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

PRESENT: HON. RICHARD B. LOWE, III *Justice* PART 52

Arthur H. Stevens

- v -

Publicis, S. A. etal

INDEX NO. 602716/03

MOTION DATE 10/18/05

MOTION SEQ. NO. 003

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

ENTERED
MAR - 1 2006
SUPREME COURT
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 1 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/28/06

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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ARTHUR H. STEVENS,

Index No. 602716/03

Plaintiff,

- against -

PUBLICIS, S.A. and PUBLICIS USA HOLDINGS, INC.,

Defendants.

----------X

Hon Richard B. Lowe, III:

Motion Sequence Numbers 003 and 004 are consolidated for disposition. In Motion Number 003, defendants Publicis, S.A and Publicis USA Holdings, Inc. (together, Publicis) move, pursuant to CPLR 3212, for summary judgment dismissing the remaining two causes of action in the complaint of Arthur H. Stevens for breach of contract and fraud.

In Motion Number 004, Stevens moves, pursuant to CPLR 3211 (e), for partial summary judgment on his breach of contract cause of action, and dismissing with prejudice the second and third affirmative defenses for estoppel and waiver, respectively.

Background

Except where noted, the following facts are not in dispute, having been resolved by the parties' Rule 19-a Statements of Undisputed Material Facts.

Stevens formerly owned all of the stock of Lobsenz-Stevens, Inc. (LSI), a relatively small public relations firm that he co-founded and managed as the company's chief executive officer (CEO). Defendant Publicis, S.A., is a global communications company, based in France, that wholly owns defendant Publicis USA Holdings, Inc., a Delaware corporation.

In mid-1999, Publicis made an offer to Stevens to purchase all of his stock in LSI.

Several months later, on October 26, 1999, LSI, Stevens, and Publicis entered into a stock purchase agreement (Purchase Agreement), pursuant to which Publicis (1) purchased all of LSI's stock, (2) paid Stevens an "Initial Payment Amount" of $3,044,000 at the closing of the transaction, and established an "Escrow Amount" with an additional $736,000 to be paid to Stevens, in whole or in part, if LSI achieved a positive "EBIT" (defined in § 1.9 [a] of the Purchase Agreement as LSI's earnings before interest and taxes, subject to certain adjustments) for the fiscal year ending on December 31, 2000, and (3) agreed to pay Stevens "earn-out" payments contingent upon LSI achieving a certain level of EBIT during the three calendar years following the closing. The same parties also entered into an employment agreement, also dated as of October 26, 1999 (Employment Agreement), that provided that LSI (to be renamed Publicis Dialog New York) would employ Stevens as its CEO for a three-year term commencing on October 26, 1999, and ending on December 31, 2002. Stevens concedes that Publicis paid him all of the compensation provided for under these agreements except for the earn-out payments.

Six months after the acquisition, LSI was beset with financial problems, including having unstable client relations and missing financial projections. In November 2000, as LSI's financial condition continued to decline, Publicis acquired a small New York-based public relations firm, Geltzer & Co., and merged it into LSI, with the primary purpose of shoring up LSI's financial condition.

Stevens' consent to the Geltzer acquisition was required, and he consented to the acquisition as well as to the formation of an executive committee at LSI consisting of Stevens, Sheila Geltzer, and Andrew Hopson, the chief operating officer of Publicis Dialog, a related entity, and the person to whom Stevens was to report, as provided for in the Employment

Agreement. When the year 2000 financial results became known, it was agreed that it was a disastrous year for LSI, and for Stevens, who was thereby ineligible to receive his earn-out for the year.

Publicis contends that, in an effort to find a solution to LSI's problems, Jon Johnson, the CEO of LSI's parent, Publicis Dialog, and Debi Lockhart, the head of human resources for Publicis, presented Stevens with three options: (1) Stevens could continue as LSI's chairman and as a member of the executive committee, and shift LSI's day-to-day operations to Sheila Geltzer whereby Stevens would spend the majority of his time securing new business, seeking to improve LSI's profitability and thereby increasing his chances of earning an earn-out for 2001 and 2002; (2) Stevens could leave LSI and be paid his full compensation through the end of the Employment Agreement, with the option to come and go as he pleases; or (3) Stevens could propose another option for Publicis' consideration.

During this time, Stevens contended that Publicis breached the Employment Agreement by discharging him on March 5, 2001 as LSI's CEO. He contends that Publicis never gave him the option to continue as CEO, and that it unilaterally made the decision to terminate him as CEO, and presented this to him as an accomplished fact. According to Publicis, Stevens' real goal in claiming a breach was to receive a guarantee of a portion of his expected earn-out, and to step aside from day-to-day operations. Nevertheless, Stevens and Publicis eventually agreed that Stevens would devote the majority of his time (i.e., 70%) to trying to increase revenues through the acquisition of new business rather than managing the company's day-to-day operations. Publicis asserts that this was Stevens' only hope of salvaging some earn-out after what Stevens himself called the "lousy" first year, where LSI suffered a $1 million loss.

According to Stevens, he was prepared to continue in a capacity other than CEO, provided that Publicis guaranteed him $2.5 million of the earn-out, which it never did. He asserts that he and Publicis negotiated for weeks over the breach, but when it appeared that they could not reach an agreement on a fair amount of compensation, on April 5, 2003, he wrote to Maurice Levy, the Chairman of Publicis Groupe S.A, again asserting breach of contract.

In March 2003, the 2001 and 2002 financial statements were issued, and they showed that LSI had a loss and that EBIT was negative, and thus, Stevens was not entitled to any earn-out. Stevens contends that the 2000 financials, if properly calculated, would show an earn-out due him, and that his termination caused him substantial damages in the form of lost earn-out in years 2001 and 2002. This action ensued.

Stevens alleges that Publicis breached the Employment Agreement by (1) discharging him as LSI's CEO, and providing an inadequate replacement to run the company; (2) diverting new business opportunities that Stevens introduced to Publicis' other affiliated companies, and failing to support these new business opportunities; (3) eliminating LSI's profits through excessive and improper charges to its results of operations and by using improper accounting methods to determine LSI's annual profits; and (4) by otherwise mismanaging LSI's business.

Publicis argues that Stevens unequivocally agreed to the new employment arrangement, which he confirmed in e-mails exchanged in March 2001, and again in April 2001 and August 2001, and through his conduct. Stevens contends that he never waived, orally or in writing, Publicis' breach of contract, and that he never signed any amendment to the Employment Agreement changing his contractual right to be CEO during the earn-out period.

Stevens now argues that he is entitled to summary judgment on his breach of contract

claims because Publicis terminated him from the CEO post without cause. In addition, he argues that both the Employment Agreement and the statute of frauds prevent Publicis from asserting that he agreed to modify the terms of his employment. Additionally, he argues that there is no merit to the second and third affirmative defenses for estoppel and waiver, respectively. The former is based on the assertion that Stevens should be estopped from asserting the statute of frauds as a defense to the modified agreement, because he agreed in writing to the new arrangement, and Publicis relied on this to its detriment. The latter defense is based on the assertion that Stevens waived any breach of contract claim that he may have had by agreeing to the new employment arrangement.

In addition to the breach of contract claim, the complaint originally contained causes of action for fraudulent inducement, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and fraud. On a prior motion, this court dismissed the fraudulent inducement and breach of the implied covenant of good faith and fair dealing cause of actions, as duplicative of the breach of contract claim (which Publicis had not sought to dismiss), and the breach of fiduciary duty cause of action on the ground of the absence of a fiduciary relationship between the parties. Remaining are the causes of action for breach of contract and fraud, in which Stevens alleges, among other things, that Publicis provided false financial statements to lower LSI's profits, and that it fraudulently concealed its actions by removing him as CEO.

Discussion

Publicis now seeks summary judgment dismissing Stevens' remaining two causes of action for breach of contract and fraud. Stevens seeks partial summary judgment against Publicis, determining it liable for breach of contract on the second cause of action and dismissing

with prejudice the estoppel and waiver affirmative defenses.

1. Breach of Contract.

If an employee is under contract to fulfill a particular position, the employee may treat any material change in his duties or significant reduction in rank as a breach of contract (*Aurielen Lintermans, Inc. v Resca*, 222 AD2d 253 [1st Dept 1995]). Stevens' duties materially changed in March 2001. Publicis claims, however, that both sides unequivocally agreed in writing to modify Stevens' job duties as they were originally set forth in the Employment Agreement. Section 13 (d) governs modification of the agreement. It provides:

> "This agreement shall not be modified by any oral agreement, either express or implied, and all amendments or modifications of this Agreement shall be in writing and be signed by all of the Parties. The provisions of this and the immediately preceding sentence may not be amended or modified, either orally or by conduct, either express or implied, and it is the declared intention of the Parties that no provision of this Agreement, including said two sentences, shall be modifiable in any way or manner whatsoever other than through a written document signed by both the Parties."

The statute of frauds, contained in New York General Obligations Law § 15-301 (1), provides:

> "1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Hence, pursuant to the statute of frauds, the parties may modify the Employment Agreement only by a writing signed by the party against whom enforcement of the change is sought (*Richardson & Lucas, Inc. v New York Athletic Club of the City of New York*, 304 AD2d 462 [1st Dept 2003]). However, the statute of frauds does not require the writing to be in one document; it "may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion" (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54 [1953], *quoting Marks v Cowdin*, 226 NY 138, 145 [1919]; *see also Henry L. Fox Co.*

v William Kaufman Org., 74 NY2d 136 [1989]).

Documentary evidence supports Publicis' position, in that it establishes that it and Stevens memorialized the terms of their oral agreement in writing to change Stevens' job responsibilities under the Employment Agreement. This is evidenced by several e-mails that Stevens exchanged with various Publicis officers. As a result, the court need not reach the issue of whether Stevens waived any breach of contract claim that he may have had by agreeing to the new employment arrangement.

On March 26, 2001, Bob Bloom, former chairman and CEO of Publicis USA, sent an e-mail to Stevens stating, in part:

> "Your Responsibilities Going Forward . . . we agreed that our mutual interest is in assuring that you earn full earnout and, simultaneously, assuring that Publicis Dialog PR New York optimizes its profits, two goals that are inexorably linked. Therefore, it would seem that it is in both your interest and our interest for you to be fully engaged in helping to drive revenue growth for your business unit because, as agreed in our lunch conversation, cost cutting alone will not produce the dual end result we collectively want and need. Thus, I suggested an allocation of your time that would permit the majority of your effort to go against new business development (70%). I also suggested that the remaining time be allocated to maintaining/growing the former Lobsenz Stevens clients (20%) and involvement in management/operations of the unit (10%). This option, it would seem, is in your best interest because it offers the best opportunity for you to achieve your stated goal of a full earnout. When I suggested this option, you seemed to have considerable enthusiasm for it and expressed your satisfaction with it so I, of course, assumed that it was an option you preferred."

In response, by e-mail sent on March 29, Stevens wrote, in part:

> "That being said, *I accept your proposal with total enthusiasm and excitement.* I will do everything possible to work cooperatively and productively with Andy, Howard, Sheila and Jon. You have my word on that. I am aware that we're going through a difficult period economically right now but we've all worked together to make the necessary decisions to make this operation as profitable as possible.
>
> "As you suggest, I will be in touch with Doug Henderson to go over financial issues related to the success of our office as well as to my earnout.

> "We all work better under encouragement, support and esprit de corps regardless of how business is going. I'm the kind of person who would work the ends of the earth for you if I'm treated with respect and dignity.
>
> *So thank you for your involvement and the positive conclusion.* I'm psyched again and will do everything in my power to generate business, maintain profits, work well with others and move forward. I feel that I've gone from persona non grata to an accepted member of the family" (emphasis added).

Bloom responded that same day with an e-mail stating:

> "I am thrilled with your decision. You have my personal assurance that all of us will continue to work in the spirit of partnership to achieve our mutual goal and function together as close senior collaborators in a climate of respect and dignity for all."

On April 12, 2001, Stevens sent an email to Andrew Hopson, the chief operating officer of Publicis Dialog, stating, among other things:

> "I am excited to devote 70% of my time to new business development. Our office needs revenues and I'm confident that my efforts will contribute to new business wins during the course of the year."

On August 14, 2001, Stevens sent another e-mail to Andrew Hopson, stating:

> "*There's nothing conditional about the 70%. That's the agreement I made and I'm not questioning that.* I need Jill on a full time basis to be even more productive re new business. I have a lot more I want to do new businesswise and I need her administrative support. Also, I don't have a rosy deal. When you're in New York you use her considerably more than I do and that's the problem" (emphasis added).

The e-mails from Stevens constitute "signed writings," because of Stevens' name at the end of the e-mails signifying his intent to authenticate their contents (*see Rosenfeld v Zerneck*, 4 Misc 3d 193 [Sup Ct, Kings County 2004]). In addition, the e-mail exchange satisfies the requirement in the Employment Agreement that the modification be signed by both parties, because of Bloom's "signed" acknowledgment of Stevens' acceptance of the proposal. Moreover, the terms of the modification are clearly expressed in the correspondence between the parties with no ambiguity, i.e., Stevens will allocate 70% of his efforts to new business

development, 20% to maintaining and growing former LSI clients, and 10% to involvement in management and operations.

Stevens' citation to *Parma Tile Mosaic & Marble Co. v Short* (87 NY2d 524 [1996]) for the proposition that the e-mails at issue here do not satisfy the statute of frauds is unconvincing. Rather, the court concusr with the decision in *Rosenfeld v Zerneck* (4 Misc 3d 193, *supra*). In *Parma*, a subcontractor sought to purchase a large quantity of ceramic tile from the plaintiff. When the plaintiff expressed reluctance because of the size of the order, the subcontractor suggested that the plaintiff seek a guaranty from the general contractor. The general contractor faxed a document to the plaintiff that the plaintiff asserted was a guaranty. The general contractor contended that it had merely transmitted by fax an unsubscribed proposal for a guaranty. The Court of Appeals held that the automatic imprinting by a fax machine of the sender's name at the top of each page transmitted did not satisfy the requirement that the writing be subscribed under the statute of frauds. The *Parma* court noted that the general contractor had programmed its fax machine to automatically imprint the company's name, phone number, date, and page number on every transmitted page. The heading only appeared on the recipient's faxed copy, not on the originating document, and neither a cover letter nor any other identifying document preceded the two-page faxed document (the guaranty). Here, in contrast, rather than the faxing of a form without a cover letter, Stevens' e-mails were addressed to a specific individual, contained his name as the author of the e-mail, and clearly manifested an intent to formalize an agreement on the proposal as to his job duties.

The assertion that Stevens' name at the end of the e-mails is merely a form put there automatically on all e-mails is made only by counsel for Stevens (Opposition Memorandum, at 5)

and thus, it is without probative value (*Lewis v Safety Disposal Sys. of Pa.*, 12 AD3d 324 [1st Dept 2004]). Indeed, in his affidavits, Stevens discusses the significance of his March 29, 2001 e-mail (as well as others), but does not challenge the authenticity of the e-mails, nor the manner in which his name was affixed to the e-mails (*see e.g.* Stevens Affidavit in Opposition [Stevens Aff.], at 9).

Stevens also argues that neither Bloom's nor his e-mails refer to the Employment Agreement or his rights under it. However, that the e-mails were not prepared or signed with the intent of evidencing the contract is inconsequential. It is sufficient to meet the requirements of the statute of frauds that they were signed with the intent to authenticate the information contained therein, and that such information does evidence the terms of the contract (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, *supra*). The e-mails specifically address the provisions of the Employment Agreement at issue, namely, the nature of Stevens' job responsibilities at LSI.

Furthermore, in the context of the Uniform Commercial Code (UCC), courts have held that the adequacy of an e-mail is to be determined on a case-by-case basis, and that it is in electronic form does not, by itself, prevent it from constituting the requisite writing under the UCC's statute of frauds (*Bazak Intl. Corp. v Tarrant Apparel Group*, 378 F Supp 2d 377, 383 [SD NY 2005]). The e-mails here leave no doubt as to their subject matter and the parties' intent to resolve an issue as to the most appropriate role for Stevens to play at LSI, vis-a-vis the earn-out potential.

I am not persuaded, however, that Publicis has demonstrated entitlement to judgment on the alternate grounds of part performance or equitable estoppel. These doctrines are not available as an exception to the statute of frauds unless the part performance or actions taken in reliance

are "unequivocally referable" to the oral agreement (*Richardson & Lucas, Inc. v New York Athletic Club of the City of New York*, 304 AD2d 462, *supra*). The conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written (*Rose v Spa Realty Assoc.*, 42 NY2d 338 [1977]). It is not sufficient that the oral agreement gives "significance" to Stevens' actions. Instead, the actions alone must be "unintelligible or at least extraordinary" and explainable only with reference to the oral agreement (*I.S. Design, Inc. v Gasho of Japan, Intl.*, 269 AD2d 150 [1st Dept], *lv denied* 95 NY2d 761 [2000]). That Stevens devoted the majority of his time to developing new business is not "explainable only with reference to the oral agreement," because the Employment Agreement stated that, as CEO, Stevens would "lead new business efforts" as well as oversee day-to-day operations (Employment Agreement, § 2).

Although I find that Publicis has not breached the Employment Agreement as to Stevens' employment duties, issues of fact remain concerning the allegation that Publicis breached the implied covenant of good faith and fair dealing by diverting revenue from LSI to Publicis' other affiliates. As an example, Stevens alleges that Geltzer brought in a substantial client – Iomega – that was projected to produce $1 million in revenue per year, but produced only $334,667 in revenue for LSI, because Publicis diverted the "bulk" of the Iomega revenue to its Salt Lake City office, thereby adversely affecting Stevens' earn-out entitlement (Stevens Aff., at ¶ 15 [c]). Stevens also alleges that Hopson usurped Stevens' attempt to develop new business with two mid-western affiliates – "Fallon/Minneapolis" and "Frankel/Chicago" – so that he could attribute their business to Publicis' Seattle office, in which he, but not Stevens, would benefit from the resulting earn-out (*id.*, at ¶ 15 [d] and Exhibit 11). Moreover, the record contains

evidence that purports to establish that the financials were not prepared accurately (*see id.*, Exhibit 9). Publicis has not disposed of these issues on these papers. Indeed, that there remain issues of fact as to the financial statements is apparent from a review of paragraphs 39-58 in Publicis' own "Statement of Undisputed Facts," the veracity of which depends upon the resolution of credibility issues.

Furthermore, Publicis' assertion that, as a result of the decision on the prior motion this claim is no longer actionable, is without merit. The prior decision held that the claim cannot be maintained as a separate cause of action, because it is duplicative of the second cause of action for breach of contract. It could be asserted, however, within the context of the breach of contract cause of action.

2. Fraud.

Summary judgment dismissing the fraud claim is warranted because the record is devoid of evidence supporting the fraud allegations (*Genevit Creations v Gueits Adams & Co.*, 306 AD2d 142 [1st Dept 2003], *lv dismissed in part, denied in part* 1 NY3d 617 [2004]).

To make out a case of fraud, a plaintiff must allege representation of a material existing fact, falsity, scienter, and injury (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209 [1st Dept 1991]). Stevens alleges, among other things, that Publicis provided false financial statements to lower LSI's profits, and that it fraudulently concealed its actions by removing him as CEO. At his deposition, however, Stevens responded to questions about the financial statements by stating that "my financial advisors will be best equipped to answer the specifics of that question" (Affidavit of John B. Webb, Esq. [Webb Aff.], Exhibit C, at 361). His financial advisor, Fishbane, testified that "[t]he only time fraud came about is that he told me that Mr. Bab felt that

fraud was a significant element of the case, but I never really delved into it in any detail" (Webb Aff., Exhibit H, at 17-18). Fishbane stated further that he did not think that he and Stevens ever discussed why Stevens believed that there was any type of fraud (*id.*).

Stevens speculates that if he can prove at trial that Publicis improperly adjusted the 2000 financials by approximately $1 million to turn a modest profit into a sizeable loss, that could suggest fraudulent intent, and that a jury could find fraudulent intent in Publicis' improperly diverting business from the New York office to other offices. Speculation is inadequate to defeat summary judgment as to a claim of fraudulent intent (*Shea v Hambros PLC*, 244 AD2d 39 [1st Dept 1998]).

Accordingly, it is

ORDERED that Publicis' motion (003) is granted only to the extent of dismissing the fifth cause of action for fraud; and it is further

ORDERED that Stevens' motion (004) is denied.

Dated: February 28, 2006

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III

FILED
MAR 1 2006
COUNTY CLERK'S OFFICE
NEW YORK