SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ELRAC, INC. d/b/a ENTERPRISE RENT-A-CAR,

Plaintiff,

INDEX No. 1122/07

MOTION DATE: March 7, 2008
Motion Sequence # 001

-against-

STUART MORGAN,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X
Memorandum of Law..... XX

This motion, by plaintiff, for judgment dismissing defendant's counterclaims, pursuant to CPLR §3211, on the grounds that the counterclaims fail to state a cause of action based upon documentary evidence, is determined as hereinafter set forth.

FACTS

The defendant, Stuart Morgan was hired by the plaintiff to work as an "Area Remarketing Manager" on October 14, 1998. On June 12, 2006 Mr. Morgan drafted, signed,

and delivered a letter of resignation to the plaintiff giving it two weeks notice. On June 23, 2006, the defendant resigned from his position with the plaintiff, and was given an "exit interview" whereas he was asked certain questions about his employment relationship with the plaintiff. The plaintiff subsequently filed a complaint against the defendant alleging; breach of contract, misappropriation of trade secrets, breach of duty of loyalty and fiduciary duty, unfair competition, tortious interference with economic business relations and advantage, and injunctive relief. The defendant answered with affirmative defenses and two counterclaims; breach of contract/quantum meruit, and constructive discharge. The plaintiff brings this motion to dismiss the counterclaims maintaining that they fail to state a cause of action based on documentary evidence.

PLAINTIFFS' CONTENTIONS

The plaintiff maintains the defendant was an employee "at will." The parties had a valid employment contract between them and therefore the defendant's counterclaim as to quantum meruit is contrary to law. The defendant made statements during his exit interview, which he signed and submitted to the plaintiff, that preclude his contrary statements asserted in this counterclaim. The plaintiff further avers that the counterclaim of constructive discharge is not recognized in New York, and even if it were, the plaintiff has failed to make a prima facie case. Moreover, some of the defendant's statements in his exit interview directly contradict the statements made in this counterclaim.

DEFENDANT'S CONTENTIONS

The defendant claims that the resignation letter and the papers submitted after the exit interview are insufficient to defeat his counter claims as a matter of law pursuant to CPLR 3211. The defendant claims that the exit interview documents do not conclusively refute his factual allegations, and the counterclaims are sufficient to survive the motion to dismiss. The defendant claims he had no choice but to fill out the exit interview papers as it was a condition of getting his severance pay. The defendant also claims that the exit interviewer, a Mrs. Gina Hernandez, advised him that she was aware of the incident he had with his supervisor but told the defendant not to make waves. The defendant was worried about making waves because his spouse still worked for the plaintiff and he did not want to put her career in jeopardy.

ELRAC, INC. v MORGAN **Index no. 1122/07**

DECISIONS

On a motion to dismiss pursuant to CPLR 3211, the Court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (**Beal Savings Bank v Sommer**, 8 N.Y.3d 318, 324, 2007). "In order to prevail on a CPLR 3211 ... motion, the moving party must show that the documentary evidence conclusively refutes [defendant's] ... allegations." (**AG Capital Funding Partners, LP v State St. Bank & Trust Co.**, 5 N.Y.3d 582, 2005).

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this Court, which includes the pertinent pleadings, and other relevant data.

Initially, the elements for quantum meruit are that the performance of services in good faith must be established; that there is acceptance of services by the person to whom they are rendered; that there is an expectation of compensation therefore; and that the reasonable value of the services is established. (**Ross v Delorenzo**, 28 A.D.3d 631, 635, 2nd Dept., 2006) (ruling that a party may not recover in quantum meruit where a valid and enforceable contract governs the relationship between the parties with respect to the subject matter for which the party seeks to recover). (See also, **American European Art Associates, Inc. v Trend Galleries, Inc.**, 227 A.D.2d 170, 1st Dept., 1996). When all of the defendant's services fall within the contemplated duties of the defendant's employment, any additional recovery for those services based on quantum meruit is precluded. (See, **Zito v Fischbein, Badillo, Wagner & Harding**, 35 A.D.3d 306, 1st Dept., 2006).

The parties had a valid employment contract between them which read in pertinent part;

> "¶8 In consideration for services performed, the Employer shall pay the Employee the compensation as may be agreed upon for the position held by the Employee, or such other sum as may be mutually agreed upon from time to time by the parties. Benefits paid to Employee shall be exclusively

determined and/or modified from time to time by Employer

¶9 In any fiscal year of the Employer in which Employee is employed under this contract for less than the full fiscal year by reason of termination or resignation of employment, Employee shall be entitled to salary and contingent compensation, if any, only for the portion of the year in which he/she was actively employed unless otherwise provided herein".

The defendant erroneously argues that because no specific salary or term was stated in the employment contract that it was not binding and therefore the reasonable value of his services amounted to more than he was paid. "When an employment contract does not state a specific date or defined period, it is presumed an employment at will." (see, **Rooney v Tyson**, 91 N.Y.2d 685, 1998). The defendant worked for the plaintiff without issue for a substantial amount of time.

In his exit interview and resignation letter the defendant wrote, "Enterprise is an amazing place to work." He had an "[o]pen line of communication with upper management"; "Enterprise has high moral values"; "***I was always rewarded for my time & effort.***" He also said he "investigated the option to stay." "I will never be able to repay Enterprise for knowledge acquired"; Enterprise is a"[g]reat company, high ethical standards"; "If I can be any assistance in the future…". These statements were signed by the defendant. The authenticity of these statements is not in dispute by the defendant. Defendant further wrote in his resignation letter, "I have decided to move on and I have accepted a position elsewhere. This was not an easy decision and took a lot of consideration … I wish both you and Enterprise Rent-A-Car every good fortune and would like to thank you for having me as a part of your team." These statements, together with the fact that the parties had a valid employment contract indicate the defendant is entitled to receive the amount of compensation that he had been receiving throughout his employment. (see, **Trataros Construction v New York City Housing Authority**, 34 A.D.3d 451) (dismissing a cause of action seeking additional compensation for alleged extra work performed because documentary evidence

conclusively established [the party] was not entitled to recover). Such counterclaim, therefore, is not a viable one.

The defendant's second counterclaim of constructive discharge alleges that the defendant worked in an abusive environment stemming from an incident with a Mr. Scharf, where the defendant was berated in front of his co-workers. There is dispute over whether the State of New York recognizes the tort of wrongful or abusive discharge. (see, **Murphy v American Home Products**, 58 N.Y.2d 232, 1983; **Russek v Dag Media, Inc.**, 47 AD3d 457, 1st Dept., 2008) (NY doesn't recognize the tort for wrongful discharge of employee at will)), (**Civiletti v Independence Savings Bank**, 236 A. D.2d 436, 2nd Dept., 1997; **DeLuca v Smithkline Beecham Corp.**, 2007 US Dist. LEXIS 12958, (SDNY, 2/16/2007 ["New York does not recognize a common law cause of action for constructive discharge"].

Alternatively, were the tort of constructive discharge to apply herein, the conduct alleged must be so "extreme and outrageous which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." (**Freihofer v Hearst Corp.**, 65 N.Y.2d 135, 1985). This claim cannot survive if the working conditions were merely difficult or unpleasant. (**Stetson v NYNEX Serv. Co.**, 995 F.2d 355, 2nd Cir., 1993). "[T]o state a claim for constructive discharge, plaintiff must allege facts showing that defendant deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign. (**Polidori v Societe Generale Groupe**, 39 A.D.3d 404, 835 NYS2d 80,1st Dept., 2007).

The conduct alleged in the defendant's counterclaim does not meet the standard. The defendant claims to have told the exit interviewer, Gina Hernandez that Mr. Scharf was the reason for his leaving. The defendant claims Mrs. Hernandez told him to not make waves and just sign the exit interview papers. These claims are unsupported by the admissible evidence. Further, the defendant's written statements directly refute the allegations made. The defendant admitted in the exit interview that the incident with the supervisor was not the reason for his resignation.

For the reasons stated above the plaintiff's motion is **granted** and the defendant's counterclaims are **dismissed**.

A Preliminary Conference has been scheduled for May 29, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel are directed for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedules for the purpose of setting **firm** deposition dates.

ENTERED
APR 22 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated APR 18 2008

J.S.C.