SHORT FORM ORDER

INDEX NO. 9668/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MICHAEL S. ACOSTA,

Plaintiff,

-against-

GENE LINK, INC.,

Defendant.

ORIG. RETURN DATE: JUNE 12, 2007
FINAL SUBMISSION DATE: AUGUST 2, 2007
MTN. SEQ. #: 001
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 8 read on this motion TO DISMISS.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affidavit in Opposition and supporting papers 5, 6; Memorandum of Law 7; Reply Memorandum of Law 8; it is,

ORDERED that this motion by defendant for an Order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint in its entirety upon the grounds that the complaint fails to state a cause of action upon which relief can be granted, is hereby **GRANTED** to the extent provided hereinafter.

This action stems from an employment relationship of the parties. Plaintiff was an employee of defendant from on or about May 1, 2006 through on or about July 28, 2006. The terms of plaintiff's employment were memorialized in a written agreement dated March 29, 2006 ("Employment Agreement"). Also in connection with his employment, plaintiff executed an "Employee Acknowledgment Form," dated May 3, 2006, and a "Non-Compete Agreement," dated May 1, 2006.

Defendant has now filed a pre-answer motion to dismiss, pursuant to CPLR 3211(a)(7), alleging that plaintiff's complaint fails to state a cause of action upon which relief can be granted. The within complaint alleges six causes of action. The first, second and fourth causes of action allege breach of contract relative to the discharge of plaintiff; the third cause of action is an unjust enrichment claim based upon the breach of contract; the fifth cause of action alleges fraudulent misrepresentation; and the sixth cause of action seeks attorneys' fees based upon the alleged breach of contract. Defendant argues that as New York is an at-will employment state, an at-will employee may be terminated at any time, with or without reason. As plaintiff's employment was not for a fixed duration, defendant argues that any cause of action based upon breach of contract must fail as a matter of law. Defendant alerts the Court that within the aforementioned Employee Acknowledgment Form, plaintiff acknowledged that "there is no specified length of employment" and that either party could "terminate the relationship at will, with or without cause, at any time, so long as there is no violation of applicable federal or state law." Therefore, defendant argues that it is undisputable that there was no fixed duration of plaintiff's employment, and he was an at-will employee. With regard to the fraudulent misrepresentation claim, defendant argues that the claim is not pled with sufficient particularity pursuant to CPLR 3016(b), and also fails to allege detrimental reliance, which is an essential element of a fraudulent misrepresentation claim. As such, defendant argues that this claim fails to state a cause of action as well.

In opposition, plaintiff argues that during the negotiations phase, ALI A. JAVED, the Director of Research & Development for defendant, assured plaintiff that he would be employed with defendant for at least six months. Based upon such an assurance, plaintiff alleges that he left a stable position and accepted the position with defendant. Plaintiff argues that paragraph 1(d) of the Employment Agreement codified the parties' understanding that plaintiff would be guaranteed at least six months of employment. Plaintiff further argues that nowhere in the four corners of the Employment Agreement is he designated an at-will employee. In addition, plaintiff alleges that he did not sign the Employee Acknowledgment Form dated May 3, 2006; he alleges that an unknown individual forged his signature thereupon. Plaintiff claims that after his employment commenced, Mr. Javed "pressured" him to renegotiate the Employment Agreement. When plaintiff refused, plaintiff alleges that Mr. Javed fired him on July 28, 2006.

Paragraph 1(d) of the Employment Agreement provides in its entirety, "[t]he sales target has to be met on a quarterly basis after the second quarter of initial appointment and will be tracked continuously." Plaintiff argues that the ambiguous nature of this provision was intentional so that Mr. Javed could fire him "prematurely" if he did not acquiesce to Mr. Javed's demands. Plaintiff further argues that a fair interpretation of this provision leads to the conclusion that plaintiff had a six month employment with defendant, at a minimum. Based upon the alleged ambiguous provision of the Agreement, plaintiff seeks to introduce parol evidence which he will obtain during the discovery process. With respect to the alleged deficiencies in pleading, plaintiff seeks, in the alternative to dismissal, leave to amend his complaint pursuant to CPLR 3025(a). The Court notes that at this juncture, plaintiff does not need leave of Court to amend his complaint, and that plaintiff has not sought such affirmative relief from the Court by way of cross-motion (*see* CPLR 2215).

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

In New York, it is well-settled that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party (*Rooney v Tyson*, 91 NY2d 685 [1998]; *Coffey v Tetragenetics, Inc.*, 40 AD3d 1247 [2007]; *Poplawski v Metropolitan Prop. & Cas. Ins. Co.*, 262 AD2d 543 [1999]). The at-will presumption will be triggered when an employment agreement fails to state a definite period of employment, fix employment of a definite duration, establish a fixed duration or is otherwise indefinite (*Rooney v Tyson*, 91 NY2d 685, *supra*). When an agreement is silent as to duration, it is presumptively at-will absent an express or implied limitation on an employer's otherwise unfettered ability to discharge an employee (*see Sabetay v Sterling Drug*, 69 NY2d 329 [1987]; *O'Connor v Eastman Kodak Co.*, 65 NY2d 724 [1985]; *Weiner v McGraw-Hill*, Inc., 57 NY2d 458 [1982]).

Here, the Court finds that the Employment Agreement is silent with respect to duration, thereby resulting in an at-will employment, terminable at any time for any reason or no reason by either party (*Rooney v Tyson*, 91 NY2d 685, *supra*; *De Petris v Union Settlement Ass'n*, 86 NY2d 406 [1995]; *Poplawski v*

Metropolitan Prop. & Cas. Ins. Co., 262 AD2d 543, *supra*). There is no allegation of any other limitation on defendant's ability to discharge plaintiff, or that plaintiff's discharge violated any federal or state statute. The clause relied upon by plaintiff, paragraph 1(d) of the Employment Agreement, provides that "[t]he *sales target* has to be met on a quarterly basis after the second quarter of initial appointment and will be tracked continuously" (emphasis supplied). As such, the Court finds that this clause relates to the sales requirements of the position, and does not establish a definite period of employment. Moreover, while the Employment Agreement speaks of income and vacation time based upon a year, this language does not guarantee a definite period of employment for a year or for any period of time (*Martin v New York Life Ins. Co.*, 148 NY 117 [1895]; *Talansky v Am. Jewish Historical Soc'y*, 8 AD3d 150 [2004]).

Further, whether a written agreement is ambiguous is a question of law for the court, and "ambiguity is determined by looking within the four corners of the document, not to outside sources" (*Kass v Kass*, 91 NY2d 554 [1998]; *Nappy v Nappy*, 40 AD3d 825 [2007]; *Carpinelli v MDF Dev.*, 245 AD2d 866 [1997]). In the instant matter, the Court finds that the Employment Agreement is unambiguous with respect to whether plaintiff was an at-will employee, and therefore a resort to parol evidence is not warranted. Finally, plaintiff's allegations of breach of an alleged duty of good faith and fair dealing are inconsistent with defendant's unfettered right to terminate the employment arrangement at any time (*see Sabetay v Sterling Drug*, 69 NY2d 329, *supra*).

Turning to plaintiff's fifth cause of action sounding in fraudulent misrepresentation and inducement, to state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373 [2003]; *Williams v Sidley Austin Brown & Wood, L.L.P*, 2007 NY Slip Op 50846[U] [Sup Ct, NY County]). In the case at bar, plaintiff alleges that defendant intentionally solicited plaintiff to come work for it based upon plaintiff's expertise in the field, when it had no intention of retaining plaintiff as an employee. As a result, plaintiff alleges that he left his former employment to work for defendant, and after being terminated, suffered economic injury. As such, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free*

School Dist. v Anderson LaRocca, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that the complaint sufficiently pleads a cause of action for fraudulent misrepresentation.

Accordingly, for the foregoing reasons, defendant's motion to dismiss plaintiff's complaint is granted to the extent that plaintiff's first, second, third, fourth, and sixth causes of action are hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: November 5, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court