Chartoff v Calderon
2007 NY Slip Op 31219(U)
May 14, 2007
Supreme Court, Suffolk County
Docket Number: 0030173/2006
Judge: Emily Pines
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Short Form Order

Index Number: 30173-2006

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:
Hon. Emily Pines
Justice Supreme Court

Original Motion Date: 02-28-2007
Motion Submit Date: 03-15-2007
Motion Sequence No('s).: 001 MOTD

____X
DAVID CHARTOFF,

Plaintiff,

-against-

JOHN CALDERON, THERACARE OF NEW YORK, INC.,

Defendant.
____X

Attorney for Plaintiff
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Attorney for Defendant
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ORDERED, that the motion (motion sequence number 001) by Defendant to dismiss the first and fourth causes of action of the Verified Complaint is granted to the extent that the fourth cause of action is dismissed only and otherwise the motion is denied; and it is further

ORDERED, that Defendant shall serve a Verified Answer within thirty (30) days from the date herein; and it is further

ORDERED, that a preliminary conference is scheduled for July 26, 2007 at 9:30 a.m. in DCM, Room 203A, Griffing Avenue Annex, Suffolk County Supreme Court, 1 Court Street, Riverhead, New York.

THE COMPLAINT

Plaintiff commenced this action to recover damages for Defendants' alleged breach of a series of oral contracts relating to his employment with the corporate Defendant, THERACARE OF NEW YORK, INC. ("THERACARE"). Defendant JOHN CALDERON ("CALDERON") was the sole shareholder of Theracare when it was incorporated in 1991. The complaint sets forth four (4) causes of action alleging a breach of four separate oral agreements.

The first cause of action alleges that from 1991 to 1998, Plaintiff was the accountant for THERACARE and that in 1998, CALDERON induced him to sell his private accounting practice and work

for Defendants full-time. In exchange, Plaintiff alleges that Defendants agreed that Plaintiff would receive "a 2.5% share in Defendant JOHN CALDERON's interest in defendant THERACARE OF NEW YORK, Inc. upon the occurrence of a triggering event, i.e., when Defendant JOHN CALDERON had a liquidating event in his interest in Defendant THERACARE OF NEW YORK, INC." **Verified Complaint at ¶10.** Plaintiff alleges that CALDERON liquidated one half interest in THERACARE in 2003 and that at the time of the liquidation, THERACARE was valued at $120,000,000.00. **Verified Complaint at ¶'s 12,13.** Plaintiff further alleges that pursuant to the aforementioned agreement, he was to receive 2.5% of the cash payment made to CALDERON for the partial liquidation of his interest and 2.5% of CALDERON's remaining stock in THERACARE and that Defendants would pay the resultant income taxes on this transaction. **Verified Complaint at ¶14, 15**. Plaintiff alleges that he received the cash payment but neither received the 2.5% stock payment nor did Defendants pay the income taxes incurred, and thus, he alleges that they breached the contract. **Verified Complaint at ¶'s 16,17**.

The second cause of action alleges that the parties entered into an agreement for Plaintiff to be paid variable compensation in the amount of 2.5% of the cash earnings of THERACARE and that Defendants failed to make said payment for the 2003 year in violation of the agreement. **Verified Complaint at ¶'s 19-26.**

The third cause of action alleges that in April of 2005, the parties entered into a different employment agreement under which THERACARE agreed to employ Plaintiff until December 2005. **Verified Complaint at ¶ 29, 30**. Plaintiff alleges that he was advised in September of 2005 that there was no more work for him and effectively he was terminated. **Verified Complaint at ¶35.** Plaintiff further alleges that in October of 2005, CALDERON "demanded that he sign a termination agreement in one day or he would stop paying Plaintiff's salary" and that Plaintiff "refused to sign this termination agreement" and thus Defendants stopped paying him in purported breach of this employment agreement. **Verified Complaint at ¶35, 36.**

Finally, the fourth cause of action alleges that also in September of 2005, the parties entered into a severance agreement under which plaintiff would receive a severance package "substantially similar to that given to all other executives of THERACARE OF NEW YORK, INC., upon their separation from employment." **Verified Complaint at ¶42.** Plaintiff alleges that Defendants failed to pay him any severance and thus breached the terms of this severance agreement. **Verified Complaint at ¶43, 44.**

MOTION TO DISMISS

Defendants now move pursuant to **CPLR §3211(a)(7)** to dismiss the first and fourth causes of

action of the complaint on the grounds that they fail to state a cause of action.

It is well settled that on a motion to dismiss for failure to state a cause of action, the allegations of the complaint must be accepted as true and the court must determine whether the facts fit any cognizable legal theory. ***Morales v. Copy Right, Inc.,*** 28 A.D.3d 440, 813 N.Y.S.2d 731 (2d Dept. 2006); ***Old Salem Development Group, Ltd., v. Town of Fishkill,*** 301 A.D.2d 639, 754 N.Y.S.2d 333 (2d Dept. 2003). The allegations of the complaint are to be liberally construed in the light most favorable to the Plaintiff and must be given every possible favorable inference. ***Andre Strishak & Assoc., P.C., v. Hewlett Packard Co.,*** 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dept. 2002).

First Cause of Action

With regard to the first cause of action, Defendants argue that the complaint fails to adequately plead the existence of an agreement between the parties as to all the material terms. Specifically, Defendants claim that the contract fails to define "liquidating event" and that there was clearly no meeting of the minds and thus, no contract. Defendants argue that the term "liquidating event" is so vague as to be subject to multiple meanings, each of which would have resulted in a different contract. Here, since CALDERON only sold or "liquidated" a portion of his shares or interest in CALDERON, and paid Plaintiff his 2.5% of the value, defendants argue that there was no breach. Defendants argue that the shares retained by CALDERON were not "liquidated" according to the dictionary definition of that term, and thus there was no breach absent some further unpled allegation of a modification of the parties' agreement. Thus, they argue that the first cause of action must be dismissed.

In opposition, Plaintiff argues this first cause of action states a claim in that he has pled each element of breach of contract; to wit, Plaintiff alleged that a contract was formed , that Plaintiff performed his obligations under the contract by selling his private accounting practice and working full-time for defendants, that CALDERON failed to perform by failing to transfer 2.5% of his remaining interest in Theracare, and that plaintiff was damaged by this breach. On the issue of vagueness of the terms of the agreement, Plaintiff alleges that the parties did specifically agree to what the "liquidating event" meant and that there was a meeting of the minds.

At the outset, the Court notes, that it is obviously unfortunate that during the lengthy professional relationship between the parties in what appears to be a successful corporate enterprise, they never recognized the importance of reducing their agreements to writing. That being said however, the Courts have recognized that a verbal contract is "as enforceable as a written one", however the burden of establishing the terms falls to the proponent and before a court will impose a contractual obligation, it must ascertain that a contract was made and that its terms are definite. ***Charles Hyman, Inc., v. Olsen Industries, Inc.,*** 227 A.D.2d 270, 642

N.Y.S.2d 306 (1st Dept. 1996). On the issue of definiteness, the First Department, quoting the Court of Appeals stated:

> The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties agreed to. That said, imperfect express does not necessarily indicate that the parties did no intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties. The conclusion that a party's promise should be ignored as meaningless is at best a last resort.

Korff v. Corbett, 18 A.D.3d 248, 794 N.Y.S.2d 374 (1st Dept. 2005)(internal citations omitted).

Considering the agreement in the case at bar in light of these principles, the Court finds that Plaintiff has pleaded a cause of action sufficient to withstand the motion to dismiss. Although the terms of the agreement might be somewhat imprecise, it is clear that the parties' intended to contract, and, in fact, Defendants have performed to a certain extent. ***Korff, supra.*** The complaint alleges the essential terms of a breach of contract claim: that the parties' entered into an agreement, that plaintiff performed, Defendants failed to perform and that Plaintiff suffered damages as a result of the breach. Taking all the allegations of the complaint as true as required on a motion to dismiss for failure to state a cause of action, Plaintiff has pleaded a cause of action for breach of contract and the motion to dismiss the first cause of action is denied.

Fourth Cause of Action

Defendants also move to dismiss the fourth cause of action on the ground that it fails to allege that an agreement was reached between the parties with regard to the alleged severance agreement. Here, Defendants argue that the complaint alleges (in the third cause of action) that Plaintiff refused to sign a written termination agreement and that it is thus clear that the parties were not able to come to terms of an agreement and hence there was no meeting of the minds on the terms of any severance agreement.

In opposition, Plaintiff argues that the parties, in September 2005, agreed to a severance package, in consideration of which, he continued his employment until December of 2005. Plaintiff argues in his Memorandum of Law, that Defendants had previously offered severance packages to other employees and that in reliance upon such practice and the promise to pay severance, he continued his employment. In reply, Defendants argue that the complaint fails to allege any oral reliance on the alleged oral agreement to provide severance, or on the severance practices afforded to others, and thus, fails to state a cause of action.

To succeed on a claim for severance, a Plaintiff must plead that the employer had a regular practice of making severance payments and that he relied upon such practice in accepting or continuing employment. ***Skarren v. Household Finance Corp.,*** 296 A.D.2d 488, 745 N.Y.S.2d 556 (2d Dept. 2002). In the absence

of proof of detrimental reliance, the contract lacks consideration and is unenforceable. ***Smith v. New York State Electric and Gas Corp.,*** 155 A.D.2d 850, 548 N.Y.S.2d 117 (2d Dept. 1989).

In the case *sub judice*, the fourth cause of action for breach of a severance agreement fails to state a cause of action. The complaint merely alleges that the parties entered into an agreement for the payment of severance "substantially similar to that given to all other executives of THERACARE OF NEW YORK, Inc., upon their separation from employment" and that Defendants failed to pay severance. Plaintiff does not allege that it relied on such severance practices in his decision to continue his employment and the Court will not infer same as requested by counsel in his Memorandum of Law in opposition to the motion. Moreover, it is clear from the allegations of the third cause of action of the complaint that the parties intended and attempted for such agreement to be in writing, but that they were unable to agree upon the terms.

Based upon the foregoing, the motion to dismiss the fourth cause of action is granted.

CONCLUSION

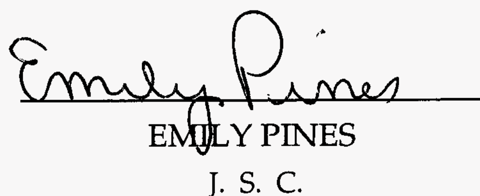
The motion to dismiss the first cause of action is denied and the motion to dismiss the fourth cause of action is granted and that cause of action is dismissed.

Defendants shall serve a Verified Answer within thirty (30) days from the date herein.

A preliminary conference is scheduled for July 26, 2007 at 9:30 a.m. as set forth above.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: May 14, 2007
Riverhead, New York



EMILY PINES
J. S. C.