduct, and personally interviewed five of plaintiff's employees, including some on several occasions, and determined that defendant should be

terminated for cause due to his engaging in unethical and inappropriate workplace behavior, including making racial slurs to co-workers and engaging in harassing, verbally abusive and discriminatory behavior to colleagues. *See id.* at ¶¶ 4-27. As such, plaintiff's submissions reflect the presence of triable issues of fact regarding whether defendant was terminated "For Cause" as defined in the Promissory Note, and accordingly whether an "Event of Default" occurred such that defendant materially breached the Promissory Note's terms by failing to immediately pay plaintiff all amounts owed thereunder. *See* NYSCEF Doc. Nos. 58; 70; *see also Hudson Val. Window Cleaning, Inc. v Rotron Inc.*, 212 AD3d 578, 579 (1st Dept 2023) (affirming the denial of summary judgment and holding that "plaintiff's motion to dismiss defendant's breach of contract counterclaim was properly denied, as defendant set forth facts sufficiently apprising plaintiff of its valid breach of contract claim"); *Parlux Fragrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72, 89-90 (1st Dept 2022) (finding that the "Supreme Court correctly denied that aspect of defendants' motion seeking summary judgment dismissing plaintiffs' cause of action for breach of the license agreements" due to "the existence of triable issues of fact"); *Haddock v Idle Media Inc.*, 176 AD3d 574, 574 (1st Dept 2019)(stating that "[s]ummary judgment was properly denied

in this breach of contract action. The record presents a number of outstanding issues of fact").

Therefore, the branch of defendant's motion for summary judgment dismissing the first cause of action pursuant to CPLR § 3212 is denied.

However, the Court determines that defendant is entitled to summary judgment dismissing the second cause of action for unjust enrichment[1] as a matter of law. The Court agrees with defendant that, given that the first and second causes of action are both grounded in plaintiff's allegation that it has been damaged due to defendant's failure to pay amounts owed pursuant to the Promissory Note after he was allegedly terminated "For Cause," and because the parties agree that the Promissory Note is a valid contract governing their dispute, the second cause of action duplicates the first cause of action and is therefore dismissed as a matter of law pursuant to CPLR § 3212. *See* NYSCEF Doc. No. 1 at ¶¶ 16-21; 22-26; NYSCEF Doc. No. 56 at ¶ 23; NYSCEF Doc. No. 58; *see also Avery v WJM Dev. Corp.*, 216 AD3d 887, 890 (2d Dept 2023) (stating that "[a]n unjust enrichment claim is not available where it simply duplicates, or

[1] "The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Travelsavers Enters. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 (2d Dept 2017).

replaces, a conventional contract or tort claim" and noting that "[h]ere, recovery on an unjust enrichment theory is precluded, since that cause of action arises out of the same subject matter as the breach of contract cause of action, which remains a viable part of this case despite the denial of summary judgment to the plaintiff on the issue of liability"); *Panwest NCA2 Holdings LLC v Rockland NCA2 Holdings, LLC*, 205 AD3d 551, 552 (1st Dept 2022) (holding that "[p]laintiff's unjust enrichment claim should have been dismissed as duplicative of the breach of contract claim. The parties do not dispute the existence of a valid written agreement, and the issue here is whether defendant breached the agreement").

Accordingly, the branch of defendant's motion for summary judgment dismissing the second cause of action pursuant to CPLR § 3212 is granted, and that claim is hereby dismissed as a matter of law.

MOTION FOR SUMMARY JUDGMENT REGARDING THE COUNTERCLAIMS

Defendant's first and second counterclaims each sound in allegations of breach of contract, and allege that plaintiff breached an employment agreement dated October 12, 1999 entered into between defendant and plaintiff's predecessor-in-interest (the "Employment Agreement") by improperly terminating defendant on a purported "For Cause" basis and by withholding $292,578 in

commission compensation that was allegedly owed by plaintiff to defendant under the Employment Agreement.[2] *See* NYSCEF Doc. No. 49 at ¶¶ 32-34; 35-37; *see also* NYSCEF Doc. No. 57.

As with plaintiff's cause of action for breach of contract, defendant has established *prima facie* entitlement to summary judgment regarding his two counterclaims for breach of contract by way of the averments in his affidavit based upon defendant's personal knowledge of the conduct underlying the respective alleged breaches. *See* NYSCEF Doc. No. 56 at ¶¶ 6-22. However, Petty's affidavit in opposition, which is similarly based upon her personal knowledge in investigating defendant's alleged workplace misconduct in 2018 that led to his termination, demonstrates the existence of triable issues of fact concerning whether defendant's termination constituted "Discharge for Cause" as defined in the Employment Agreement. *See* NYSCEF Doc. No. 70 at ¶¶ 1-29. As such, the Court on this Record cannot determine whether plaintiff materially breached the Employment Agreement by improperly terminating defendant and by relatedly withholding $292,578 in commission compensation. *See* NYSCEF

[2] The Employment Agreement provides that it is governed by California law. *See* NYSCEF Doc. No. 57 at Art. 15. As with Texas, California has the same requisite elements for a breach of contract claim as does New York. *See, e.g., Oasis West Realty, LLC v Goldman*, 51 Cal. 4th 811, 821 (Sup. Ct. Cal. 2011) (stating that "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff").

Doc. No. 57 at Art. 6.2; *see also Parlux Fragrances, LLC*, 204 AD3d at 89-90 (holding that the "Supreme Court correctly denied that aspect of defendants' motion seeking summary judgment dismissing plaintiffs' cause of action for breach of the license agreements" due to "the existence of triable issues of fact"); *Haddock*, 176 AD3d at 574 (stating that "[s]ummary judgment was properly denied in this breach of contract action. The record presents a number of outstanding issues of fact").

Therefore, the branch of defendant's motion for summary judgment in his favor regarding the first and second counterclaims for breach of contract is denied.

Triable issues of fact also preclude an award of summary judgment in defendant's favor with respect to the third counterclaim seeking damages in connection with plaintiff's alleged violation of Article 6 of the New York Labor Law. In sum and substance, the third counterclaim alleges that plaintiff violated Sections 191(c) and 193 of the Labor Law in connection with plaintiff's termination of defendant by failing to pay him wages due in the amount of not less than $792,578 and/or by making unauthorized deductions from defendant's wages for an improper and unjustified purpose. *See* NYSCEF Doc. No. 49 at ¶¶ 38-50. Given the Record presently before the Court on this motion, which notably includes conflicting sworn testimony from

defendant and from Petty regarding the factual circumstances that led to defendant's termination from plaintiff's employment, triable issues of fact regarding wages allegedly owed by plaintiff to defendant preclude an award of summary judgment in defendant's favor on his third counterclaim. *See* NYSCEF Doc. Nos. 56-58; 70; *see also Kieper v The Fusco Group Partners Inc.*, 152 AD3d 1030, 1032 (3d Dept 2017) (affirming the denial of summary judgment regarding a Labor Law § 193 claim and stating that "we conclude that the record discloses triable issues of fact as to whether plaintiff, under the terms of the employment agreement, earned the commissions alleged in the complaint"); *Kaye v Artmatic Corp.*, 214 AD2d 473, 474 (1st Dept 1995) (holding that "[t]here are issues of fact which preclude summary judgment on plaintiff's claim for statutory damages for commissions allegedly not timely paid to the decedent pursuant to Labor Law § 191-c").

Accordingly, the branch of defendant's motion for summary judgment in his favor concerning the third counterclaim is denied.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment (seq. no. 2) is granted in part and denied in part. Specifically, the branch of defendant's motion for

summary judgment dismissing the second cause of action pursuant to CPLR § 3212 is granted, and that claim is hereby dismissed as a matter of law; and defendant's motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.[3]

Dated: White Plains, New York
December 7, 2023

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Ogletree Deakins Nash Smoak & Stewart PC
Attorneys for Plaintiff
599 Lexington Avenue, 17th Floor
New York, New York 10022

Kudman Trachten Aloe Posner LLP
Attorneys for Defendant
488 Madison Avenue, 23rd Floor
New York, New York 10022

[3] All other arguments raised on this motion and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.