Analytica Group v Schoonveld
2008 NY Slip Op 32091(U)
July 22, 2008
Supreme Court, New York County
Docket Number: 0604258/2005
Judge: Eileen Bransten
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SCANNED ON 7/25/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BRANSTEN, Justice

PART 3

Index Number : 604258/2005
ANALYTICA GROUP
VS.
SCHOONVELD, ETLJO
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. 604258/05
MOTION DATE 5/7/08
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7-22-08

J.S.C.

HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE
- -X

THE ANALYTICA GROUP

Plaintiff,

Index No.: 604258/05
Motion Date: 5/7/08
Motion Sequence No.: 003

-against-

ELTJO SCHOONVELD

Defendant-Counter Plaintiff

-against-

THE ANALYTICA GROUP

Counterclaim Defendant

- -X

FILED
JUL 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

ELTJO SCHOONVELD,

Counter-Plaintiff

-against-

ACCENTIA BIOPHARMACEUTICALS, Inc.,
(f/k/a ACCENTIA, Inc.),

Counterclaim Defendant

- -X

PRESENT: EILEEN BRANSTEN, J:

Plaintiff/Counter-Defendant The Analytica Group, Inc. ("Analytica") and Counter-Defendant Accentia Pharmaceuticals, Inc. ("Accentia") (collectively "Counterclaim Defendants") move pursuant to CPLR 3211 for partial dismissal of the counter-complaint. Defendant/Counter-Plaintiff Eltjo Schoonveld ("Schoonveld") opposes the motion, and cross-moves for an order directing the Counterclaim Defendants to answer the counter-complaint and comply with his discovery demands.

BACKGROUND

In October 2002, Analytica, a subsidiary of Accentia, hired Schoonveld as an executive vice president and general manager. As a condition of his employment, he entered into a confidentiality and non-solicitation agreement in which he agreed not to compete with Analytica for one year after leaving its employ; take any confidential information with him; and solicit any employee or customer.

In the summer of 2004, Analytica suspected Schoonveld of blocking its access to his computer files and copying proprietary information onto several computer disks. Schoonveld gave his resignation notice on September 2, 2004, effective thirty-days later. On September 28, 2004, Analytica accused Schoonveld of siphoning confidential company information and then terminated him. Schoonveld subsequently began to work for Bristol Myers Squibb, Analytica's competitor.

Analytica commenced this action against Schoonveld for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, unfair competition, and conversion. Schoonveld moved pre-answer to dismiss the complaint and Analytical cross-moved for partial summary judgment on its breach of contract claim. On September 12, 2006, the Court (Moskowitz, J.) denied both motions and directed Schoonveld to answer the complaint.

Schoonveld answered and asserted a number of counterclaims against Analytica. The Court (Moskowitz, J.) found that the answer and counterclaims were drafted in an incomprehensible fashion, and granted Analytica's motion to dismiss and Schoonveld's cross-motion to amend.

On July 30, 2007, Schoonveld served an amended answer and asserted counterclaims against Counterclaim Defendants for breach of a written contract; breach of an oral agreement; wrongful discharge; breach of the covenant of good faith and fair dealing; promissory estoppel; fraudulent inducement; and violations of the New York Labor Law § 191, 195, & 198. He also asserts the doctrine of laches as an affirmative defense and demands judgment for punitive damages.

Counterclaim Defendants now move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the affirmative defense, the demand for punitive damages, and all counterclaims except that for breach of a written contract. Schoonveld cross-moves for an order directing them to answer the counterclaims and comply with his outstanding discovery requests.

DISCUSSION

In the context of a CPLR 3211 motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993]).

Laches Affirmative Defense and Demand for Punitive Damages

Counterclaim Defendants move to dismiss the laches affirmative defense and the claim for punitive damages on the grounds that the court already disposed of these claims. The law-of-the-case doctrine precludes a party from re-litigating a judicial determination that was made in the course of a single action before final judgment is rendered (*see Baron v Baron*, 128 AD 2d 821 [2nd Dept 1987]).

As an affirmative defense, Schoonveld pleads that Analytica's claim that he violated the restrictive covenant is barred by the doctrine of laches because

> "[Analytica] made no objection to [him] working at Bristol Myers Squibb until the filing of this complaint. . . and its witnesses were unable to prove

> the same. . .before an administrative law judge determining the entitlement of [Schoonveld] to unemployment insurance benefits."

(Girshon Aff'd, Ex. A, ¶ 34)

However, the Court (Moskowitz, J.) already held, when it denied Schoonveld's motion to dismiss the complaint on September 12, 2006, that "the Unemployment Board decision has no preclusive effect in this action and the Court denies dismissal on this ground" (*id.*, Ex. D, at 7). The same Court warned Schoonveld when he raised this defense again during the May 17, 2007 oral argument on Analytica's first motion to dismiss the counterclaims that "[he] cannot refer to a determination that [the Court] already ruled on" (*id.*, Ex. B, ¶¶ 21-22).

Similarly, after the same Court granted Analytica's motion to dismiss Schoonveld's counterclaims, it gave him the opportunity to amend his answer and counterclaims *with the exception* of his claim for punitive damages (*see, id.*, Ex. E), finding that "there is just no punitive damages claim" (*id.*, Ex. B, ¶ 17). Indeed, generally, "punitive damages will not be awarded in what is essentially a private action, particularly if the action involves . . . a breach of contract" (*Apfel v Prudential Bach Securities, Inc.*, 183 AD 2d 439 [1st Dept 1992]).

Schoonveld cannot seek relief or proceed on a theory that was already rejected by the Court. If he disagreed with the prior determinations, his proper remedy was an appeal, not disregard for them (*see Mohamed v. Defrin*, 45 AD 3d 252 [1st Dept 2007]; *see also Kye Po Choi v Q.R. Development Corp.*, 17 AD 3d 538 [2nd Dept 2005]).

Accordingly, these determinations are law of the case and Schoonveld is barred from asserting a laches affirmative defense and a demand for punitive damages. The motion to dismiss those parts of the answer and counterclaims are granted.

Second Counterclaim against Accentia: Breach of an Oral Agreement

In order to state a claim for a breach of contract, the plaintiff must allege that: 1) a contract exists; 2) the non-breaching party performed under the contract; 3) the other party breached; and 4) the breach caused damage to the non-breaching party (*see Najjar Indus. Inc v New York,* 87 AD 2d 329 [1st Dept 1982]). Here, Schoonveld pleads that he entered into an oral agreement with Accentia pertaining to his alleged three-year employment contract with Analytica; he complied with all of the agreement's terms; Accentia breached the agreement by failing to appoint him to its Executive Committee and not giving him stock options; and that he suffered damages as a result of the alleged breach (*see* Girshon Aff'd, Ex. A, ¶¶ 223-227).

By his own pleading, Schoonveld's claim could not survive this motion because an employment agreement for a fixed three-year term must be in writing in order to be enforceable (*see* N.Y. Gen. Oblig. Law § 5-701). However, the accompanying documentary evidence demonstrates that this employment relationship was not for a set-time, could be fully-performed within one year, and therefore is not barred by the Statute of Frauds.

First, Analytica's offer letter dated October 10, 2002 does not contain a term-certain for the employment period; in fact it contains a sentence that he would be entitled to a raise on January 1, 2003 if he is still employed by them at that time (*see* Girshon Aff'd, Ex. A, Ex. A). Clearly, if it was uncertain after the employment agreement was executed that Schoonveld would still be an Analytica employee three months later, this could not have been a three-year term. Second, the Confidentiality and Non-Solicitation Agreement executed on October 10, 2002 fails to contain a time-frame for his employment with them (*id.*). Accordingly, this alleged oral agreement that does not appear to be for a definitive term need not be in writing in order to be enforced. Schoonveld sufficiently pleads breach of an oral agreement, and the motion to dismiss is denied.

Third and Fourth Counterclaims: Wrongful Discharge

"New York does not recognize a . . .wrongful discharge [claim] from an employment at will" (*Russek v Dag Media,* 47 AD 3d 457 [1st Dept 2008]). It is well settled that absent an agreement establishing a fixed duration, an employment relationship is presumed to be at will (*see Ingle v Glamore Motor Sales, Inc.*, 73 NY 2d 183 [1989]).

Since no writing demonstrates a fixed-duration employment either with Analytica or Accentia, this Court must assume that it be one of at-will. Accordingly, the claims for wrongful discharge are dismissed.

Fifth and Sixth Causes of Action: Breach of the Covenant of Good Faith and Fair Dealing

To state a cause of action for breach of the implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Zuckerwise v Sorceron, Inc.*, 289 AD 2d 114 [1st Dept 2001]). When such a cause of action is redundant of a breach of contract claim, it must be dismissed (*see, Canstar v J.A. Jones Const. Co.*, 212 AD 2d 452 [1st Dept 1995]).

While some of the breach of the covenant of good faith and fair dealing allegations are identical to those related to the breach of contract claim against Analytica, the latter does contain additional assertions that warrant denying its dismissal. Among these are the averments that Analytica "deliberately [undermined Schoonveld's] ability to perform" (Girshon Aff'd, Ex. A, ¶ 258[e]); "[refused] to support the department, headed and operated by Schoonveld (*id.*, ¶ 258[f]); and "[attempted] to conceal and hide inefficiencies of lack of productivity in other areas of Analytica. . . and [had Schoonveld's department] make up [those] shortfalls" (*id.*, ¶ 258[j]). Since these assertions go beyond a mere contract breach and allege specific actions meant to harm Schoonveld, the motion to dismiss the fifth counterclaim is denied.

In contrast, the allegations against Accentia for breach of the implied covenant are identical to those for breach of the oral agreement. Schoonveld pleads in both causes of action that Accentia committed the respective breaches by failing to deliver stock options, denying him compensation, and wrongfully terminating him (*id.,* ¶ 225 & ¶ 264). The sixth cause of action is therefore dismissed.

Seventh and Eighth Causes of Action: Promissory Estoppel

"To avoid dismissal of a promissory estoppel claim, a plaintiff must allege 1) an unambiguous promise; 2) reasonable and foreseeable reliance on the promise; and 3) injury as a result of that reliance" (*Urban Holding Corp v Haberman*, 162 AD 2d 230 [1st Dept 1990]). Here, Schoonveld pleads that Analytica and Accentia, respectively, made certain promises to him, which included vesting him with stock options; an entitlement to a bonus; an appointment to Accentia's Executive Committee; and control over hiring and firing other employees (*see* Girshon Aff'd, Ex. A, ¶ 271 & ¶ 281). He relied on these promises by ending his prior employment relationship (*id.,* ¶ 272 & ¶ 285) and suffered "substantial losses in compensation" when his tenure with Analytica ended (*id.,* ¶ 277 & ¶ 287).

Counterclaim Defendants' argument that a promissory estoppel claim is inapplicable in an employment-related action has no merit. In each of the cases they cite, the court held that promissory estoppel could not be used to resuscitate a breach-of-contract claim barred

by the Statute of Limitations (*see Cunnison v. Greenshields,* 107 AD 2d 50 [1st Dept 1985]; *see also Ginsberg v. Fairfield-Noble Corp,* 81 AD 2d 318 [1st Dept 1981]). Here, Schoonveld's promissory estoppel claim is separate from his breach of contract claims and is not asserted in the manner or for the purpose that the Appellate Division, First Department prohibits. Accordingly, the motion to dismiss the seventh and eighth causes of action is denied.

Ninth and Tenth Causes of Action: Fraudulent Inducement

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false or known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party. . .and injury" (*Lama Holding Co. v Smith Barney,* 88 NY 2d 413 [1996]). Schoonveld pleads that Counterclaim Defendants represented to him that his employment would be for a three-year term, that he would be entitled to profit-sharing and a bonus, and that he would have a high-level of authority within the company (*see,* Girshon Aff'd, Ex. A, ¶ 291 and 304). These promises were allegedly false and made to induce Schoonveld to accept the position with Analytica (*id.,* ¶ 296 and 306), and caused him injury because he left his prior employment (*id.,* ¶ 297 and 307).

However, in order "[t]o plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties." (*Krantz v Chateau Stores of Canada*, 256 AD 2d 186 [1st Dep 1998]). "No cause of action for fraud is stated or exists where the only fraud charged relates to a breach of an employment contract" (*Dalton v Union Bank of Switzerland*, 134 AD 2d 174 [1st Dept 1987]). Schoonveld's fraudulent-inducement allegations are redundant of those for his breach-of-contract claims since the purported misrepresentations exclusively pertain to the employment's terms. The motion to dismiss the ninth and tenth causes of action is therefore granted.

Eleventh and Twelfth Causes of Action: Violation of the New York Labor Law

In his final causes of action against Counterclaim Defendants, Schoonveld alleges violations of New York Labor Law Sections 191, 195, and 198. It is settled that "employees serving in an executive, managerial, or administrative capacity do not fall under Section 191 of the Labor Law" (*Pachtler v Bernard Hodes Group, Inc.*, 2008 WL 2338595). Section 195 requires employers to maintain payroll records in accordance with Section 191's provisions (*see* N.Y. Lab. Law § 195[1]). "[A]ttorney's fees are only available [pursuant to Section 198] to plaintiffs who prove a [substantive] violation" (*Pachler*, 2008 WL 2338595).

The claims for Labor Law violations must be dismissed. Section 191 is inapplicable since, by his own admission, Schoonveld was an executive vice president and such employees are exempt from this section. Since Section 195 is linked to Section 191, that claim must also be dismissed. Moreover, Schoonveld does not plead that Counterclaim Defendants failed to maintain payroll records in violation of this section. Finally, since there is no viable substantive Labor Law claim, Schoonveld cannot seek attorney's fees under Section 198.

Accordingly, it is

ORDERED that the Counterclaim Defendants' motion to dismiss the second, fifth, seventh, and eighth counterclaims is DENIED; and it is further

ORDERED that the Counterclaim Defendants' motion to dismiss the third, fourth, sixth, ninth, tenth, eleventh, and twelfth counterclaims is GRANTED; and it is further

ORDERED that the Counterclaim Defendants' motion to dismiss the laches affirmative defense and demand for punitive damages is GRANTED; and it is further

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ORDERED that the Counterclaim Defendants are to answer the counterclaims within 10 days from the date of this order's entry.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 22, 2008

ENTER

Hon. Eileen Bransten

HON. EILEEN BRANSTEN

FILED
JUL 25 2008
COUNTY CLERK'S OFFICE
NEW YORK