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

PRESENT: GISCHE PART 10

JUDITH J. GISCHE, J.S.C. *Justice*

INDEX NO. 108431/06

SABUTAGE INC

-v-

MOTION DATE

MOTION SEQ. NO. 5

JOAN TUCH INC

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 05 2010

COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 12/21/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

SABOTAGE, INC. and MARTIN P. GREENBERG,

Plaintiffs,

-against-

JEAN TOUCH, INC. and VICTOR HARARI a/k/a VICTOR HATARI,

Defendants.

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Decision/Order
Index No.: 108431/06
Seq. No. : 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's motion [SJ] w/EL affirm, RT affid, exhs	1
JG affid	2

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff alleges that the defendant's breached an employment contract which was extended from July 11, 2005 to August 13, 2005. Defendants' defense is based on the claim that plaintiffs resigned from their employment and it was plaintiffs, rather, who breached the contract with defendant.

Defendants Jean Touch, Inc. ("Jean Touch") and Victor Harari s/h/a as Victor Harari a/k/a Victor Hatari ("Hatari") move for partial summary judgment dismissing: [1] the complaint against Hatari; [2] the first and fourth causes of action; and [3] directing that any lost earnings recovered by plaintiffs be reduced by the amount of earnings plaintiffs acknowledged having received subsequent to the end of their employment with Jean Touch.

Since issue has been joined, and this motion was made timely after note of issue was filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

Plaintiff's first cause of action is for wrongful termination of plaintiff's employment. In support of these allegations, plaintiffs annexed as exhibit "B" to the complaint a termination agreement and release. Exhibit "B" is a two-page letter memorandum drafted by defendant Hatari to plaintiff Greenberg and dated December 27, 2005. The letter memorandum seeks to "confirm" a conversation had between Hatari and Greenberg wherein the parties agreed to terminate the employment contract.

Defendants seek to strike exhibit "B" from the complaint on the grounds that this

document relates to a proposed settlement and was exchanged in the context of settlement negotiations. Defendants seek an order directing that any lost earnings recovered by plaintiffs be reduced by at least the amount of earnings plaintiffs acknowledged having received subsequent to the end of their employment with Jean Touch, Inc. and during the term of the Employment Agreement. Defendants also moved for dismissal of the fourth cause of action seeking damages for loss of reputation, and seek dismissal of this action against Hatari, individually. Plaintiffs have only opposed that portion of the motion related to exhibit "B" and the damages offset.

At the outset, inasmuch as plaintiffs have not opposed dismissal of the fourth cause of action and the entire action against Hatari, that portion of the motion is granted. It is well settled that no cause of action lies for damage to reputation arising from the breach of an employment contract. See Marion Scott Real Estate, Inc. v. Rochdale Village, Inc., 23 Misc.3d 1129(A) (NY Sup 2009); see also MacArthur Constr. Corp. v. Coleman, 91 AD2d 906 (1st Dept 1983). As for the action against Hatari, the contract upon which this action is based was entered into by Jean Touch, only, and not Hatari in his individual capacity. Therefore, plaintiff cannot hold Hatari individually liable based on the allegations contained in the complaint.

Under CPLR 4547, any statements made for settlement purposes only are inadmissible to prove either the liability of the alleged wrongdoing or the weakness of a claim. At his deposition, plaintiff Greenberg testified as follows regarding exhibit "B":

A: About four days after Victor fired me he sent me a settlement or what he wanted to settle for agreement...
Q. Is that what is attached as Exhibit B to the compliant, to your complaint?

A. Yes.

Q. Did you accept this Agreement that is dated December 27, 2005?

A. No.

Q. What did you do, if anything, to inform Jean Touch, Inc. that you weren't accepting this Agreement?

A. I hired lawyers to contact Victor to see if we can get together to mediate the settlement.

In opposition to this motion, Greenberg maintains in his affidavit that exhibit "B" was sent to him "unsolicited and without any attempts at negotiation." Greenberg also states that he relies on exhibit "B" as evidence that he was terminated by the defendants.

Whether exhibit "B" was sent to plaintiff in the context of settlement negotiations, or otherwise unsolicited, it is undisputed that exhibit "B" was an offer of settlement. CPLR 4547 is unambiguous, and based thereupon, exhibit "B" must be struck from the complaint as inadmissible, unless it falls within an exception to the rule. See i.e. Richmond County Country Club v. Tax Com'n of City of New York, 53 AD3d 661 (2d Dept 2008).

To the extent that plaintiff argues that exhibit "B" is admissible because it contains a statement of independent fact, to wit, that plaintiff was fired, this argument must be rejected. The document does not contain a statement that the defendants fired plaintiffs. Rather, the document is clear insofar as it is the product of a mutual agreement by the parties to terminate the employment contract. Moreover, plaintiff has not established that this document, even if it did contain a statement that the defendants fired plaintiffs, would otherwise fall within an exception to CPLR 4547. See

Miller v. Sanchez, 6 Misc3d 479 (NY Sup 2004); see also Andresen v. Kirschner, 190 Misc2d 779 (2001) reversed on other grounds 297 AD2d 235 (1st Dept 2002).

As for the offset, the Jean Touch points to Greenberg's testimony regarding his employment after he left the Jean Touch's employ. Greenberg testified as follows:

Q. When did you find a new job?

A. In January.

Q. Do you remember exactly when you started or approximately when you started?

A. Approximately the 16th of January, 2006.

Q. So it was only a few weeks then that you are not working?

A. Approximate - yeah.

Q. What was your next job after Jean Touch/

A. I worked for the company that owned the Bongo license.

...

Q. How long did you work there?

A. Approximately 6 months.

Q. Now, after the approximately 6 months that you worked at the company that owned the Bongo license, where did you work next?

A. Stunt Sportswear.

Q. How long did it take to get that job after you are no longer working at Bongo?

A. Approximately three weeks.

...

Q. What were you compensated at Bongo, your salary and commission?

A. I don't remember exactly.

Q. Approximately?

A. Approximately $150,000 for a salary, plus 1% commission.

Q. How about at Stunt?

A. At Stunt I believe it was $125,000 plus 1% commission.

If they prevail, the measure of plaintiffs' damages for the breach of contract claim will be the wage that would be payable during the remainder of the term, less the income which Greenberg "has earned, will earn, or could, with reasonable diligence earn during the unexpired term." Cornell v. TV Development CO., 17 NY2d 69 (1966). In opposition, plaintiff argue that Greenberg's testimony was "approximated after being pressed by Defendants' counsel" and is therefore "insufficient to establish 'as a matter of law' any compensation earned."

The court rejects plaintiffs' argument. Greenberg admitted that he earned certain wages at his deposition, and plaintiffs have failed to come forward with any proof that would otherwise raise a triable issue of fact on what, if any, wages Greenberg earned after he left the defendants' employ and prior to the expiration of the contract term. Accordingly, the defendants are also entitled to an order directing that an offset of at least $77,403.85 be applied to any damages awarded to plaintiff on the first cause of action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the defendants' motion for summary judgment is granted in its

entirety; and it is further

ORDERED that the claims against Victor Harari a/k/a Victor Hatari are hereby severed and dismissed; and it is further

ORDERED that the fourth cause of action is hereby severed and dismissed; and it is further

ORDERED that exhibit "B" is hereby stuck from the complaint; and it is further

ORDERED that defendant Jean Touch, Inc., is entitled to an offset against any damages that plaintiffs are awarded on the first cause of action for breach of contract in, at least, the total amount of $77,403,85, representing wages earned by plaintiff Greenberg during the unexpired contract term after Greenberg left the employ of Jean Touch.

This case is ready to be tried. The court hereby lifts the temporary restraining order it placed staying the trial, and directs plaintiff to serve a copy of this decision/order on the Trial Support Office so that this case can be placed on the calendar.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

FILED

JAN 05 2010

COUNTY CLERK'S OFFICE NEW YORK

Dated: New York, New York
December 21, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.