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SHORT FORM ORDER

Index Number: 40828-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 05-05-2010
Motion Submit Date: 05-11-2010
Motion Sequence .: 001 RRH
002 RRH

_____X

MITCHELL BLATT,

Plaintiff,

-against-

HALCYON JETS HOLDINGS, INC., HALCYON JETS INC., AND ALLIANCE NETWORK COMMUNICATIONS HOLDINGS, INC.

Defendants.
_____X

Attorney for Plaintiff
Jeffrey a. Sunshine, PC
3000 Marcus Avenue - Suite 2E5
Lake Success, New York 11042

Attorney for Defendants
Schrader & Schoenberg, LLP
711 Third Avenue, Suite 1505
New York, New York 10017

ORDERED, that the motion (motion sequence number 001) by defendants, Alliance Network Communications Holdings, Inc., f/k/a Halcyon Jet Holdings, Inc., pursuant to CPLR §3211(a)(1) and (7) to dismiss the Complaint against them is granted; and it is further

ORDERED, that plaintiff's cross motion (motion sequence number 002) pursuant to CPLR §3215(a) for a default judgment against defendant Halcyon Jets, Inc., is granted; and it is further

ORDERED, that a hearing on counsel fees on motion sequence number 001 and an inquest on motion sequence number 002 shall be held on October 4, 2010 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action seeking damages for breach of a severance agreement by the filing of a Summons and Complaint on or about November 2, 2009. Defendants Alliance Network Communications Holdings, Inc. ("Alliance"), and Halcyon Jets Holdings, Inc. ("Holdings")[1] served a Verified Answer dated January 30, 2010. The Complaint sets forth causes of action for breach of contract, fraud, unjust enrichment, conversion and counsel fees. The gravamen of the Complaint is that plaintiff and defendants entered into an Agreement, dated August 12, 2008, wherein defendants agreed to pay plaintiff a severance amount of $300,000.00 and plaintiff agreed to resign from his employment as the Chairman of the Board and Chief Executive Officer of Holdings and Halcyon Jets, Inc. (the "Company"). Plaintiff alleges that defendants only paid the sum of $67,500.00, leaving the amount of $232,500.00 due and owing.

The Agreement referred to Halcyon Jets Holdings, Inc., as "Holdings" and Halcyon Jets, Inc., as the "Company" stated as follows:

> 2. **Severance.** The severance period shall be deemed to extend for a period beginning on the date of this Agreement through and including July 31, 2009 (the "Severance Period"). The Employee shall receive *from the Company* as severance pay a continuation of his base salary in the amount of $300,000 less any lawful tax withholdings, payable in accordance with the Company's customary payroll practices during the Severance Period. The amounts payable under this Section 2 shall be payable notwithstanding the death or disability of the Employee during the Severance Period.

(Emphasis added). The Agreement further provided at Section 12 that plaintiff was advised to consult an attorney prior to executing the document but had chosen not to do so. Section 16 contained a merger clause that the Agreement constituted the entire understanding between the parties and that there were no other promises or agreements, except as contained therein. In Section 18, the parties acknowledged that they "carefully read and understood the terms" of the Agreement, entered into it "knowingly, voluntarily and of their own free will, understand its terms and significance and intend to abide by its provisions without exception." Finally, the

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[1] According to Defendants, in July of 2009, Holdings acquired all of the outstanding shares of Alliance and changed its name to Alliance. Additionally, the Company was sold to Halcyon Jet Acquisitions Group, LLC (a non-party) who agreed to assume all the debts of the Company.

Agreement provided that in the event of litigation, the prevailing party would be entitled to recover legal fees and costs.

Defendant Holdings and Alliance move to dismiss the Complaint pursuant to CPLR §3211(a)(1) and (7). Holdings and Alliance argue that the plain language of the Agreement mandates dismissal of this action because, pursuant to Section 2, it was the Company, and not Holdings, which was obligated to make the severance payments to plaintiff. Therefore, only the Company can be liable for the payments and the cause of action for breach of contract must be dismissed as against Holdings. Turning to the remaining causes of action of the Complaint, Holdings and Alliance argue that the claims for fraud and unjust enrichment must be dismissed as duplicative of the breach of contract claim. Further, the claim based upon unjust enrichment must also be dismissed because there is a written contract governing the parties' relationship. Additionally, defendants assert that the claim for conversion based upon their alleged breach of fiduciary duty must be dismissed because solely as plaintiff's employer, defendants did not owe plaintiff a fiduciary duty. According to defendants, plaintiff is a sophisticated businessman, the parties entered the Agreement after arm's length negotiations and plaintiff had the opportunity to consult an attorney prior and subsequent to executing the Agreement. Finally, defendants argue that plaintiff is not entitled to attorneys' fees, but rather should be obligated to pay their counsel fees. Thus, defendants Holdings and Alliance seek dismissal of the Complaint and an award of costs and counsel fees in their favor.

Plaintiff opposes the motion and cross-moves pursuant to CPLR §3215 for an Order granting him a default judgment against defendant, Halcyon Jets, Inc. (the "Company") on the ground that the Company has failed to answer or otherwise move with respect to the Complaint. Plaintiff annexes a copy of the affidavit of service demonstrating that the Company was served on November 13, 2009, an affidavit by plaintiff and an affirmation of counsel stating that it has failed to answer the Complaint. Therefore, plaintiff seeks a default judgment against the Company.

Turning to the motion to dismiss, plaintiff argues that defendants' interpretation of the Agreement is erroneous because he entered into the Agreement with both Holdings and the Company and both should be held liable. Plaintiff argues that the Complaint states a cause of action and should not be dismissed pursuant to CPLR §3211(a)(1). He argues that the corporate restructuring that occurred subsequent to the execution of the Agreement was a mechanism to avoid liability to plaintiff and that initially defendants' counsel also represented the Company but only filed an Answer on behalf of Holdings and Alliance. Plaintiff argues that defendants' motion should be denied in its entirety.

In reply, defendants reiterate that the plain language of the Agreement imposes an obligation only upon the Company to pay plaintiff the severance amount. Defendant notes that since plaintiff was the Chief Executive Officer of both Holdings and the Company, he was aware they were separate entities. Further, again note that plaintiff expressly acknowledged in the Agreement that he had the opportunity to consult counsel but elected not to do so and further, that the Agreement contained a provision entitled plaintiff to revoke his acceptance within twenty-one days after signing. Thus, plaintiff must be bound by the terms of the Agreement, including looking only to the Company for payment of the balance of the severance amount. With regard to the claims for fraud, unjust enrichment and conversion, defendants points out that plaintiff has wholly failed to address the sufficiency of these claims in his opposition to the motion to dismiss. Finally, defendants urge the Court to award it reasonable attorneys' fees and costs pursuant to the terms of the Agreement.

It is well settled that a motion to dismiss pursuant to CPLR 3211(a)(1) will be granted "only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim". ***Fontanetta v. Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010)**(internal quotations omitted). The documentary evidence must conclusively establish a defense as a matter of law. ***Suchmacher v. Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). *See also, Levenherz v. Povinelli*, 14 A.D.3d 658, 789 N.Y.S.2d 295 (2d Dept. 2005).**

The fundamental principles of contract interpretation are that written agreements are construed in accordance with the parties' intent and a written agreement that is "complete, clear, and unambiguous on its face must be enforced according to the plain language of the meaning of its terms." ***Norma Reynolds Realty, Inc. v. Edelman,* 29 A.D.3d 969, 817 N.Y.S.2d 85 (2d Dept. 2006).** ***See also, Lobacz v. Lobacz,* 72 A.D.3d 653, 897 N.Y.S.2d 516 (2d Dept. 2010); *M & R Rockaway, LLC v. SK Rockaway Real Estate Company,* __A.D.3d __, 902 N.Y.S.2d 621 (2d Dept. 2010).** Turning to the cause of action for fraud, such claim fails where the only fraud alleged arises from the breach of contract. ***Selinger Enterprises, Inc,. v. Cassuto,* 50 A.D.3d 766, 860 N.Y.S.2d 533 (2d Dept. 2008)**. Similarly, a cause of action for unjust enrichment is barred where the subject matter is governed by a valid and enforceable contract between the parties. ***See, e.g., Hamlet at Willow Creek v. Northeast Land Development Corp.*, 64 A.D.3d 85, 878 N.Y.S.2d 97 (2d Dept. 2009)**.

In this case, the plain and unambiguous language of the Agreement dictates that the cause of action for breach of contract be dismissed. Plaintiff agreed that the Company (Halcyon Jets, Inc.,) would pay the severance, he acknowledged he read and understood the terms of the Agreement, and elected to waive representation by counsel. The Agreement clearly bound only the Company and not Holdings to pay the severance and thus, the first cause of action for breach of contract must be dismissed. Since the allegations of the fraud causes of action simply mirror those of the breach of contract claim, those causes of action must likewise be dismissed. Likewise, the cause of action for unjust enrichment also fails since there was a valid written agreement between the parties governing the subject matter. Finally, plaintiff has failed to establish a fiduciary relationship with defendants such as to sustain the cause of action for conversion and this claim is also dismissed.[2] Based on the foregoing, plaintiff's claim for attorneys' fees is also dismissed and pursuant to Section 13 of the Agreement, defendants are

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[2]The Court notes in dismissing these causes of action that plaintiff did not specifically oppose that portion of defendants' application which sought dismissal of the second, third, fourth and fifth causes of action.

awarded counsel fees and costs in an amount to be determined at a hearing.

With regard to plaintiff's cross-motion for a default judgment against Halcyon Jets, Inc., same is granted without opposition, in an amount to be determined at an inquest.

The hearing on counsel fees and inquest on damages shall be held on October 4, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 19, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.