

Highet v International Barcode, Inc.

2010 NY Slip Op 30093(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 105849/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Allen Highet

INDEX NO. 105849/09

MOTION DATE _____

- v -
Int'l Barcode, Inc

MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/8/10

[Signature]
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 2

ALAN HIGHET,

Plaintiff,

INDEX NO. 105849/09

-against-

MOTION SEQ. NO. 001

INTERNATIONAL BARCODE, INC. d/b/a,
BARCODE TECHNOLOGY d/b/a BTI, and
CARY BUNIN,

Defendants.

FILED
JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

In this action for breach of contract, plaintiff Alan Hightet (Hightet) moves (1) pursuant to CPLR 3212, for summary judgment on the second, third, and fourth causes of action, and (2) pursuant to CPLR 3211, for an order dismissing a counterclaim of defendants International Barcode, Inc. d/b/a/ Barcode Technology d/b/a BTI (BTI) and Cary Bunin (Bunin) (collectively, Defendants). Defendants cross-move, pursuant to CPLR 3212 (a), for summary judgment and for severance of Defendants' counterclaim.

BACKGROUND

BTI is a corporation that engages in the business of bar code technology and Bunin is its chief executive officer.

In summer 2008, Hightet's acquaintance, who was a stockbroker at a brokerage firm of nonparty Oppenheimer & Co. Inc.

(Oppenheimer), introduced Hightet to Bunin. Bunin allegedly represented to Hightet that he had significant experience in

investment banking, that BTI had close relationships with a number of major investment banking firms, and that he expected an investment of over \$60 million in BTI in the immediate future. Bunin offered Hight an executive position at BTI and allegedly represented that Hight could expect to acquire retirement assets worth tens of millions of dollars while at BTI's employ.

Agreement One

On September 11, 2008, Hight entered into an agreement, entitled "Memorandum of Agreement" (Agreement One), with BTI (Complaint, exhibit A). Pursuant to this agreement, BTI hired him for a position of "Managing Director - International Strategic Relationships" for a term of three years, commencing September 10, 2008, with a \$200,000 annual salary paid twice monthly. Hight was eligible for an executive stock option plan. Agreement One further provided that "Hight w[ould] make an investment of \$1,000,000 in BTI" as follows:

Hight will make an arrangement at a financial institution to establish a line of credit for BTI, by Hight's depositing with such institution acceptable collateral, in the amount of \$750,000 ... Within 90 days of the date of this Agreement, the arrangement will be expanded by an additional \$250,000;

Interest and other costs relating to carrying the line of credit will be borne by BTI; and

Absent conversion, the collateralized lending arrangements between the parties will be unwound, on the expiration of the term of the three year term or earlier in the event of the termination of Hight's employment for cause, by Hight or BTI, in which event, the unconverted obligation will be repaid within

a reasonable time, not to exceed 180 days

(Complaint, exhibit B, Agreement One, at 2).

In September 2008, Hight opened a brokerage account at Oppenheimer (the Oppenheimer Account) and transferred to it shares of three public companies publicly traded in Australia, Credit Suisse Group, Broken Hill Propriety Ltd., and Commonwealth Serum Laboratories (collectively, the Shares), which were, at the time, valued at approximately \$600,000 (Complaint, ¶ 16; Hight Aff., ¶ 8; exhibit I, Oppenheimer Account Statements). Hight also took out a \$490,000 mortgage (the Mortgage) against his house in Irvington, New York and, in November 2008, deposited the Mortgage proceeds of \$490,000 into the Oppenheimer Account.

Agreement Two

On November 5, 2008, Hight entered into another agreement (Agreement Two) with BTI, entitled "Collateralized Lending Arrangement Agreement" (Complaint, exhibit B). Agreement Two provides that

[a]s a term of his employment by BTI, Hight has agreed to enter into a collateralized lending arrangement with BTI to facilitate a third party loan to [BTI] in the amount of \$1,000,000 (the "Loan Amount"). ... Hight will pledge suitable and sufficient assets and/or liquid funds with ... Oppenheimer ... for the term of his employment agreement, to enable BTI to borrow the Loan Amount from Oppenheimer

(Complaint, exhibit B, Agreement Two, "Recitals"). Agreement Two further provides that Hight would deliver the first \$750,000 of a collateral to Oppenheimer within 30 days, and the balance of

\$250,000 within 90 days (see *id.*, § 1 [a]). The agreement references exhibit A that "lists the collateral that has been or will be delivered and/or deposited with Oppenheimer by November 10, 2008 to secure the first \$750,000 of the Loan Amount" (*id.*, § 1 [b]). Exhibit A lists the Shares and the \$490,000 of Mortgage proceeds (collectively, the Collateral) (*id.*, exhibit A).

Agreement Two provides "that the collateral pledged by Hight will be released ... by Oppenheimer and delivered to Hight ... " either at the end of Hight's three-year employment term at BTI or whenever his employment at BTI ends, provided that he has not elected to convert the Collateral into BTI's common shares (*id.*, § 2 [a], [b]).

Hight alleges, and the Oppenheimer Account statements show, that in October and November 2008, a total of \$725,000 was wired from the Oppenheimer Account to BTI (Complaint, ¶¶ 16, 17, exhibit I; Hight Aff., ¶ 14).

After commencement of his employment, Hight allegedly discovered that Bunin's representations with respect to the viability and growth potential of BTI were inaccurate. Hight allegedly had few actual responsibilities, and Bunin did not invite him to meetings of the board of directors or shareholders, and did not disclose BTI's financial information to Hight. In February and March 2009, BTI failed to pay Hight his salary twice and by letter dated March 18, 2009, placed him on a temporary unpaid leave.

On or about March 20, 2009, Hight resigned from BTI due to

its failure to pay his salary. In his resignation letter, Hightet requested BTI to repay the \$725,000 that he had advanced to it "and to release the collateral held at Oppenheimer ... " (Hightet Aff., exhibit F). BTI refused.

BTI made monthly mortgage payments on the Mortgage through May 2009, but it allegedly failed to pay the costs and interest associated with the maintenance of, and transactions at, the Oppenheimer Account.

Hightet alleges that he subsequently discovered that BTI has been sued by other individuals who had been either hired by, or entered into other contractual relationships, with BTI, and BTI allegedly defaulted on its obligations to them (see 09/03/09 Poretz Reply Aff., exhibits A-E).

Complaint

Hightet asserts five causes of action: (1) breach of contract, for BTI's breach of the Employment Agreement, as a result of its failure to pay Hightet's salary;¹ (2) unjust enrichment by BTI "in the amount of the reasonable and uncompensated value of [Hightet's] services and in the pledged cash and securities which [BTI] obtained under false pretenses" (Complaint, ¶ 33); (3) seeking a declaration directing BTI to return Hightet's cash and securities pledged and/or advanced to it; (4) breach of contract, for BTI's breach of the Collateral

¹ In his affidavit, Hightet represents that BTI subsequently made outstanding salary payments to him and, accordingly, withdraws his first cause of action (Hightet Aff., ¶ 16, n 5).

Agreement, seeking damages in the amount of the cash and securities Hight pledged and/or advanced to BTI pursuant to the Collateral Agreement; and (5) fraudulent inducement to contract, alleging that Hight advanced funds to BTI based on, inter alia, Bunin's false representations about the company's growth potential.²

In their amended answer, Defendants counterclaimed against Hight, alleging that Hight breached an agreement with BTI, by failing "to fully fund" a \$1 million loan to BTI (Amended Answer, ¶ 4). Defendants claim that Hight's breach caused damages to BTI and excused its performance of any unfulfilled obligations to Hight. BTI seeks monetary damages of \$650,000 (Hight Aff., exhibit B).

Hight moves for summary judgment on the second, third, and fourth causes of action and for an order dismissing Defendants' counterclaim. Defendants cross-move for summary judgment against Hight, and for an order severing their counterclaim.

DISCUSSION

To obtain summary judgment, a movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party

²Hight withdrew the fifth cause of action as well (Hight Aff., ¶ 1, n 1). Accordingly, the two causes of action against Bunin are withdrawn.

must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

Highet moves for summary judgment on causes of action for, inter alia, unjust enrichment and breach of contract. A party may not proceed on a contract implied in law where an express contract between the parties exists (*see Parsa v State of New York*, 64 NY2d 143, 148 [1984] [quasi-contractual claim exists only in the absence of an express contract]; *SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 [1st Dept 2001]). The parties here do not dispute the validity of either Agreement One or Agreement Two. In fact, both plaintiff and Defendants contend that the other side materially breached the agreements. Accordingly, the cause of action for unjust enrichment is dismissed.

Breach of Contract

Highet alleges that BTI breached Agreement Two and seeks monetary damages "in the amount of the value of the cash and securities he pledged and/or advanced to [BTI] pursuant to [Agreement Two]" (Complaint, ¶ 39).

The parties agree that Highet deposited the Collateral in the Oppenheimer Account and that \$725,000 was wired, with Highet's consent, from this account to BTI. The parties also agree that Highet worked for BTI from approximately September 2008 until March 2009, when he was first placed on an temporary unpaid leave and then resigned from BTI's employ.

The parties disagree as to whether Highet has a right to demand the return of the funds advanced to BTI. BTI contends that the parties' intent was that Highet would provide, either directly or via Oppenheimer, \$1 million for the period of three years and that BTI would be obligated to return the funds prior to then only if BTI terminated Highet. BTI argues that Highet does not have a right to demand return of the funds if he resigns from BTI's employ before the end of the three-year period (see 08/31/09 Bunin Aff., ¶¶ 22-23).

It is well settled that a contract whose language is "clear, unequivocal and understandable," is "enforced without resort to extrinsic evidence" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 114 [1st Dept 1998] [citing and quoting *Federal Deposit Ins. Corp. v Herald Sq. Fabrics Corp.*, 81 AD2d 168, 180 (2d Dept 1981) (internal quotation marks omitted)]; see also *West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]).

Agreement Two provides, in relevant part, that
 all of the collateral shall be released at
 the end of the three year term of Highet's
 current employment agreement with BTI ...
 provided, however, that *if Highet ceases to
 be employed by BTI at an earlier date,
 whether for cause or not, and he does not
 elect to convert [the Collateral into BTI's
 shares], the parties agree to release the
 collateral at such earlier date*

(Agreement Two, § 2 [b] [emphasis added]). This provision clearly and unambiguously provides for a return of the collateral before the end of the three-year period if either BTI terminates

Highet or if he resigns from BTI's employ. Moreover, Highet has a right to demand the return of the collateral even if he resigns not for cause (*id.*). Highet resigned from BTI's employ in March 2009 (Highet Aff., exhibits F-G). Accordingly, BTI is now obligated to return to Highet the funds that he advanced to BTI.

BTI contends that Highet breached Agreement Two himself by failing to advance, or arrange for a third-party loan of, \$1 million in full, which excuses BTI's performance under the agreement. Indisputably, Highet deposited the Collateral that, according to Agreement Two, was "to secure the first \$750,000 of the Loan Amount" (Agreement Two, § 1 [b], exhibit A). According to Agreement Two, Highet had 90 days to deposit the remaining \$250,000 worth of collateral into the Oppenheimer Account (*id.*, § 1 [a]). However, Agreement Two does not specify any consequences if Highet fails to deliver the remaining \$250,000. It does not provide that BTI is entitled to liquidated damages. Nor does it bar Highet from demanding the return of the funds that he already advanced if he resigns from BTI's employ. Accordingly, Highet's alleged failure to fully fund a \$1 million loan to BTI does not give a right to BTI to refuse to return \$725,000 that Highet advanced to it.

BTI further argues that under Agreement Two, it had up to 180 days to return the funds and that Highet prematurely commenced this action prior to then. Highet resigned in March 2009. One hundred eighty days elapsed in September 2009. Accordingly, the deadline for BTI to repay the funds advanced has

passed (see Agreement Two, § 2 [c]).

Highet has made a prima facie showing of entitlement to summary judgment as a matter of law, and Defendants have failed to raise an issue of material fact. Therefore, Highet's motion for summary judgment on the fourth and fifth causes of action is granted.

Highet presents an itemized list of the amounts that BTI owes him, which include, along with the funds that were wired to BTI, fees and payments owed to him under the agreements (see Highet Aff., ¶¶ 21-22, exhibit H). Defendants do not challenge the accuracy of these amounts. Defendants also do not dispute that pursuant to both agreements, they are obligated to reimburse Highet for fees charged by Oppenheimer as well as monthly Mortgage payments (see Agreement One, at 2; Agreement Two, § 3). Highet also seeks \$40,000, which apparently he lost as a result of Oppenheimer buying and selling a Treasury instrument with the \$490,000 Mortgage proceeds (see Highet Aff., ¶ 21 [c]). However, pursuant to either agreement, BTI is not responsible for losses resulting from Oppenheimer trading the assets that are deposited in the Oppenheimer Account. Accordingly, Highet's request for money damages, with the exception of the \$40,000, is granted.³

Highet also moves, pursuant to CPLR 3211, to dismiss Defendants' counterclaim for breach of contract. A cause of

³In view of Highet's entitlement to a money judgment for breach of contract, the declaratory relief sought in the third cause of action is moot.

action for breach of contract must allege "the nature of the contractual obligation alleged to have been violated" (see *Sebro Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]). Defendants allege that Hight failed "to fully fund" the agreed-upon \$1 million, which "caused damages to [BTI]" (Answer, ¶¶ 4-5). As previously discussed, Hight deposited the Collateral that was supposed to support the first \$750,000 of the \$1 million loan and, with his consent, \$725,000 was wired from Oppenheimer to BTI. BTI contends that as a result of Hight's failure to fund the remaining amount, it was unable to pay his and other executives' salaries and placed him and them on unpaid leave (see *Bunin Aff.*, ¶¶ 26-28). It is unclear if BTI can prove that it sustained any actual damages as a result of Hight's alleged failure. However, for the purposes of a CPLR 3211 motion, Defendants' counterclaim survives.

"When a viable counterclaim arises from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with that transaction, summary judgment should be denied" (*Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995] [emphasis added]). Here, although the counterclaim arises from the same transaction as the one involved in the main action, it is not inextricably intertwined with that transaction. Accordingly, it is appropriate to enter judgment in favor of Hight, and sever and continue the counterclaim.

CONCLUSION, ORDER and JUDGMENT

For the foregoing reasons, it is hereby

ORDERED that the first and fifth causes of action of plaintiff Alan Hight's complaint are permitted to be withdrawn; and it is further

ORDERED that the complaint is hereby severed and dismissed as against defendant Cary Bunin, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the cross motion of defendant International Barcode, Inc. d/b/a Barcode Technology d/b/a BTI, pursuant to CPLR 3212 (a), for summary judgment is granted only to the extent that plaintiff's second cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of plaintiff Alan Hight for summary judgment is granted in plaintiff's favor on the fourth cause, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant International Barcode, Inc. d/b/a Barcode Technology d/b/a BTI in the amount of \$706,286.65, together with interest at the statutory rate of 9% per annum from the date of September 17, 2009, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and its if further

ORDERED that BTI's counterclaim is severed and shall continue.

Dated: 1/8/10

ENTER:

Ray
J.S.C.

LOUIS B. YORK
J.S.C.

FILED
JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE