

Goldman v White Plains Center for Nursing Care

2006 NY Slip Op 30264(U)

August 25, 2006

Supreme Court, New York County

Docket Number:

Judge: Alice Schlesinger

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PRESENT: ALICE SCHLESINGER

PART IA Part 16

Index Number : 105701/2005
GOLDMAN, LORRAINE

vs
WHITE PLAINS CENTER

Sequence Number : 005

SUMMARY JUDGMENT

NO. _____

IN DATE _____

IN SEQ. NO. _____

IN 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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 05 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: AUG 25 2006

ALICE SCHLESINGER 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: IAS PART 16

-----X
LORRAINE GOLDMAN,

Plaintiff,

- against -

Index No. 105701/05

WHITE PLAINS CENTER FOR NURSING CARE,
LLC and NMC ACQUISITION, LLC,

Motion Seq. No. 005

Defendants.

-----X
SCHLESINGER, J.:

In this action, plaintiff Lorraine Goldman seeks damages from defendants, her former employer, claiming that her employment was terminated in violation of her Employment Agreement and based on age discrimination in violation of the Human Rights Law (NYS Executive Law §296). Both parties have moved for summary judgment on the contract claim.

The essential facts are undisputed. In 1979 plaintiff Lorraine Goldman was hired by the Nathan Miller Center for Nursing Care, Inc. (the Miller Center), a not-for profit corporation operating a nursing home facility. Goldman assumed the position of Administrative Director pursuant to a written Employment Agreement effective April 1, 1990. As relevant here, the Agreement described the Term of Employment in paragraph 1 as follows:

- a. The Miller Center hereby employs Employee, and Employee hereby accepts employment with The Miller Center, all in accordance with the terms and conditions hereof, for a term of two (2) years commencing April 1, 1990, subject to the terms of Section 6 hereof (the "Employment Period").

b. Subject to the terms of Section 6 hereof, the parties hereto agree to enter into good faith negotiations not less than nine (9) months prior to the end of the Employment Period with respect to renewal of this Agreement on mutually agreeable terms.

Paragraph 6, entitled "Termination", provided in relevant part that:

This Agreement may be terminated:....

b. By either party giving notice to the other at least six (6) months prior to the end of the Employment Period of its intention not to renew this Agreement in accordance with the notice provisions of Section 9. . . ¹

Following the expiration of the Agreement's initial term in 1992, Goldman continued her employment until the termination at issue in 2005. More or less on an annual basis, Goldman's performance was positively evaluated and her wages were increased, and a written memorandum was drafted confirming the precise amount of the increase. The last such memorandum submitted to this Court with the motion papers was dated November 2002 and applied to the period from April 1, 2002 to March 31, 2003.

In the meantime, in March 2001 the defendants herein executed a Purchase Agreement with the then owner of the Miller Center to acquire the facility. Because the sale was subject to the approval of the Attorney General, the transaction was not completed until October 2004. At that time, the seller and the defendants herein as the buyer executed an Assignment and Assumption Agreement dated October 27, 2004. In that Agreement,

¹The other bases for termination, none of which apply here, are mutual agreement, the employee's loss of her license, employee disability, and employee violation of the Agreement or applicable governmental requirements. Section 9 mandates notice by certified mail, return receipt requested.

defendants expressly assumed the obligations of Goldman's Employment Agreement, which was specifically referenced in the Assumption Agreement. In addition, a copy was provided to defendants. Goldman's employment continued until January 19, 2005, at which time defendants terminated it for no stated reason and without compliance with the notice provisions governing termination. Thereafter, defendants hired a younger person to fill the position.

Discussion

Relying on *Abram Landau Real Estate v. Bevona*, 123 F.3d 69 (2nd Cir. 1997), plaintiff asserts that her Employment Agreement contained an "evergreen clause" which had the effect of indefinitely renewing the terms of the Agreement, absent notice of termination. In *Landau*, the collective bargaining agreement expressly provided that it would expire on April 20, 1994, but it also contained an "evergreen clause" which provided that:

Upon the expiration date of this agreement ... this agreement shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect...

123 F.3d at 71.²

Defendants dispute that Goldman's Employment Agreement contained an evergreen clause. They cite cases such as *31 West 47th Street Co., et al., v. Bevona, et al.*, 215 AD2d 152 (1st Dep't 1995) and *Robin Court Condominium v. Local 32B-32J, S.E.I.U., AFL-CIO*, 227 AD2d 194 (1st Dep't 1996). In those cases, as in *Landau*, the evergreen clause

²The agreement also apparently included a provision for termination on notice, which the union exercised. The precise issue in *Landau*, not relevant here, was whether the court or an arbitrator should decide the validity of the evergreen clause.

provided that the agreement would continue in "full force and effect" after its expiration date until a successor agreement had been made or either party had exercised its right to terminate the agreement pursuant to its notice provisions.

Goldman's Employment Agreement does contain language which arguably can be read to imply an effect similar to an evergreen clause; that is, that the parties contemplated repeated renewals absent termination by one or both of the parties pursuant to the Agreement's notice provisions. As in the above-cited cases, the Agreement contains a well-defined initial term of employment, which may be construed as a two-year minimum period of commitment by both parties, absent termination by mutual agreement or other cause pursuant to paragraphs 6 and 9 of the Agreement. The Agreement (at ¶3) further provides for compensation by defining a "Base Salary" which "shall be adjusted annually ..." Had the parties intended to limit the Agreement to two years, they presumably would have provided for an increase only at the commencement of the second year, on April 1, 1991, rather than "annually." Renewals are also suggested by the above-quoted language in ¶1b (Term of Employment), which provides for "good faith negotiations not less than nine (9) months prior to the end of the Employment Period with respect to renewal of this Agreement on mutually agreeable terms." Should no agreement be reached at least six (6) months before the end of the term, ¶6 allows either party (or both) to terminate by following the notice provisions in ¶9 of the Agreement. Goldman and the then owner, in fact, negotiated increases more or less annually, at least through 2002-2003.

On the other hand, the Employment Agreement does not contain the specific language found in the evergreen clauses in the above-cited cases that the agreement "shall remain in full force and effect" until a successor agreement has been reached or either party

has given notice of termination. Defendants argue that this case is therefore governed by the unpublished decision in *Wenzel et al., v. Edison Parking Corp., et al.*, 1995 WL 13553 (SDNY 1995). The *Wenzel* agreement had a set initial term which provided that, should either party “desire to terminate or modify this Agreement at its expiration date, it shall give notice to the party in writing at least sixty (60) days prior to the expiration date of the contract and negotiations for a new agreement shall commence as soon thereafter as is practical.” Plaintiff in *Wenzel* argued, as plaintiff argues here, that the agreement remained in effect because no party had given notice of termination. Noting that the argument was “not as easily addressed, particularly since this argument received only cursory treatment from the parties,” the court rejected the argument based, in part, on the “absence of, for example, an ‘evergreen clause’...” Thus, *Wenzel* is not controlling here, not only because the “evergreen” argument was not fully explored, but also because the somewhat unique language in the *Wenzel* agreement is very different from the language here. In Goldman’s case, the Agreement expressly provides for negotiations regarding renewals at a set time. In *Wenzel*, the agreement suggests the opposite: there shall be no renewal absent notice of a request to negotiate. Thus, *Wenzel* is readily distinguishable from the case at bar and provides no guidance as to the language required for an evergreen clause.³

Nevertheless, since it is plaintiff’s burden to prove entitlement to the drastic remedy of summary judgment, and she has failed to provide legal support for finding an “evergreen clause” based on the specific language at issue in her Employment Agreement, plaintiff’s argument for summary judgment on that point must be rejected.

³ Also without merit is defendants’ claim that Goldman’s Employment Agreement cannot have an evergreen clause because it contains an expiration date. The contracts in each of the above-cited cases contained both an expiration date and an evergreen clause.

In support of their cross-motion for summary judgment, defendants urge the Court to find that Goldman was merely an employee at will. At best, they argue, the Employment Agreement was impliedly renewed by operation of law for one year under *Borne Chemical Co. v. Dictrow*, 85 AD2d 646 (2nd Dep't 1981)(cited by Goldman in opposition to defendants' earlier motion to dismiss) or until March 31, 2005.

The Court finds that *Borne* is relevant here. The issue in *Borne* was the extent to which a covenant not to compete contained in a multi-year employment contract carried over into the employment period which continued after the expiration of the contract. The original contract was for 3 years, commencing 1972 and expiring in 1975, at which point it was extended for another 3 years through 1978. The employee continued to work without a further extension of his contract until he was discharged in the spring of 1979. In remanding the case on the enforceability of the covenant, the court discussed in detail the rule that applies to employment relationships which continue following the expiration of a multi-year written contract:

It is the rule that when, upon the expiration of a contract of employment for a definite term, the employee continues to render the same services as he rendered during the term of the contract without expressly entering into any new agreement, it will be presumed that he is serving under a new contract having the same terms and conditions as the original one ..., and provisions and restrictions forming essential parts of the original contract, even though collateral to the employment itself, continue in force. Where the original term of an employment contract is for more than one year, a continuance in employment will not, because of the Statute of Frauds (General Obligations Law, §5-701, subd a, par 1), support a presumption of a renewal for the full period of the original term, but only of employment from year to year thereafter ...

85 AD2d at 648 (citations omitted).

The rule discussed in *Borne* dates back to the 1891 decision by the Court of Appeals in *Adams v. Fitzpatrick*, 125 NY 24. The rule has been repeatedly restated and applied throughout the years by the Court of Appeals and the First Department, continuing to date. See, e.g., *Cinefot International Corp v. Hudson Photographic Industries, Inc.*, 13 NY2d 249 (1963); *Carter v. Bradlee, et al.*, 245 AD 49 (1st Dep't 1935), *aff'd* 269 NY 664 (1936); *Shen v. Fair-Tex Mills, Inc.*, 26 AD2d 282 (1st Dep't 1966); *Schlaifer v. Kaiser*, 50 AD2d 749 (1st Dep't 1975), *aff'g the decision by Fein, J.* 84 Misc2d 817 (Sup. Ct., NY Co.); *Perlick v. Tahari*, 293 AD2d 275 (1st Dep't 202).

The rule applies here to extend Goldman's Employment Agreement through March 31, 2006, rather than the 2005 date suggested by defendants. Goldman began her employment with a two-year written contract based on an annual salary. As indicated in *Borne*, while the Statute of Frauds bars the presumption of renewal for the original two-year term, it presumes "employment from year to year thereafter" or for "successive one year extensions of the original contract." 85 AD2d at 648. Goldman's employment was terminated in January 2005, toward the end of the implied one year extension from April 1, 2004 through March 31, 2005. Under *Borne*, quoted above, the provisions continued in force. However, because defendants did not comply with the provisions in ¶ 6 and ¶ 9 requiring notice of termination at least 6 months in advance, a successive one-year extension is implied through March 31, 2006.

Defendants have not created any issue of fact to rebut the presumption of the extension. Nor have they persuasively argued that Goldman became a mere at-will employee. The cases cited by defendants (at pp. 12-14) are all distinguishable because, unlike *Borne* and the case at bar, they did not involve a written employment contract for a

fixed term at an annual salary. *Waldron v. Goddess*, 93 AD2d 706 (1st Dep't 1983) involved a broker's agreement based on commissions, *General Re Corp. v. Foxe*, 177 Misc2d 867 (Sup Ct, NY Co 1998) involved a profit-sharing arrangement where at-will employment was conceded by the parties, and *Curley v. Brignoli, et al.*, 746 F Supp 1208 (SDNY 1989) involved a partnership agreement.

Thus, plaintiff Goldman is entitled to summary judgment on liability as to her breach of contract claim. Damages cannot be computed at this time because that evidence was not submitted to the Court with the moving papers, but the necessary information presumably is readily ascertainable. Interest must be computed at the statutory rate of 9% per annum from January 19, 2005, the date of the breach. See *Siegel v. Laric Entertainment Corp., et al.*, 307 AD2d 861 (1st Dep't 2003). Defendants are entitled to summary judgment dismissing only plaintiff's claim for attorney's fees in connection with the breach of contract claim, as no statutory or contractual basis for the award of fees has been established. *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 NY2d 487 (1989).

The parties are directed to appear in Room 222 on October 25, 2006 at 9:30 a.m. to discuss the outstanding issues in this case, including the status of discovery with respect to the age discrimination claim, as directed by this Court in the companion decision under motion sequence 006.

This constitutes the decision and order of this Court.

Dated: August 25, 2006

AUG 25 2006

FILED

SEP 05 2006

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NEW YORK

Alice Schlesinger

J.S.C.

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