

Steen v Berard Assoc., Inc.

2011 NY Slip Op 31030(U)

April 15, 2011

Sup Ct, NY County

Docket Number: 107153/2010

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 107153/2010

KNIGGE, STEEN

INDEX NO. _____

vs

BERARD ASSOCIATES, INC.

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

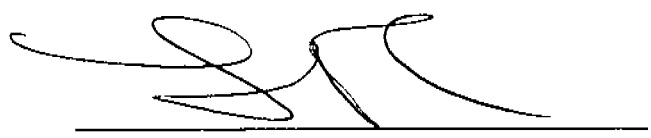
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

APR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
STEEN KNIGGE,

Plaintiff,

- against -

BERARD ASSOCIATES, INC.,

Defendants,
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
107153/10

**DECISION
and ORDER**

Mot. Seq.
002

FILED

APR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Steen Knigge ("Plaintiff") brings this action against Berard Associates, Inc. ("Defendant") for monies he claims are owed to him pursuant to his employment agreement with Defendant. Plaintiff alleges in his complaint that he entered into an employment agreement with Defendant on May 12, 2009 (hereinafter "the Agreement") whereby Plaintiff became Defendant's Vice President of Strategy. The agreement provided for a salary of \$144,000 for the first six months of Plaintiff's employment (which Plaintiff refers to as a "trial period"), and for a salary of \$200,000 thereafter. The agreement further provided that, in the event Plaintiff is terminated without cause, Defendant shall either provide Plaintiff with three months' prior notice of termination, or pay Plaintiff a lump-sum in lieu of prior notice.

Plaintiff claims that, after signing the Agreement, he began working for Defendant and fulfilled all of his obligations under the Agreement. On October 22, 2009, Defendant advised Plaintiff that he was being terminated. Plaintiff claims that, although his performance was satisfactory and Defendant's business was expanding at the time, "Defendant ... made unsubstantiated claims regarding the failure of recent business initiatives" as a pretext to terminate him without providing the requisite three month's notice or lump sum payment pursuant to the Agreement.

Plaintiff commenced this action on June 1, 2010 alleging causes of action sounding in (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; and (4) quantum meruit. Plaintiff seeks

judgment in the amount of \$39,000 (\$35,400 in unpaid salary plus \$3,600 in unused vacation days).

On July 12, 2010, Defendant filed a pre-answer motion to dismiss Plaintiff's second through fourth causes of action. The parties subsequently entered into a stipulation whereby Plaintiff withdrew those causes of action, leaving only the breach of contract claim, and rendering moot the motion to dismiss.

On or around October 28, 2010, Defendant served its verified answer and counterclaims on Plaintiff. Defendant's first counterclaim is for breach of contract. Defendant alleges that "the parties set monetary goals for the development of new business by Plaintiff in the amount of \$600,000 for the first year, \$1,200,000 for the second through fifth years and \$2,000,000 per year thereafter." Defendant claims that Plaintiff breached his contract by "completely fail[ing] to perform his duties and responsibilities under the [Agreement]," damaging Defendant in the amount of \$100,000 or greater. "Examples of his failure," Defendant claims, "include spending an inordinate amount of time on the internet on personal matters, taking unauthorized vacation days, and otherwise neglecting his responsibilities."

Defendant's second counterclaim is for fraudulent inducement. Defendant alleges that "Plaintiff made false representations regarding his knowledge, expertise and contacts with the intent to induce Defendant to enter into the Employment agreement," and knew that he would be incapable of performing his obligations under the Agreement.

Presently before the court is a motion by Plaintiff for an order dismissing Defendant's counterclaims pursuant to CPLR §3211(a)(7). Plaintiff claims that Defendant's first counterclaim must be dismissed because (1) Defendant cannot sustain a breach of contract action against Plaintiff for Plaintiff's alleged failure to perform his duties under the Agreement; (2) Defendant fails to identify a specific provision of the contract that was violated; (3) the claimed damages are speculative; and (4) Plaintiff's ability to perform under the contract was frustrated by Defendant. As to Defendant's second counterclaim, Plaintiff argues that Defendant fails to plead the alleged fraud with the requisite particularity of CPLR §3016(b); and that it is duplicative of Defendant's breach of contract claim.

Defendant submits a memorandum of law in opposition to the motion.

[* 4]

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted).

Here, the court finds that Defendant’s counterclaim for breach of contract against Plaintiff fails as a matter of law. Under New York law, an employer’s sole recourse for an employee’s alleged poor performance is to terminate the employee (*see Guepet v. International TAO Systems*, 443 N.Y.S.2d 321, 323 [Sup. Ct. Nassau Co. 1981]); *Burke v. Steinman*, 2004 U.S. Dist. LEXIS 8930 [S.D.N.Y. May 18, 2004]). While Defendant cites cases in support of the proposition that an employer can sue for an employee’s breach of the duty of loyalty, no such conduct is alleged in Defendant’s counterclaim. Rather, Defendant’s claim against Plaintiff concerns Plaintiff’s alleged laziness and absenteeism (*compare with Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.*, 100 A.D.2d 81 [1st Dept. 1984]) (defendant, while in the employ of plaintiff, “surreptitiously organized a competing corporation, corrupted a fellow employee, and secretly pursued and profited from one or more opportunities properly belonging to his employer”).

With respect to Defendant’s fraudulent inducement counterclaim, the court finds that Defendant fails to allege the fraudulent conduct with the requisite specificity. CPLR §3016(b) provides that, where a party brings a cause of action sounding in fraud, “the circumstances constituting the wrong shall be stated in detail.” “A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages” (*Nicosia v. Bd. of Mgrs. of the Weber House Condominium*, 2010 NY Slip Op 7254, *2 [1st Dept. 2010], *citing Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here,

Defendant vaguely states that "Plaintiff made false representations regarding his knowledge, expertise and contacts" without specifying what that claims were or when they were made. Moreover, Defendant fails to state with any particularity how Plaintiff's alleged misrepresentations caused it to suffer damages.

Wherefore it is hereby

ORDERED that Plaintiff's motion is granted and Defendant's counter-claims are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 15, 2011



EILEEN A. RAKOWER, J.S.C.

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