Weening v Modes Distex Inc.
2005 NY Slip Op 30470(U)
September 29, 2005
Sup Ct, NY County
Docket Number: 601523/04
Judge: Herman Cahn
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SCANNED ON 10/5/2005

[* 1]

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

PRESENT: Cahn Justice

PART 49m

Martin Weening

- v -

Modes Dister Inc.

INDEX NO. 601523/04

MOTION DATE 8/8/05

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 05 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/29/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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MARTIN WEENING

Plaintiff

-against-

Index No. 601523/04

MODES DISTEX INC. and ROBERT BARAKETT,

Defendants.

----------X

FILED
OCT 05 2005
COUNTY CLERK'S OFFICE
NEW YORK

CAHN, J.

This action arises out of an employment agreement between plaintiff Martin Weening and defendant Modes Distex Inc. Plaintiff now moves for partial summary judgment on the first cause of action for breach of contract. For the reasons set forth below, plaintiff's motion for summary judgment is granted.

FACTS

Plaintiff and Distex entered into an employment agreement dated as of July 1, 2002, pursuant to which Distex agreed to employ plaintiff as its Chief Executive Officer for a term of 18 months, until July 1, 2004 (Employment Agreement, ¶ 1 [Aff. of Steven I. Super, Exh B]).

Pursuant to the Employment Agreement, plaintiff was required to provide certain services that were described as "executive/management/sales/creative services" as requested by Distex' Chairman, defendant Robert Barakett, subject to Barakett's direction (id., ¶ 2). Plaintiff's compensation, as set forth in the Employment Agreement, included: (1) an annual salary of $175,000; (2) $800 per month for automobile expenses; (3) $1,500 for health insurance; and (4) a bonus based the company's net sales (id., ¶ 3).

The Employment Agreement included separate provisions for "termination without cause" and "termination for cause." Pursuant to paragraph 5 of the Employment Agreement, if Distex terminated the Agreement without cause, it remained liable for all financial obligations owed plaintiff under the Agreement, including salary and expenses as severance:

> The Company shall be entitled to terminate this Agreement upon notice to Employee without cause, for any reason or for no reason, whereupon (a) Company shall remain liable for all financial obligations owed Employee under this Agreement ....

Id., ¶ 5.

Pursuant to paragraph 6, Distex could terminate the Employment Agreement at any time for "Cause." If Distex terminated the Employment Agreement for "Cause," Distex was required to give plaintiff "written notice" of any termination, and such termination would be effective upon plaintiff's receipt of such notice:

> The Company may terminate this Agreement for Cause at any time by giving Employee written notice thereof and such termination shall be effective upon receipt thereof by Employee.

Id., ¶ 6.

On January 6, 2004, Barakett called plaintiff, and advised him that Distex was terminating the Employment Agreement (1/27/05 Barakett Aff., ¶ 8 [Super Aff., Exh E]; Barakett Dep. at 221:14-221:25 [Super Aff., Exh C]). Although Distex now contends that the termination was for cause, Distex failed to give plaintiff written notice that the Employment Agreement was terminated for cause (Barakett Aff., ¶ 8; Barakett Dep. at 218:13-220:21]). In fact, Distex failed to give plaintiff any written notice of the termination (Barakett Aff., ¶ 8 ["I cannot find any email termination notice. I realize now that, before sending the email that I had composed, I decided to

call Plaintiff instead"]; Barakett Dep. at 221:14-221:25).

Pursuant to paragraph 13, all notices or other communications under the Employment Agreement were required to be in writing, to be effective (Employment Agreement, ¶ 13]).

Distex claims that the Employment Agreement was terminated for cause based upon two subsections – (a) and (c) – of the termination for cause section (Barakett Dep. at 192:25-193:7). Pursuant to these two subsections, "Cause" justifying termination of the Employment Agreement was defined as: "(a) Employee's willful misconduct in connection with the business of the Company" and "(c) Employee's persistent failure to provide services reasonably requested by the President of the Company" (Employment Agreement, ¶ 6 [a]; [c]).

The sole basis for Distex' claim of plaintiff's "willful misconduct" is Distex' allegation that plaintiff "misrepresented his experience, connections, [and] successes in the industry" (Barakett Dep. at 150:10-150:20). With respect to the claim that plaintiff failed to "provide services reasonably requested by the President of the Company," the sole basis for this claim is Distex' allegation that plaintiff "failed to grow the business" (Defendants Amended Response to Plaintiff's Interrogatories [Super Aff., Exh D]; Barakett Dep. at 156:23-156:25; 192:13-192:14).

Plaintiff contends that he was terminated without cause, and that Distex never paid him the salary or expenses that were required to be paid upon a termination without cause, including $114,000 in unpaid salary; $5,600 for unpaid automobile expenses; $10,500 for unpaid health insurance payments; and $12,000 for unpaid bonus. Plaintiff further contends that, as of December 23, 2003, Distex owed him $27,596.60 in salary arrears, and this sum, plus additional

amounts owed thereafter until the termination of the Employment Agreement, was never paid (Weening Aff., ¶ 3).

DISCUSSION

In support of his motion for summary judgment, plaintiff argues that the Employment Agreement required written notice of termination for cause, and it is undisputed that Distex failed to give any written notice when it terminated the Employment Agreement on January 6, 2004. Plaintiff further argues that, because the Employment Agreement was thus terminated without cause, Distex remains liable for all of the financial obligations under the Employment Agreement, including severance payments and other compensation. Accordingly, plaintiff concludes that he is entitled to summary judgment on his first cause of action for breach of contract.

In opposition to the motion, defendants contend that there are issues of fact as to whether plaintiff was terminated for cause. Specifically, defendants contend that, given the use of the conditional word "may" instead of "must" in the termination for cause provision, there was no absolute requirement that such termination had to be provided in writing. Defendants also argue that, because plaintiff and Barakett exchanged a series of e-mails after the initial phone conversation in which plaintiff immediately provided Distex with a written acknowledgment of his acceptance of the termination, there are questions of fact as to whether plaintiff waived the right to receive written notice of termination, and whether that subsequent exchange of e-mails satisfied the requirements set forth within the Employment Agreement for the provision of notice of termination for cause.

Summary judgment is appropriate where an action turns on the construction of a

contract, and the contract language is unambiguous (Namad v Salomon Inc., 74 NY2d 751 [1989]; Mallad Const. Corp. v. County Fed. Sav. & Loan Assoc., 32 NY2d 285 [1973]; Hay Group Inv. Holding B.V. v Saatchi & Saatchi Co. PLC, 223 AD2d 458 [1st Dept 1996]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed, and the parties' reasonable expectations (Wallace v 600 Partners Co., 86 NY2d 543 [1995]; International Marine Investors & Mgt. Corp. v Wirth, 245 AD2d 544 [2d Dept 1997]).

A writing is ambiguous only where "the agreement on its face is reasonably susceptible of more than one interpretation" (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986]; accord Beacon Music Co. v G. Schirmer, Inc., 141 AD2d 484 [2d Dept 1988]). The language of a contract is not ambiguous simply because the parties urge different interpretations, especially where one party's proffered interpretation fails to give meaning and effect to all provisions (Bethlehem Steel Co. v Turner Constr. Co., 2 NY2d 456 [1957]; accord Hunt Ltd. v Lifschultz Fast Freight, Inc., 889 F2d 1274 [2d Cir 1989]).

Here, paragraph 6 of the Employment Agreement, which provides that Distex "may terminate this Agreement for Cause at any time by giving [plaintiff] written notice thereof," is clear and unequivocal. Based upon a plain reading of this language, by failing to provide plaintiff with written notice of termination, Distex failed to satisfy a condition precedent for termination for cause. Where an agreement specifies conditions precedent to the right of cancellation, the conditions must be complied with prior to a party's execution of that right (see Rebh v Lake George Ventures, Inc., 223 AD2d 986 [3d Dept 1996]; Hanson v Capital District Sports, Inc., 218 AD2d 909 [3d Dept 1995]). Since Distex failed to satisfy the condition

precedent of written notice, it could not have terminated the Agreement "for cause" as a matter of law.

Although defendants argue that the requirement for written notice of termination for cause was not mandatory because the word "may" appears in the same sentence that mentions "written notice," a plain reading of the termination for cause provision, where the word "may" is juxtaposed immediately before the word "terminate" and the words "written notice" occur later in the sentence, makes crystal clear that the permissive word "may" has no relationship to the requirement for written notice. Clearly, the word "may" relates to the company's termination rights, and has absolutely no connection with the requirement for written notice. Defendants' proposed construction of the sentence, whereby "may" is connected to the written notice provision, defies common sense, and a plain reading of the contractual provision. The "mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (Bethlehem Steel Co. v. Turner Const. Co., 2 NY2d at 460; Federal Deposit Ins. Corp. v. Herald Square Fabrics Corp., 81 AD2d 168 [2d Dept], appeal dismissed, 55 NY2d 602 [1981]).

Defendants also argue that the requirement for written notice of termination for cause was waived by plaintiff because he sent an e-mail confirming his termination via a telephone call by Barakett and, "thereafter, various e-mails were exchanged between plaintiffs and defendants wherein Distex explained some of the specific reasons why plaintiff's employment was being terminated for cause," and "they began negotiations for plaintiff's severance package" (Def Mem at 3).

However, defendants cannot bootstrap this post-termination e-mail confirmation into a waiver by plaintiff of the contractual requirement that written notice be given for a termination for cause. Barakett chose to terminate plaintiff's employment via a telephone call, notwithstanding the contractual requirement that all notices under the Employment Agreement be in writing (Agreement, ¶ 13). Plaintiff's subsequent e-mail, acknowledging his termination without cause, simply memorialized the phone call. In this e-mail, plaintiff stated:

> I think it would be appropriate to keep what we discussed today between us until a set statement is drafted and adhered to as part of what is communicated to the industry as party of the severance agreement reached.

1/6/2004 E-mail from Plaintiff to Barakett (Aff. of Martin I. Nagel, Exh A). Accordingly, there is no basis for the claim of waiver of the written notice requirement.

Indeed, the e-mails included in defendants' opposition papers completely undercut their position, and actually prove that plaintiff was terminated without cause. These e-mails describe post-termination negotiations between the parties regarding severance payments to plaintiff – specifically, the amount and timing of such payments. For example, in plaintiff's January 6, 2004 e-mail to Barakett, plaintiff referred to a "severance agreement," and in a January 19, 2005, e-mail from Barakett to plaintiff, Barakett wrote:

> I just want to know also that you understand that the statement below is intended strictly for the purpose of announcing your departure from the company to any third party in a favorable manor. It shall in no way be interpreted otherwise or serve as a basis for or have any bearing **on our negotiations of your severance package**.

Nagel Aff., Exh B (emphasis added). However, if plaintiff had been terminated for cause, he would not be entitled to receive any severance payments. Thus, the e-mails provide documentary

evidence that plaintiff was terminated without cause. Morever, the e-mails from plaintiff to Barakett are peppered with the phrase "termination without cause," and Barakett fails to refute plaintiff's characterization of his termination in any of his e-mails to plaintiff (see Nagel Aff., Exhs A-C). Indeed, Barakett never claimed that no severance should be paid due to a termination for cause.

In any event, it is clear that, even if Distex could be excused from providing written notice of termination for cause, it has failed to show sufficient "Cause" justifying termination. The sole basis for plaintiff's alleged "willful misconduct" is Distex' post hoc rationalization that he "misrepresented his experience, connections, [and] successes in the industry" before he was hired (Barakett Dep. at 150:10-150:20), in that he "puffed" his work history, and "exaggerated" his connections in the industry on his resume (id. at 146:24-147; 191:4-191:21; 192:5-192:11; 232:15-232:21). Even if true, such puffery and exaggerations by plaintiff obviously relate to plaintiff's prior employment, and have no connection with Distex' business. Thus, they cannot reasonably constitute "willful misconduct in connection with the business of the Company."

Barakett also alleges that plaintiff "failed to grow the business," and that this constitutes a persistent failure to provide services reasonably requested, justifying termination of the Employment Agreement under subsection (c) of the definition of "Cause" (Barakett Dep. at 156:23-156:25; 192:13-192:14). However, Barakett has failed to cite any specific "services" that he requested plaintiff to perform, and that plaintiff persistently failed to perform, or to present any documentary evidence in support of the contention that plaintiff "failed to grow the business."

Accordingly, plaintiff's termination was without cause, and, pursuant to paragraph 5 of the Employment Agreement, Distex "remain[s] liable for all financial obligations owed plaintiff under [the] Agreement." Because Distex has failed to pay such financial obligations to plaintiff that arose from termination of the Employment Agreement without cause, plaintiff is granted summary judgment on his first cause of action for breach of contract.

Summary judgment is granted as to liability only, as it impossible on these papers to determine the specific amounts that plaintiff is owed pursuant to paragraph 5 of the Employment Agreement. Hence, the issue of the amount of compensation due plaintiff is referred to a Special Referee to hear and report.

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on his first cause of action for breach of contract is granted as to liability only; and it is further

ORDERED that the issue of the amount of the compensation owed plaintiff under the Employment Agreement is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that both this motion, and the trial in this action scheduled for November 9, 2005, are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the

Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: September 29, 2005

ENTER:

J.S.C.

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