SHORT FORM ORDER

INDEX
NO.: 23403-06

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 2-20-08
SUBMITTED: 4-09-08
MOTION NO.: 002-MD

XENTAUR CORPORATION,

Plaintiff,

-against-

BEDROS BEDROSSIAN,

Defendant.

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Upon the following papers numbered 1 to 3 read on this motion to Dismiss Defendant's Counterclaims; Notice of Motion and supporting papers 1-3; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers____; it is,

ORDERED that this motion by plaintiff to dismiss the defendant's Second, Third and Fourth counterclaims is granted to the extent that the third counterclaim is dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that this action is transferred to the inventory of Justice Emily Pines, Part 46, Commercial Division, and all further adjudication of this matter shall be on her calendar.

This case arises out of a relationship between the parties wherein the defendant Bedros Bedrossian ("Bedrossian"), is a 12.5% shareholder of Xentaur Corporation pursuant to an agreement dated May 14, 1995 (the "Agreement"). The Complaint alleges fourteen causes of action against Bedrossian. However, this motion seeks to dismiss three of the four counterclaims alleged by Bedrossian, and only the facts relevant to those counterclaims will be discussed herein.

The record shows that from 1996 through August 2006, Bedrossian was an employee of Xentaur serving as President of the corporation. Bedrossian claims that the terms of his employment were set forth in the Agreement. He further claims that when he became President

and shareholder of Xentaur he had an expectation of long-term employment, and an understanding that he would not be discharged arbitrarily or in bad faith. Bedrossian alleges four counterclaims against Xentaur. The first alleges conversion and is not a subject of the within motion. The second, third and fourth counterclaims seek damages arising from claims of wrongful discharge, breach of an employment agreement and payment for unused vacation time.

By this motion, Xentaur seeks to dismiss the second, third and fourth counterclaims arguing that they fail to state causes of action. In particular, Xentaur claims that the Agreement upon which Bedrossian relies to establish his claims, fails to support the employment related counterclaims. With respect to the second counterclaim for wrongful discharge, Xentaur argued Bedrossian was an at-will employee terminable at any time. Xentaur argues that an at-will relationship cannot support a claim for wrongful discharge. Xentaur further argues that there was never an agreement or promises made for a fixed term of employment of Bedrossian. Xentaur argues that, the court should dismiss the second and third counterclaims. Xentaur also argues that at no time was there an agreement between the parties to pay Bedrossian for unused vacation time and therefore the fourth counterclaim should also be dismissed.

In opposition to the motion to dismiss, Bedrossian argues first and foremost that this motion should be decided under New Jersey law. It is undisputed that Xentaur is a corporation formed under the laws of the State of New Jersey. Bedrossian claims that at the time the Agreement was executed, Xentaur operated out of offices located in Norwood, New Jersey. Relying on this premise, he argues that although his counterclaims state valid causes of action under both New Jersey and New York law, New Jersey has a superior interest in these claims and therefore New Jersey law should apply. He argues, that New Jersey courts have held that minority shareholders have a cause of action for improper termination and are not considered strictly at-will employees. In addition, Bedrossian cites New Jersey cases which provide for the payment of accrued vacation time at the time of termination of employment. In the alternative, Bedrossian argues that if the court finds that New York law applies, he is still entitled to his unused vacation time as Xentaur had a policy of compensating employees for unused vacation.

Turning first to the issue of which law to apply, the court finds that New York law should apply to the matters now before it. Where a conflict of law exists between two states, the courts look to the choice of law rules of the forum to decide which state's law applies (*see*, **Locke v Aston** 2006 Slip Op 2839). New York applies an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation (*Id* at 37). Furthermore, if the plaintiff and the defendant are domiciled in different states, the law of the situs of the injury generally applies (*see* **Neuumeier v Kuehner**, 31 NY2d 121). If however, the parties share a common state of domicile, an analysis as to the predominant interest must be completed (*see* **Aviles v Port Authority of New York and New Jersey** 202 AD2d 45). Applying this law to the case now before the court, it is undisputed that although Xentaur is a New Jersey corporation, the principal place of business since 1995 has been Suffolk County, New York. In addition, Xentaur is authorized to do business in New York and Bedrossian has worked exclusively in New York during his employment with Xentaur. This fact supports the position that if there were a breach of the Agreement, that breach occurred in New York. The court therefore finds that New York has the predominant interest, and this court will apply New York Law.

Under New York Law, it is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez,** 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Plaintiff argues that since the Agreement did not contain a definite term and Bedrossian was an at-will employee, Bedrossian cannot state a cause of action for wrongful termination and therefore the second counterclaim should be dismissed. Not withstanding this argument, Courts have held that an employee may maintain an action for wrongful termination where certain circumstances can be demonstrated (*see*, **Leibowitz v Bank Leumi Trust Company of New York** 152 AD2d 169). These circumstances include but are not limited to inducement to leave prior employment, assurances by the employer and provisions contained in a personnel handbook or manual of the corporation (*Id* at 173). Bedrossian has argued that these circumstances exist in the within matter. The court finds that Bedrossian has set forth a cognizable claim for wrongful termination, sufficient to defeat this motion to dismiss.

Turning now to Bedrossian's Third cause of action alleging breach of contract. Bedrossian argues that the Agreement is an employment agreement between Xentaur and himself. Bedrossian further argues that he fully performed his duties faithfully in accordance with the agreement and by terminating him, Xentaur breached the Agreement. Xentaur argues that this was not an agreement to employ Bedrossian for a definite term, but only an agreement that while he was employed he would be a full time employee. The consideration for this arrangement was granting Bedrossian 12.5% ownership in the corporation. Such ownership was transferred to Bedrossian and is not in dispute. Courts have held, "A cardinal principle governing the construction of contracts is that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract" (see, **Metropolitan Life Insurance Company v. Noble Lowndes International Inc**. 84 NY2d 430; see also, **Prime Realty Holding Co. v Station Plaza Company**, 122 A2d 141). Furthermore, a court will endeavor to give the contract the construction most equitable to both parties (see, **Metropolitan Life Insurance Company v. Noble Lowndes International Inc**. 84 NY2d 430). Under CPLR 3211, dismissal is warranted if the documentary evidence submitted utterly refutes the factual allegations asserted, conclusively establishing a defense to the asserted claims as a matter of law (*see*, **Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88). A fair reading of the Agreement indicates that it has been fully performed. Bedrossian worked full time during his employment and was given a 12.5% ownership in Xentaur. The Agreement supports Xentaur's argument that there was never a promise to hire Bedrossian for a fixed period of time. Therefore, the court dismisses Bedrossian's breach of contract claim which relies on this Agreement.

The Fourth cause of action seeks reimbursement for unused vacation time. Bedrossian argues that Xentaur maintains a policy of compensating employees for unused vacation time at the time of termination. Since discovery has not yet occurred, the Court denies dismissal of Bedrossian's fourth cause of action to allow Bedrossian an opportunity to prove the existence of such a policy.

Therefore, the court denies the motion to dismiss the Second and Fourth counterclaims and grants the motion to dismiss the Third counterclaim.

HON. ELIZABETH HAZLITT EMERSON

DATED: May 21, 2008

J. S.C.