SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

JOHN CONGIGLIO,

Plaintiff,

INDEX NO.: 011331/2007
MOTION DATE: 09/17/2007
MOTION SEQUENCE: 001

-against-

RAY-X MEDICAL MANAGEMENT SERVICES, INC., RAY-X MEDICAL MANAGEMENT SERVICES, INC., d/b/a RAY-X MEDICAL MANAGEMENT SERVICES, RAY-X MEDICAL MANAGEMENT SERVICES, INC., d/b/a ELMONT OPEN MRI, ANDREW PRESTI, WAYNE NEAGLE, RAY BECCE, D.R. ROSSI, M.D., P.C., D.R. ROSSI, M.D., P.C. d/b/a RAY-X MEDICAL MANAGEMENT SERVICES, D.R. ROSSI, M.D., P.C., d/b/a "JOHN DOE CO'S 1-10" & D.R. ROSSI, M.D.,

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Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation of Saul D. Zabell in Support & Exhibits Annexed	2
Affirmation in Opposition of Paul J. Solda, Affidavit of John Consiglio & Exhibits Annexed	3
Reply Affirmation of Saul D. Zabell	4

Before the Court is defendants' motion to dismiss pursuant to C.P.L.R. §3211, or, in the alternative, for an order to compel arbitration pursuant to C.P.L.R. §7503. Defendants argue that this matter should be sent to arbitration pursuant to an agreement to arbitrate executed by plaintiff and defendants in connection with plaintiff's former term of employment with

defendant Ray-X Medical Management. Should the Court choose not to send this case to arbitration, defendants ask that it be dismissed pursuant to C.P.L.R. §3211 for failure to state a claim upon which relief may be granted. Conversely, the plaintiff argues that his nine causes of action should not be sent to arbitration.

Plaintiff was employed by defendant Ray-X Management Services, owned by defendants Presti, Neagle and Becce, from 1994 until 1997, at which time the company was dissolved and sold. In January 1998, Ray-X Medical Management Inc. was incorporated by the same individual defendants: Presti, Neagle and Becce. Defendants hired plaintiff as a salaried employee and a commissioned salesperson. In January 2000, he was promoted to sales and marketing manager. In accordance with an employment contract executed by defendant, Ray Becce, as president of RXMMS, plaintiff was to receive a base salary and commission with performance incentive based on revenue collections. Plaintiff alleges that he never received that commission and performance incentive despite meeting the agreed criteria and that defendants cited "cash flow problems" for the delay.

On February 20, 2006, plaintiff signed an "Acknowledgment of and Agreement with Ray-X Arbitration Policy" form. *See* Exhibit B, Defendants' Motion. In January or February 2007, defendant RXMMS sold its assets to defendant Rossi who conducts business under the name "Long Island Radiology." In May 2007, plaintiff was fired by defendant Rossi. Plaintiff alleges that this was because of his age and gender.

Plaintiff commenced this action to recover commissions and expense reimbursement accrued during his years of employment and to recover damages from various alleged torts and statutory violations incidental to his termination. He pleads nine causes of action.

Plaintiff John Congiglio's First, Second, Third and Fifth causes of action are referred to arbitration. "[T]he announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties." *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463 (1975). According to the employment agreement, plaintiff submitted to arbitration "any such dispute arising out of [his] employment." *See* Exhibit F, Employee Manual, of Defendants' Motion. Plaintiff's claims for Breach of Contract, Labor Law §191, Account Stated and Equity fall under his employment agreement. The parties both consented to an arbitration agreement and

therefore this Court will interfere as little as possible with that decision. *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49-50, 689 N.E.2d 884, 666 N.Y.S.2d 990 (1997). Judicial intervention with the arbitration process is discouraged. *New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO*, 99 N.Y.2d 1, 6 -7, 780 N.E.2d 490, 750 N.Y.S.2d 805 (2002).

Finding that the aforementioned First, Second, Third and Fifth causes of action are covered by the Arbitration Agreement, while the Fourth, Sixth, Seventh, Eighth and Ninth causes of action are not, the court has decided to sever the latter causes of action from the former. *Berger v. Cantor Fitzgerald, Inc.*, 240 A.D.2d 222, 223, 658 N.Y.S.2d 591, 592 (1st Dep't 1997); *Brennan v. A.G. Becker, Inc.*, 127 A.D.2d 951, 953, 512 N.Y.S.2d 555, 557 (3d Dep't 1987).

The Fourth, Sixth, Seventh, Eighth and Ninth causes of action are subject to Defendants' Motion to Dismiss Pursuant to C.P.L.R. §3211. "It is well settled that on a motion to dismiss, a court must liberally construe the complaint in the light most favorable to plaintiff and all factual allegations therein must be accepted as true." *Goldman v. Metropolitan Life Ins. Co.*, 13 A.D.3d 289, 290, 788 N.Y.S.2d 25, 27 (1st Dep't 2004). Nevertheless, we will only consider whether the alleged facts suit a cognizable legal theory. *Leon v. Martinez,* 84 N.Y.2d 83, 87-8, 614 N.Y.S.2d 972 (1994); *Morone v. Morone*, 50 NY2d 481, 484, 429 N.Y.S.2d 592 (1980).

Plaintiff's Seventh cause of action is dismissed as a matter of law. In New York, there is no fiduciary relationship between an employee and employer when the employment is terminable at will. *Bevilacque v. Ford Motor Co.*, 125 A.D.2d 516, 519 (2d Dep't 1986).

The remaining causes of action are as follows: Fourth cause of action under N.Y.B.C.L. §610, Sixth cause of action for Fraudulent Conveyance, Eighth cause of action for violations of Labor Law Art. 20-C, and the Ninth cause of action for Employment Discrimination. The aforementioned causes of action are factually inadequate to constitute valid causes of action. "[A] pleading which, fairly construed, fails to allege any facts which constitute a wrong but, only general conclusions, is entirely insufficient and may be dismissed on that ground." *Gerdes v. Reynolds*, 281 N.Y. 180, 183-84 (1939). This rule is applied "in the interest of fairness and dispatch, to establish a system of pleading within our jurisdiction which would require of a party that he state his case in such a manner that vagueness is avoided; that an opponent may be

informed of the facts to which he must plead and which he must be prepared to meet upon a trial, without the risk of surprise by some unforeseen construction of an obscure pleading." *Kalmanash v. Smith*, 291 N.Y. 142, 153-54 (1943).

Plaintiff's Fourth cause of action pursuant to "relevant statutes of the B.C.L." is too vague. *Id.* On the other hand, while plaintiff does cite to B.C.L. §610, that section is irrelevant to this matter inasmuch as it refers to the "selection of inspectors at shareholders meetings."

Plaintiff's Sixth cause of action, which is loosely cited as a violation of the "N.Y. Fraudulent Conveyances Act" is inherently flawed as no factual acknowledgment is made to the required element of "actual intent." [1] Plaintiff's allegation that "[s]uch transfer when made, has in effect, defrauded creditors and employees of Ray-X," will not suffice. *See* Exhibit A – Complaint, Defendants' Motion.

Plaintiff's Eighth cause of action also fails. Notwithstanding the fact that plaintiff fails to state which prohibition(s) of Labor Law Art. 20-C defendants may have violated, the facts alleged do not even lend themselves to a violation of that law. More specifically, while plaintiff seems to dance around Art.20-C(2)(a), it must be noted that a violation of Labor Law §191, the only law mentioned by plaintiff, does not qualify as a "violation [which] creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud."

Lastly, Plaintiff's Ninth cause of action for employment discrimination lacks the factual substance to establish a cause of action. Furthermore, a vague reference to entire bodies of law and "other related discriminatory statutes," gives no direction to defendant, nor the court. *Kalmanash* at 153-54.

On the basis of the foregoing, it is

ORDERED that plaintiff's First, Second, Third and Fifth causes of action are sent to arbitration. It is further

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[1] Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. McKinney's N.Y. Debtor and Creditor Law § 276 (2007). (?art. 10 fraudulent conveyances)

ORDERED Plaintiff's Fourth, Sixth, Seventh, Eighth and Ninth causes of action are dismissed.

Insofar the causes of action to be determined by the court have been found insufficient, the court marks this action disposed and it needs no further attention of the court.

Dated: November 5, 2007

J.S.C.