SHORT FORM ORDER

Index Number: 13849-2008

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

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

Original Motion Date: 10-14-2010
Motion Submit Date: 12-07-2010
Motion Sequence .: 002 MGCASEDISP

[X] FINAL DISP
[ ] NON - FINAL DISP

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DAVID J. ANSCHEL, M.D.,

Plaintiff,

-against-

NEUROLOGY ASSOCIATES OF STONY BROOK, UNIVERSITY FACULTY PRACTICE CORPORATION and STONY BROOK PHYSICIANS, P.C.,

Defendants.
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ORDERED, that the motion (motion sequence number 002) by defendants pursuant to CPLR §3212 for summary judgment dismissing the Complaint is granted in its entirety and this action is dismissed.

Plaintiff commenced this action against defendants by the filing of a Summons and Complaint on April 11, 2008 and issue was joined by defendants' service of a Verified Answer.[1] The action arises out of the employment relationship between plaintiff, a former professor-physician, employed by defendants. Plaintiff alleges he was entitled to certain additional compensation, beyond his agreed upon salary amount, and that defendants failed and refused to pay. The Complaint alleges causes of action

[1] The Court notes that a copy of the Verified Answer has not been annexed to either the moving or opposition papers.

for breach of contract, promissory estoppel and, quantum meruit/unjust enrichment.

Specifically, the submissions reflect that in or about November of 2003, plaintiff, a board certified neurologist and clinical neurophysiologist, began discussions with defendants regarding employment. Plaintiff met with Dr. Patricia Coyle, the acting chair of the Neurology Department in December of 2003 to interview for the position of Adult Epileptologist and subsequently engaged in negotiations over the terms of employment. By letter dated January 21, 2004, Dr. Coyle offered plaintiff the position as Assistant Professor of Neurology at an annual starting salary of $120,000 "with an opportunity for salary review annually". In response, plaintiff emailed Dr. Coyle with a list of items to be clarified and with regard to the salary stated as follows:

> Paragraph five mentions a starting annual salary of $120,000. I know this is the number you had mentioned on the telephone. Other facilities have offered higher salaries. Some of these are in areas of the country where the cost of living (both housing and daily expenses) is lower than in the Stony Brook area. I would prefer to work at Stony Brook, but this difference is too much to ignore. I would like to start at $140,000.

Dr. Coyle responded with the correspondence, dated February 17, 2004, which forms the basis of this lawsuit (the "February offer letter"). It stated in relevant part as follows:

> I am prepared to offer you a starting annual salary of $120,000 with an opportunity for additional compensation up to $140,000 in your first year. *After you have joined the clinical faculty I agree to provide you with additional compensation based on your productivity. The measurements of productivity will be number of patients admitted, new patients seen in clinic and increase in procedures from base line numbers.* This salary will be drawn from the State of New York and the Department's practice plan. You will receive fringe benefits, including contributions to a vested pension plan, as determined by your salary source.

(Emphasis added).

The gravamen of plaintiff's action is that by virtue of the italicized language in the February offer letter, defendants promised to pay plaintiff additional compensation and he seeks in excess of $600,000. Plaintiff commenced employment with defendants in July of 2004 and in conjunction therewith, received a letter, dated July 28, 2004, from Dr. Norman Edelman, Vice President of the Health Sciences Center and Dean of the School of Medicine, wherein he was formally offered appointment as Clinicial Assistant

Professor in the Department of Neurology. This letter stated that plaintiff's salary would be $120,000, broken down as follows: $15,000 state-funded salary rate plus $105,000 permissible earnings from clinical practice income. Dr. Edelman's letter did not mention the additional compensation contained within the February offer letter and plaintiff signed that he accepted the offer on August 6, 2004.[2]

Defendants now move for summary judgment dismissing the Complaint in its entirety. Defendants annex the aforementioned correspondence, correspondence from Dr. Norman Edelman, plus an affidavit from Dr. Coyle, the deposition transcript of plaintiff, memorandum of law and a salary schedule. Defendants argue that the language contained in the February offer letter merely represented an unenforceable "agreement to agree" and the breach of contract claim must be dismissed. Moreover, because the parties had a written agreement, the claims sounding in promissory estoppel and quasi contract/unjust enrichment, must likewise fail.

First, defendants argue that the February offer letter did not contain a formula for calculating plaintiff's entitlement to additional compensation or a reference to any extrinsic formula. Although plaintiff relies on a document the parties refer to as a "profit and loss projection" (the "P&L projection"), in support of his claim, defendants argue that the purpose of this document was to justify the starting compensation offered plaintiff. Defendants note that the P&L projection was sent to defendant *prior* to the initial January offer letter. Dr. Coyle explains in her affidavit that the purpose was to demonstrate to the Dean of the Department that the proposed salary would be covered by projected revenues, and the revenue projections do not constitute a guarantee of compensation or a methodology for calculating additional compensation. Moreover, plaintiff admitted in his deposition that the P&L projection was "given to me in response to my inquiry how my salary will be generated, or how they came up with that 120 number". Notably, neither the January offer letter nor the February offer letter references the P&L projection. Additionally, according to the salary schedule annexed to the moving papers, if plaintiff's claims were accepted regarding an agreement to base the additional compensation on the P&L projection, plaintiff's salary could potentially exceed those of every other member of the Department. Also, the P&L projection does not mention the categories referenced in the February offer letter, to wit, "number of patients admitted, new patients seen in clinic and increase in procedures from baseline numbers". When questioned about this at his deposition, plaintiff stated that *his* understanding was clear and that there were no questions in *his mind* that if he improved the clinical collections and exceeded

[2] It is undisputed that plaintiff's appointment was not renewed past April 2, 2008 and plaintiff resigned effective July 15, 2007.

the projections he would be compensated. He admitted he did not receive the P&L projections again after January 2004. Defendants argue that such admissions demonstrate that there was no meeting of the minds regarding the alleged agreement for payment of additional compensation. Thus, the language regarding additional compensation was merely an unenforceable agreement to agree and the breach of contract claim must be dismissed.

Defendants also argue that the promissory estoppel claim must be dismissed because plaintiff cannot satisfy the elements of such cause of action because he fails to establish an unambiguous promise by defendants. Moreover, since there is a written agreement between the parties governing the subject matter (plaintiff's employment), the promissory estoppel claim must fail. Likewise, the existence of the written agreement bars recovery in quantum meruit/unjust enrichment.

Based on the foregoing, defendants urge the Court to dismiss the Complaint in its entirety.

Plaintiff opposes the motion and submits an affidavit and memorandum of law, together with his deposition transcript and the transcripts of the depositions of Dr. Coyle and Constance Calisi, former employee of defendants. Plaintiff argues that he was promised "an opportunity to earn additional compensation based upon the anticipation that I would be able to increase the productivity of Defendants' Neurology Department, and hence increase revenues for Defendants." Plaintiff's affidavit at ¶2. He claims he always believed he was entitled to additional compensation and that if he exceeded the base revenue numbers contained in the P&L projection (which he calls the "Recruitment Formula"), he would be entitled to further earnings. Plaintiff notes that while the January offer letter did not mention additional compensation, the February offer letter contained the disputed language, based upon a telephone conversation with Dr. Coyle. Plaintiff admits that his concerns regarding the omission were not addressed in his email to Dr. Coyle and as a result the February offer letter contained the provision regarding additional compensation. Plaintiff further admits that he signed the letter from Dr. Edelman, but that he was "informed that this letter was just a 'formality'" and that he had to sign. Plaintiff's affidavit at ¶25. Plaintiff states that the highest amount of compensation he received during his tenure was approximately $150,000 and that the maximum permitted compensation for the position was in excess of $400,000 for the 2006/2007 year. Plaintiff alleges that during the course of his employment, he discussed with Dr. Coyle on several occasions the fact that he was not receiving additional

compensation. He claims Dr. Coyle made excuses but did not deny that such monies were owed. Ultimately, plaintiff states that he resigned due to defendants' breach of the February offer letter.

Plaintiff argues that summary judgment must be denied because there is a material issue of fact regarding the intent of the parties regarding a contract term and thus the parties can submit extrinsic evidence to resolve the ambiguity. Plaintiff asserts that the February offer letter sets forth a clear contractual obligation to pay him additional compensation based upon his productivity and as such, is not an unenforceable agreement to agree. Instead, the February offer letter specifies the measurements of productivity (number of patients admitted, new patients seen in clinic and increase in procedures from baseline numbers), and only omits the precise manner and calculation of the compensation. The obligation to pay the compensation is clearly delineated in the February offer letter. Thus, the Court can look to extrinsic evidence to resolve the ambiguity and hold the parties to their bargain, specifically the P&L projection and the motion for summary judgment must be denied.[3] Defendants submit a reply memorandum of law and reiterate that Dr. Coyle explained in her affidavit that the language regarding additional compensation contained in the February offer letter was merely expression of a future intent to implement a means for plaintiff to earn additional compensation if he was exceptionally productive. The February offer letter does not contain any objective means to calculate additional compensation or refer to any extrinsic formula to do so. Defendants note that plaintiff's affidavit repeatedly references "his beliefs" regarding additional compensation and he concedes that there was no objective criteria to make the calculation. As such, it is an unenforceable agreement to agree and the breach of contract claim must be dismissed. The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein*, Inc.,** 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.***, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Bald conclusory assertions are insufficient to defeat a motion for summary judgment. ***Orange County-Poughkeepsie Ltd Partnership v. Bonte*,** 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather

[3] Plaintiff does not specifically address defendants' arguments regarding the promissory estoppel and quantum meruit/unjust enrichment causes of action.

to determine whether there exists a genuine issue of fact." ***Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.***, 172 A.D.2d 658, 570 N.Y.S.2d 960 (2d Dept. 1991). Issue finding and not issue determination is the key on a motion for summary judgment. ***Francis v. Basic Metal Inc.***, 144 A.D.2d 634, 534 N.Y.S.2d 697 (2d Dept. 1988).

The Courts have repeatedly held that where an employment or commission agreement lacks an essential term necessary to calculate the amount of compensation, it is unenforceable as a mere "agreement to agree". ***Zere Real Estate Services, Inc., v. Adamag Realty Corp.,*** 60 A.D.3d 758, 875 N.Y.S.2d 162 (2d Dept. 2009); ***Place v. Ginsburg,*** 280 A.D.2d 656, 721 N.Y.S.2d 243 (2d Dept. 2001); ***Parkway Group, Ltd., v. Modell's Sporting Goods,*** 254 A.D.2d 338, 678 N.Y.S.2d 656 (2d Dept. 1998). ***See also, Whitton v. General Electric Co.,*** 200 A.D.2d 924, 607 N.Y.S.2d 448 (2d Dept. 1994).

To establish a cause of action for promissory estoppel, a plaintiff must demonstrate (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise was made; and (3) an injury sustained as a result of the reliance. ***Rodgers v. Town of Islip,*** 230 A.D.2d 737,646 N.Y.S.2d 158 (2d Dept. Plaintiff's failure to establish the existence of a clear and unambiguous promise is fatal to its claim sounding in promissory estoppel. ***Rogowsky v. McGarry,*** 55 A.D.3d 815, 865 N.Y.S.2d 670 (2d Dept. 2008). ***See also, Asgahar .***

Regarding a claim for unjust enrichment, a plaintiff cannot prevail on such cause of action where it is established that there is a valid contract between the parties governing the same subject matter. ***Whitman Realty Group, Inc. v. Galano,*** 41 A.D.3d 590, 838 N.Y.S.2d 585 (2d Dept. 2007). ***See also, Marc Contracting, Inc., v. 39 Winfield Assoc., LLC.,*** 63 A.D.3d 693, 880 N.Y.S.2d 346 (2d Dept. 2009); ***Yenrab, Inc. v. 794 Linden Realty, LLC.,*** 68 A.D.3d 755, 892 N.Y.S.2d 105 (2d Dept. 2009).

In the case at bar, defendants have met their prima facie burden of demonstrating entitlement to summary judgment by the submission of the February offer letter, which the Court finds was only an "agreement to agree" on additional compensation, the acceptance of Dr. Edelman's offer letter, signed by plaintiff, together with the transcript of plaintiff's deposition and the affidavit of Dr. Coyle. It is clear, as evidenced by plaintiff's repeated statements as to "his beliefs"that plaintiff believed there was an agreement as to additional compensation, no meeting of the minds prevailed on this issue. The terms of the February offer letter were too indefinite to enable the determination of the additional

compensation and, Dr. Coyle explained that the P&L projection was used as a basis for justifying plaintiff's base salary. In opposition, plaintiff has failed to raise a triable of fact and the breach of contract claim is dismissed.

As defendants have demonstrated that there was no clear and unambiguous promise regarding the additional compensation, the promissory estoppel claim is also dismissed. Finally, the claim for quantum meruit/unjust enrichment is barred as the parties had a written agreement governing the subject matter of the claim.

Based on the foregoing, and the record before the Court, the motion to dismiss is granted in its entirety.

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

Dated: December 14, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[X] FINAL DISP
[ ] NON - FINAL DISP