

Healey v E-Vantage Solutions, Inc.

2007 NY Slip Op 30807(U)

April 13, 2007

Supreme Court, New York County

Docket Number: 0602499/2003

Judge: Bernard J. Fried

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BERNARD J. FRIED
J.S.C.

PART 60

FBEM

Index Number: 200499/2003

HEALEY, THOMAS E.

E-VANTAGE SOLUTIONS, INC.

SEQUENCE NUMBER 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

NYS SUPREME COURT
REVIEWED
APR 19 2007
E-FILING DEPT.

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
APR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/13/07


BERNARD J. FRIED J.S.C.
J.S.C.

Check one: FINAL DISPOSITION ¹ 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 60

-----X
THOMAS E. HEALEY,

Plaintiff,

I n d e x N o .
602499/2003

-against-

E-VANTAGE SOLUTIONS, INC.,

Defendant.
-----X

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FILED
APR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

APPEARANCES

For Plaintiff:

For Defendant:

Menaker & Herrmann LLP
10 East 40th Street - 43rd Floor
New York, NY 10016
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Allison C. Pierre, Esq.

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FRIED J.

Under motion sequence 001, defendant E-Vantage Solutions, Inc. (E-Vantage) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, and for judgment on its first, third and fourth counterclaims for breach of fiduciary duty, breach of contract and corporate waste.

Plaintiff commenced this action to recover unpaid salary and other compensation due under an alleged employment agreement, and damages for failure to convey stock options in accordance with the alleged agreement. Plaintiff, alternatively, seeks quantum meruit relief, and the recovery of out of pocket expenses purportedly incurred by plaintiff on defendant's behalf. Plaintiff's breach of contract claims are based upon the terms of a letter

agreement dated March 5, 2001, and signed by Andreas Typaldos, Chief Executive Officer of E-Vantage. According to the terms of the writing annexed to the complaint, defendant agreed to hire plaintiff as President of its United States operations for a term of 3 years, at an annual salary of \$250,000, plus a minimum annual bonus of \$35,000, and 400,000 options to purchase shares in E-Vantage at a price of \$.50 per share. The parties do not dispute that plaintiff started working for E-Vantage in March 2001, and that he tendered a letter of resignation before the end of the purported three year term in July 2003. Plaintiff asserts that defendant breached the contract by failing to pay the agreed upon annual compensation and bonus, and by refusing to tender the agreed upon stock options.

Defendant asserts that the signed version of the March 5, 2001 letter agreement was merely an agreement to agree, and that even if the writing is enforceable, plaintiff breached the agreement, and forfeited any additional rights under the agreement, by failing to give four months notice of termination as required under paragraph 7 of the alleged agreement. Defendants also assert, on the counterclaims, that plaintiff breached his fiduciary duty by expending his time and energy in other ventures, and by diverting defendant's business opportunities. Defendant alleges that plaintiff failed to perform the contract as specified, and that he wasted corporate assets by causing E-Vantage to pour money into useless software projects that he was incapable of completing or marketing.

As the proponent of the motion for summary judgment, defendant was required to tender sufficient evidence to eliminate any material issues of fact from the case, and establish a prima facie right to judgment (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v*

Associated Fur Mfrs, Inc., 46 NY2d 1065 [1979]). Failure to establish a prima facie case, requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing is made, however, the burden shifts to the opponents of the motion, to submit evidence, in admissible form, sufficient to establish the existence of material and triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*id.*).

Defendant's motion to dismiss plaintiff's breach of contract claims is based upon paragraph 10 of the signed letter agreement which states, "[t]he foregoing is subject to a mutually approved and signed employment agreement." Defendant asserts that this language, drafted by plaintiff, demonstrates that the signed writing was merely an agreement to agree, which is unenforceable (*see V'Soske v Barwick*, 404 F 2d 495, 499 [2d Cir 1968], *cert. denied* 394 U S 921 [1969]; *Scheck v. Francis*, 26 NY2d 466 [1970]; *Pelham Commons Joint Venture v Village of Pelham*, 308 AD2d 520, 521 [2d Dept 2003]; *Sabetfard v Smith*, 306 AD2d 265, 266 [2d Dept 2003]; *Andor Group, Inc. v Benninghoff*, 219 AD2d 573 [2d Dept 1995], *lv denied* 87 NY2d 812 [1996]). The mere insertion of such language in a writing, however, does not demonstrate, prima facie, that the parties failed to reach an agreement. Even a preliminary agreement may be binding, and the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event (*V'Soske v Barwick*, 404 F2d at 499; *Richbell Info. Serv., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]; *T. Moriarty & Son, Inc. v Case Contracting Ltd.*, 287 AD2d 390 [1st Dept 2001]; *Satra Ltd. v*

Coca-Cola Co., 247 AD2d 248 [1st Dept 1998]; *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587 [1st Dept 1993]). The question is whether there was a meeting of the minds on all of the material terms of the transaction (*see Express Indus. & Terminal Corp. v. New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *Henri Assoc. v Saxony Carpet Co., Inc.*, 249 AD2d 63, 66 [1st Dept 1998]). Plaintiff testified, and affirmed, that he added paragraph 10 in the event that E-Vantage had any confidentiality agreements, medical benefits, stock option documents or other documents that needed to be signed in connection with his employment. Plaintiff also testified, and affirmed, that he asked Mr. Typaldos whether E-Vantage required any other documents to be signed, and that Typaldos stated that they did not need any other employment contract. Typaldos denies making the statement, which creates an issue of credibility for determination at trial.

Plaintiff submits evidence and testimony to demonstrate that the signed letter agreement was the result of bargained for negotiation (*see 9/29/06 Healy Aff exhs 4, 5 and 6*), and it contains all of the elements necessary to form a valid employment agreement except for the start date (*see Durso v Balsch*, 37 AD3d 646 [2d Dept 2007])[elements of an effective employment contract consist of identity of parties and terms of employment which include commencement date the duration of the contract and salary]; *Pail v Precise Imports Corp.*, 256 AD2d 73, 74 [1st Dept 1998]; *Merschrod v Cornell University*, 139 AD2d 802, 805 [3rd Dept 1988]). In some instances, the failure to specify a commencement date is fatal to the finding of a valid employment agreement (*see e.g. Whitehorn Assoc., Inc. v One Ten Brokerage*, 264 AD2d 516 [2d Dept 1999]). In this case, however, defendant's answer to the complaint admits that plaintiff commenced employment with E-Vantage in March 2001

(*id* at 517), and defendant does not assert that the commencement date was an open term subject to further negotiation. The exact date, moreover, may be determined from other documents not intended to create a contract, such as payroll records, which, in this case, presumptively are in the defendants' control (*cf. compare Lalonde v Modern Album & Finishing Co.*, 38 AD2d 960 [2d Dept 1972], with *Whitehorn Assoc., Inc. v One Ten Brokerage*, 264 AD2d at 517).

Defendant's additional argument, that plaintiff forfeited any rights under the written agreement by failing to give notice of termination in accordance with paragraph 7 of the signed letter agreement, is countered by plaintiff's evidence that defendant was in substantial breach of the agreement at the time of his resignation due to its failure to pay the agreed upon salary and benefits (*see Grace v Nappa*, 46 NY2d 560, 567 [1979][material breach excuses plaintiff's performance]; *DeCapua v Dine-A-Mate, Inc.*, 292 AD2d 489 [2d Dept 2002]). A party is excused from complying with a contract if the other party has committed a material breach, that goes to the root of the contract (*In re Lavigne*, 114 F3d 379 [2d Cir 1997]; *Babylon Assoc. v Suffolk County*, 101 AD2d 207 [2d Dept 1984]).

Defendant also failed to demonstrate a prima facie right to judgment on its counterclaims based upon the fact, admitted by plaintiff, that he was simultaneously working for or with another entity. Paragraph 9 of the signed letter agreement states:

Company acknowledges and understands that Employee has existing relationships and advisory roles with other companies that involve cash and/or equity compensation, and Employee will continue in these roles in a non-interference and non-competitive basis....

Accordingly, there is a genuine issue of fact regarding whether plaintiff was prohibited from

engaging in other employment (*see Roemer and Featherstonhaugh PC v Featherstonhaugh*, 274 AD2d 630, 632 [3rd Dept 2000]). Plaintiff's evidence also raises issues of fact regarding whether plaintiff's activities on behalf of these other entities diverted corporate opportunities from the defendant, or interfered with, or competed with defendant's business, and the alleged material breach by defendant undermines defendant's assertion of a right to enforce the non-compete provision (*see DeCapua v Dine-A-Mate, Inc.*, 292 AD2d at 491, *citing Cornell v T.V. Development Corp.*, 17 NY 2d 69, 75 [1966]).

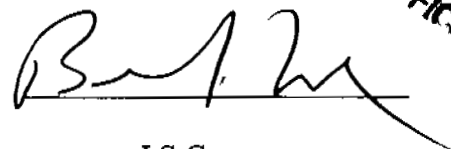
Defendant's allegations of corporate waste are similarly incapable of summary determination. Defendant's evidence merely raises issues of fact regarding whether plaintiff could have or should have engaged the company in the instant messaging projects that, admittedly, were unsuccessful, and plaintiff's submissions are sufficient to create a triable issue of fact with respect to whether defendant interfered with plaintiff's ability to perform as contemplated under the employment agreement by failing to pay staff and independent contractors assigned to create and market the programs (*see Kooleraire Serv. & Installation Corp. v Board of Educ. of the City of N.Y.*, 28 NY2d 101,106 [1971]; *HGCD Retail Services, LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43 [1st Dept 2006]).

For the reasons stated above, it is:

ORDERED, that defendant's motion for summary judgment is denied.

DATED: 4/13/07

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.

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APR 13 2007
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