

Wolf v American Tech. Ceramics, Corp.

2010 NY Slip Op 30551(U)

March 15, 2010

Supreme Court, Suffolk County

Docket Number: 28631-08

Judge: Elizabeth H. Emerson

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

PRESENT: Honorable Elizabeth H. Emerson

_____ x
JUDAH WOLF,

Plaintiff,

-against-

AMERICAN TECHNICAL CERAMICS,
CORP.,

Defendant.

_____ x

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DECISION AND ORDER AFTER TRIAL

A non-jury trial of this action was conducted by this Court on February 24, March 30, April 27, April 28, and May 27, 2009. Thereafter, the parties were given an opportunity to submit post-trial memoranda, which they did by September 2009. In rendering its determination, the Court has considered the pleadings and the testimony of each of the trial witnesses, evaluated the credibility of such witnesses, examined the trial exhibits, and reviewed the post-trial memoranda submitted on behalf of the parties.

This action arises out of an employment relationship between the defendant, American Technical Ceramics Corp. (hereinafter "ATC"), a Delaware corporation authorized to do business in the State of New York, and the plaintiff, Judah Wolf, ATC's former Senior Vice-President of Thin Film Products (hereinafter "Mr. Wolf"). In 1993, ATC purchased Mr. Wolf's private thin-film business, Miltech Corporation. In return, Mr. Wolf received a cash payment,

stock of ATC, and an employment agreement with ATC pursuant to which Mr. Wolf would continue to run the thin-film business acquired by ATC. For the next fourteen years, Mr. Wolf did in fact, run the thin-film operation of ATC. On December 31, 2001, Mr. Wolf entered into a new employment agreement with ATC (the "Employment Agreement"), which superseded all prior employment agreements. The Employment Agreement contained a non-compete covenant that became effective upon the termination of the "employment period" as that term was defined in the Employment Agreement (hereinafter the "Employment Period"). Pursuant to the non-compete covenant, Mr. Wolf was prohibited for a two-year period after the termination of his employment with ATC from engaging in a "competitive business" as such term was defined in paragraph 9(a) of the Employment Agreement. The Employment Agreement further provided in paragraph 9(a) that ATC was obligated to pay Mr. Wolf his base salary during the non-compete period in certain circumstances as set forth therein. More specifically, the Employment Agreement stated:

"In the case of (i) the termination of Employee's employment with the Company upon expiration of the Employment Period Employee's obligations pursuant to the third sentence of this paragraph 9(a) shall continue for only so long as the Company continues to pay Employee his base salary. [On] (ii) the termination of Employee's employment with the Company for any other reason than Employee's resignation or other voluntary termination of his employment..."

Several years later, Mr. Wolf entered into a letter agreement with ATC amending the Employment Agreement. (hereinafter the "Amended Employment Agreement"). The amendment, which became effective on December 22, 2005, extended the Employment Period of the agreement "until either party gives written notice to the other of his or its election to terminate." The Amended Employment Agreement provided that "[n]otice of an election to terminate must be given **at least 90 days** in advance of the scheduled termination date (emphasis added)." Both parties agree that, in essence, this provision meant that either party could terminate the Employment Period so long as such party provided 90 days' prior written notice to the other party of its intent to terminate.

According to the testimony at trial, it became apparent to the parties in the spring of 2007 that ATC would be sold to a third party. At that time, Mr. Wolf expressed a desire to negotiate a new employment agreement with ATC's prospective buyer, AVX Corporation (hereinafter "AVX"). Unable to reach an agreement with AVX, on June 25, 2007, Mr. Wolf delivered an informal letter to Kathleen Kelly, ATC's Vice President of Administration, expressing his intention to negotiate a new employment agreement or, in the alternative, to let his employment agreement with ATC expire. Three days later, on June 28, 2007, under the mistaken belief that he was required to give notice of his election to terminate his employment prior to the end of ATC'S fiscal quarter, Mr. Wolf delivered a formal letter to ATC stating, " in accordance with the provisions of my current employment agreement with ATC, I hereby give notice that I do not intend to continue my employment with ATC under the terms of that agreement and let it expire on September 30, 2007." After clarification from Kathleen Kelly and counsel for ATC

that he was not required under the Amended Employment Agreement to give notice at a quarter's end. On June 29, 2007, Mr. Wolf delivered a letter to ATC revoking his earlier resignation. Less than three weeks later, on July 16, 2007, Mr. Wolf delivered another formal letter to ATC regarding his intention to terminate his employment stating, "in accordance with the provisions of my current employment agreement with ATC, I hereby give notice that I do not intend to continue my employment at ATC under the terms of that agreement and let it expire on October 16, 2007." The period between July 17 and October 16, 2007, is equal to 91 days.

During the summer of 2007, ATC completed its merger with AVX. Almost three months later, on October 2, 2007, Mr. Wolf sent an e-mail to John Gilbertson, Chief Executive Officer of AVX, the parent company of ATC, in which he reiterated that his employment agreement would expire on October 16, 2007, and sought further clarification regarding his obligations under the non-compete covenant of the Amended Employment Agreement. Mr. Wolf testified that Mr. Gilbertson did not respond to Mr. Wolf's request for clarification. On October 5, 2007, Mr. Wolf sent a letter to John Lawing, Vice President of AVX Corporation, in which he stated, "I am hereby giving notice, that unless we come to an agreement regarding the terms of my future employment with ATC/AVX prior to October 26, 2007, I will be resigning from my current position, effective on that date." Mr. Wolf also requested clarification on AVX's position and his obligation under the non-compete covenant of the Amended Employment Agreement. Ten days later, on October 15, 2007, at the request of K. Kelly, Mr. Wolf sent another letter to John Lawing, in which he stated, "I am hereby giving notice of my resignation from my position in ATC/AVX effective on October 26, 2007." Mr. Wolf again asked for clarification regarding AVX's position in reference to his non-compete obligation. Again, Mr. Wolf did not receive a response regarding the non-compete or the termination of his employment.

Mr. Wolf continued to work at ATC through October 26, 2007. Mr. Wolf testified, in essence, that he believed his employment had ended on October 16, 2007, but as specified in his July 16, 2007, letter, he was willing to work day-to-day to "allow an orderly transition of the business." Further, Mr. Wolf stated that, having built the business from the ground up, he had a moral and ethical obligation to make sure his departure would not become destructive to the business and the people who worked there, so he continued to perform his duties until October 26, 2007. The record demonstrates that Mr. Wolf's departure was not a surprise to ATC or AVX. In fact, the companies took a number of significant steps to provide for an orderly transition, including reassigning necessary personnel from other areas of the companies and arranging for their training. Finally, the record lacks any evidence that anyone at either of the companies objected to Mr. Wolf's departure or the termination of his employment.

On November 6, 2007, Mr. Wolf received a letter from Evan Slavitt, Vice President for Business and Legal Affairs of AVX, stating that Mr. Wolf remained subject to the two-year non-compete covenant and that his "resignation obviate[d] any obligation by ATC/ATX to continue to pay [his] salary for the next two years in order for the non-competition obligations

to continue.” The letter contained no further information regarding the reason or the contractual provision on which AVX was relying in making that statement. Mr. Wolf testified that this was the first time that ATC or any of its employees has expressed the position that they would hold Mr. Wolf to the non-compete, but would not pay the salary provided for in the Amended Employment Agreement. Mr. Wolf testified that, fearful of possible litigation, he abided by his obligations under the non-compete covenant and refrained from engaging in a competitive business.

Mr. Wolf commenced this action on July 31, 2008, by filing a verified complaint alleging five causes of action: to wit, declaratory judgment, breach of contract, unfair competition, tortious interference with economic relations with a request for punitive damages, and unjust enrichment. After an extended discovery phase, ATC submitted a motion for summary judgment dated March 5, 2009, to dismiss all of Mr. Wolf’s allegations. The court reserved its decision on ATC’s summary judgment motion and directed the parties to proceed with the action before the Court. On September 19, 2008, the parties stipulated, and it was so ordered by the court, that the restrictions of the non-compete covenant would be limited only to restrain Wolf from being employed by Vishay Technologies. Mr. Wolf testified that he has made efforts to seek employment, but at the time of trial he remained unemployed.

Following the close of the record on May 27, 2009, counsel for the parties agreed that, in the interest of streamlining the litigation, Mr. Wolf would withdraw, with prejudice and without costs to either party, his causes of action for unfair competition (the third cause of action), tortious interference with prospective economic relations (the fourth cause of action) and unjust enrichment (the fifth cause of action). In turn, counsel for the parties agreed that ATC would withdraw its pending motion for summary judgment without costs to either party. Accordingly, the only remaining causes of action before the court are Mr. Wolf’s claims for declaratory relief and breach of contract.

The First Cause of Action

Under his first cause of action, Mr. Wolf seeks a judgment declaring that (i) the non-competition covenant is void as being anti-competitive, deprives him of his ability to earn a living, and/or resulted from unequal bargaining power, and/or presents an unreasonable restraint on free labor; (ii) the term of the Employment Agreement expired on July 16, 2007; (iii) Mr. Wolf worked through the expiration of the term of the Employment Agreement and for more than 90 days thereafter; (iv) Mr. Wolf, as a condition of being bound by the non-competition covenant, must be paid his salary as set forth in the Employment Agreement; (v) since termination of his employment, Mr. Wolf has not competed; (vi) ATC is obligated to pay Mr. Wolf his salary because it demanded compliance with the non-competition covenant and received the benefit of said covenant; (vii) ATC’s failure to pay Wolf during the non-compete period releases Mr. Wolf of his obligations under the non-competition covenant; (viii) in the event that the non-competition clause is enforceable, its terms must be specifically defined and

limited; and (ix) ATC breached the Employment Agreement.

As a general rule, a court should not entertain an action for declaratory judgment when there is no necessity for doing (*see, Holtzman v Sup. Ct. Of the State of N.Y.* 152 AD2d 724, 725 [2d Dep't 1989]). A declaratory judgment action is generally appropriate only when a conventional form of remedy is unavailable. When alternative conventional forms of remedy are available, resort to an action for declaratory relief is generally unnecessary and should not be encouraged (*see, Bartley v Walentas*, 78 AD2d 310, 312 [2d Dep't 1980]). It is unnecessary when, as here, an action at law for damages will suffice. In determining whether Mr. Wolf is entitled to damages under his cause of action for breach of contract, the Court will determine whether ATC breached the Amended Employment Agreement, as well as the ancillary issues for which Wolf seeks declaratory relief. Accordingly, the Court finds that, since Mr. Wolf has a conventional remedy, the first cause of action for declaratory relief is dismissed.

The Second Cause of Action

Under his second cause of action, Mr. Wolf seeks to recover damages for breach of contract. As a general rule, unless statutory language or public policy dictates otherwise, the terms of a written agreement define the rights and obligations of the parties to the agreement, (*see, Abiele Contracting, Inc. v New York City School Construction Authority*, 91 NY2d 1, 9 [1997]). An agreement set forth in clear, concise terms should be enforced according to those terms (*see, Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). A court may not write into an agreement conditions that the parties did not insert by adding or exercising terms under the guise of the agreement's apparent meaning (*see, Salmow v Del Col*, 79 NY2d 1016, 1018 [1992]; *Matter of Kalman v Kalman*, 300 AD2d 487, 488 [2d Dep't 2002]). Where the language of an agreement is unambiguous, its interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement (*see, 1550 Fifth Ave. Bay Shore, LLC v 1550 Fifth Ave., LLC*, 297 AD2d 781, 783 [2d Dep't 2002]). To establish a cause of action for breach of contract, the plaintiff must demonstrate: (i) the existence of a contract between the plaintiff and defendant; (ii) consideration, (iii) performance by the plaintiff; (iv) breach by the defendant; and (v) damages resulting from the breach (*see, Rexnord Holding, Inc. v Biderman*, 21 F.3d 522, 525 [2d Cir. 1994]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dep't 1986]).

The court finds that the Amended Employment Agreement, insofar as it is relevant to the issues before the court, is clear and unambiguous. The Amended Employment Agreement clearly provides and the parties agree, that either party had the right to terminate the Employment Period so long as proper notice was given. The dispute for the parties is, in essence, whether Mr. Wolf gave notice in the manner necessary to terminate the Employment Period, thereby implicating the company's obligation to pay his salary during the non-compete period or whether he failed to do so and is, therefore, not entitled to such salary. If Mr. Wolf's employment ended upon expiration of the Employment Period (as such term is defined in the

Amended Employment Agreement), ATC is obligated to pay Mr. Wolf if it wishes to restrain him from engaging in a competitive business for two years after the scheduled termination date. There is no doubt from the facts set forth in the record, including without limitation, Evan Slavitt's letter of November 6, 2007, that ATC intended to hold Mr. Wolf to the non-compete. The gravamen of Wolf's claim for breach of contract is that ATC failed to pay his salary as set forth in the Amended Employment Agreement despite the fact he delivered timely notice and that he refrained from engaging in a competitive business after he terminated his employment with ATC. Mr. Wolf contends that his letter dated July 16, 2007, provided the requisite 90-day notice of his election to terminate his employment with ATC, which in turn caused the Employment Period to expire. Mr. Wolf argues that the fact that he continued to work for several days after October 16, 2007, does not change that result. Further, he testified that he has abided by the terms of the non-compete since his departure from ATC. Mr. Wolf further argues that his communications following the July 16, 2007, letter and the terms of the non-compete notices to employees at ATC were extended as a courtesy to provide a reminder of his election to terminate his employment and to seek clarification as to both parties' rights and obligations.

In response, ATC acknowledges that Mr. Wolf has not received compensation after termination of his employment and that they sought to hold him to the terms of the non-compete. Furthermore, there are no serious allegations by ATC that Mr. Wolf breached his non-compete obligation, and the record is devoid of any credible evidence that would support such a claim. Rather, ATC contends that it is not liable to pay the amount set forth in the Amended Employment Agreement because Mr. Wolf failed to provide adequate notice of his termination. Therefore, ATC argues that his departure on October 26, 2007, was a resignation and that his actions did not operate to terminate the Employment Period. ATC argues that the July 16, 2007, letter which stated that Wolf would leave his employment on October 16, 2007, is not the controlling termination letter. Instead, ATC argues that Wolf's third letter dated October 15, 2007, is the controlling termination letter. ATC claims that, by sending the October 15, 2007, letter and continuing on in his employment until October 26, 2007, Mr. Wolf's notice should be calculated from October 15, 2007, through October 26, 2007, the last day of his employment. Since the 90-day notice requirement was not satisfied, ATC contends that the Employment Period did not terminate, and ATC's obligation to pay Mr. Wolf his salary during the non-compete period was not triggered.

The issue before the Court is to determine whether Mr. Wolf provided the required 90-day notice, ending the Employment Period and thereby triggering ATC's obligation to pay his salary during the non-compete period. The court finds that the record unequivocally demonstrates that Mr. Wolf satisfied the 90-day requirement set forth in the Amended Employment Agreement. The July 16, 2007, letter contained all of the elements necessary to constitute a proper notice of resignation. It was delivered at least 90 days prior to termination, and there is no credible indication in the record that Mr. Wolf revoked the July 16, 2007 letter. Rather, the record reveals that Mr. Wolf's subsequent communications and interactions with ATC confirmed that he had terminated his employment. A fair reading of these communications

demonstrates that Mr. Wolf remained open to continue to negotiate with ATC in an attempt to reinstate his employment relationship, but that no such agreement was reached. ATC's argument that Mr. Wolf's interaction with ATC following his July 16, 2007, letter of termination, created multiple new contracts, is without merit and contrary to well-established law surrounding the creation of a contract.

While ATC argues that Mr. Wolf's subsequent correspondence nullifies the July 16, 2007, letter, the parties behavior suggests otherwise. The record indicates that both parties acknowledged the October 16, 2007, scheduled termination date and made preparations for Mr. Wolf's departure. For example, ATC began making arrangements to transfer ownership of Mr. Wolf's company car and to transfer the responsibilities of the thin-film business. Also, Mr. Wolf explained different aspects of his job with other employees to whom such responsibilities would be transferred. Mr. Wolf testified that, between October 16, 2007, and October 26, 2007, he continued on as a "courtesy" to the ATC. The record demonstrates that ATC accepted this extra time without protest or complaint. In fact, ATC made no response whatsoever to any of his communications regarding its position as to the Employment Period, the non-compete, or Mr. Wolf's termination date until after such date had past.

Furthermore, in the many day-to-day dealings that senior employees of ATC and AVX had with Mr. Wolf during the relevant period, ATC's position regarding Mr. Wolf's notice, its intention to enforce the non-compete, and its intention not to pay Mr. Wolf's salary were not raised until after Mr. Wolf's departure, despite Mr. Wolf's repeated requests for clarification and/or indication of the companies intent. In fact, ATC chose not to respond to these requests, notwithstanding the fact that Mr. Wolf was complying with ATC's requests to assist in an orderly transition of the business and to remain on good terms with the company. In fact, it is clear that, despite ATC's lack of response, Mr. Wolf behaved in a professional manner.

The record is clear that the plain language of the Employment Agreement allows either party to terminate for any reason, as long as the party provides at least 90 days' written notice. The parties themselves have acknowledged this fact throughout the record. Accordingly, as notice of termination could be given at any time and for any reason. The only logical reason for the 90-day period was to provide the other party an adequate period to respond to the change. In the case of Mr. Wolf's decision to end his employment with ATC, that would mean a period of time sufficient to allow for the orderly transition of the thin-film business. As described above, there are numerous examples in the record that this occurred.

In view of the foregoing, the Court finds that Mr. Wolf's July 16, 2007, letter provided proper notice, thereby terminating the Employment Period. Accordingly, the court finds that the Employment Period was terminated in accordance with the provisions of the Amended Employment Agreement. Furthermore, the record clearly demonstrates that ATC enforced the terms of the non-compete and that Mr. Wolf abided by its restrictions. Accordingly, ATC was contractually obligated to pay Mr. Wolf's salary as set forth in the Agreement. ATC's

Index No.: 28631-08

Page 8

arguments regarding mitigation are without merit. The suggestion that Mr. Wolf should have consulted Mr. Slavitt, an in house attorney for his former employer, regarding ATC's willingness to let Mr. Wolf pursue potential job opportunities with any competitors is patently ridiculous. This is particularly true given the aggressive manner with which ATC sought to enforce the non-compete. Therefore, ATC is liable to Mr. Wolf for the salary stipulated in the Amended Employment Agreement; to wit, his salary at the rate provided from the date that his termination of employment took effect. Such amount shall be paid with interest from the date of the complaint.

After careful consideration of all the matters alleged, it is

ORDERED that the plaintiff's FIRST cause of action for declaratory judgment is dismissed; and it is further

ORDERED that, on the plaintiff's SECOND cause of action for breach of contract, the plaintiff is entitled to damages equal to his base salary as set forth in the Amended Employment Agreement, together with interest from the date of the complaint.

Dated: March 15, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.