SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

DOUGLAS P. MENELLY,

Plaintiff,

INDEX No. 16688/09

MOTION DATE: Sept. 23, 2011
Motion Sequence # 001, 002

-against-

WILLEX INDUSTRIAL COPORATION,
WILLIAM T. SPAKER, JR. and
WILLIAM J. SPAKER,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Support..... X
Reply Affirmation/Affidavit..... XXX
Memorandum of Law..... XX
Reply Memorandum of Law..... XX

Motion by defendants Willex Industrial Corporation, William T. Spaker, Jr. and William J. Spaker for summary judgment dismissing the complaint is **granted** in part and **denied** in part. Cross-motion by plaintiff Douglas P. Menelly for summary judgment is **denied**.

This is an action for breach of an employment agreement and a shareholder agreement.

Defendant Willex Industrial Corporation, is a closely held corporation in the business of distributing screws, bolts, nuts, and other metal fastener systems. Defendant William T. Spaker is the president of the corporation and defendant William J. Spaker, William T.'s son, is its chief executive officer. William T. and William J. Spaker are also the majority shareholders.

In 2005, Willex's largest customer" was MKS, a company which had various affiliates and subsidiaries in Asia, including China. In order to facilitate doing business with MKS, Willex opened a facility in Shenzhen, China and hired plaintiff Douglas P. Menelly to run the operation there.

On July 10, 2007, Willex entered into a five year employment contract with Menelly, which provided that he would be eligible for an "equity-stake bonus" of shares of stock in the company commencing May 1, 2007. Willex also entered into a shareholders' agreement with Menelly on the same date.

The employment agreement provided for a fixed term of employment for Menelly for the period through and including April 30, 2011. Pursuant to the employment agreement, Menelly was to receive the following compensation through April 30, 2011: salary of $66,000 per year; rent for an apartment in China; two business class round trips each year between China and the U.S.; vehicle and travel expenses; health insurance and uninsured medical expenses; tax preparation and tax equalization expenses. Plaintiff claims that Willex has refused to provide these salary and other benefits despite due demand.

The employment agreement also provided that Willex could terminate plaintiff's employment for "cause":

> ...if it shall justly determine, in good faith, that there has been continued gross neglect by the Employee of his duties hereunder or willful and serious misconduct on his part in connection with the performance of his duties, but only after giving the Employee written notice of such neglect or misconduct and an opportunity to correct such neglect or misconduct; except that such notice requirement shall not apply in case of willful misconduct which has resulted in material financial loss to the Corporation, of material damage to the Corporation's good will, or has been otherwise materially detrimental to the Corporation's interest.
> [Employment Contract, §4.2[b]]

Pursuant to the employment agreement, plaintiff ultimately acquired 32 shares of Willex, or a 16 % interest in the stock of the corporation. The shares issued to plaintiff, however, were non-voting shares (Shareholders Agreement, Article II, §9). Pursuant to the shareholders agreement, plaintiff had the right to sell his shares, but they were subject to a right of first refusal by Willex and the Spakers individually (*Id.* at Art. I, §2).

From the beginning, plaintiff's tenure in China was marked by problems between the parties. Defendants claim that the plaintiff engaged in conduct that was insubordinate and presented challenges to the defendants' authority. Plaintiff argues that as a 16% shareholder in Willex, he was not merely an employee; rather, he was a manager of the Shenzen operation with an important stake in the company. While plaintiff concedes there were occasional policy disagreements with the Spakers, he denies that he was guilty of insubordination.

Several incidents require particular mention. In June 2007, plaintiff purchased of a $21,000 car on Willex's credit line without informing either of the Spakers. Defendants claim that plaintiff secretly hired additional employees to help run the Shenzen operation and violated Chinese labor and employment laws. Defendants assert that plaintiff's performance was inadequate in that he failed to generate new business. According to defendants, if the Shenzen operation did not generate sufficient profit, it was at risk of being shut down by the Chinese government.

Finally, defendants claim that plaintiff imperiled Willex's relationship with MKS. In selling to MKS, Willex preferred to ship orders based upon its own assessment of MKS' needs, a practice referred to as "vendor-managed inventory," or "VMI." Although MKS China had initially agreed to VMI, it objected to Willex viewing its inventory and refused to accept items on Willex's proposed delivery list. In response, Menelly sent MKS an email threatening to sue the customer for breach of contract. Defendants claim that they were required to apologize and disavow Menelly's statement in order to restore the relationship with MKS.

Nevertheless, Menelly insisted that the email to MKS China was consistent with his instructions from the Spakers. In an email to defendants dated June 9, 2009, plaintiff stated that "[i]t is my opinion that the current issues at Willex are a culmination of poor business decisions by senior management over the past 12-24 months." In the email, plaintiff stated that he was leaving for vacation in South America for two weeks beginning June 15, and an assistant, Jane Zhou, would be in charge of the office.

On June 13, 2009, William J. responded via email that he had never authorized this vacation and the state of the company did not permit a vacation at this time. William J. stated that plaintiff's leaving on vacation would be considered serious misconduct, tantamount to his "resignation as General Manager for Willex Industrial." In his response email dated June 16, 2009, plaintiff advised William J., "Dear Bill, I do not resign. I am on vacation." However, on June 15, 2009, William J. had already sent a letter to plaintiff informing him that his employment with Willex was terminated.

In bringing this suit, plaintiff asserts four causes of action: (1) breach of employment agreement by Willex for terminating the plaintiff without cause, and subsequently failing to pay him for the remainder of the contract period; (2) a claim for a declaratory judgment that plaintiff "is under no further obligation to offer his stock to defendants and defendants have no further right to purchase" his stock; (3) a claim for breach of the Shareholder Agreement by defendants failing to repurchase's plaintiff's shares; and (4) defamation based upon an email communication sent to various MKS officials after plaintiff's June 5, 2009 email, advising those officials, that plaintiff had not sent his email with authorization from Willex and apologizing for plaintiff's lack of professionalism.

Both parties move for an award of summary judgment.

Plaintiff asserts two primary arguments. First, the acts constituting the purported cause for his termination were actually done with defendants' permission or on defendants' express instructions; the remaining "reasons" amount to nothing more than complaints about plaintiff's past job performance and are not legal cause for termination. Specifically, plaintiff asserts that he was authorized to send the email threatening to sue MKS for breach of contract, as William J. had instructed Menelly to convey a "get tough" message to MKS China the previous day.

Secondly, plaintiff argues that he was not merely an employee; rather he was a manager and a shareholder with an important stake in the growth of the company. Plaintiff claims that his occasional policy disagreements with the Spakers over the course of three years do not prove him "insubordinate," rather defendants are raising past issues as a pretext to justify their breach of the employment agreement.

Defendants, in turn, assert four basis for their entitlement to an award of summary judgment. First, the record sufficiently demonstrates that plaintiff was terminated from his employment consistently with the terms of his employment agreement regarding early

termination, i.e. without notice and an opportunity to correct his performance.

Second, defendants are entitled to a declaration that the first refusal provision in the Shareholders' Agreement is operative because plaintiff has failed to produce and attach a bona fide third party offer to his written notice of his intent to sell. Third, the Shareholder Agreement contains no provision requiring defendants to repurchase plaintiff's shares and accordingly defendants did not breach the agreement.

Lastly, plaintiff was not defamed by the defendants when they apologized in writing to a client of the Company for representations plaintiffs made to that client in an email because (a) written representations do not constitute "slander" and (b) such representations do not constitute defamation as a matter of law.

The standards for summary judgment are well settled. On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues fact (***JMD Holding Corp. v. Congress Financial Corp.***, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). This Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (***Liberty Taxi Mgt. Inc. v. Gincherman***, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

First Cause of Action:
Breach of Employment Agreement by wrongful termination

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach (***Furia v. Furia***, 116 AD2d 694 [2nd Dept. 1986]).

There is no dispute that the Employment Agreement at issue states that "[t]he Board of Directors of the Company may elect to terminate [the Plaintiff's] employment

hereunder...(b) for "cause:"

> if it shall justly determine, in good faith, that there has been continued gross neglect by the Employee of his duties hereunder or willful and serious misconduct on his part in connection with the performance of his duties, but only after giving the Employee written notice of such neglect or misconduct and an opportunity to correct such neglect or misconduct; except that such notice requirement shall not apply in case of willful misconduct which has resulted in material financial loss to the Corporation, of material damage to the Corporation's good will, or has been otherwise materially detrimental to the Corporation's interest.

"An employer's determination of good cause justifying termination of an employment contract is entitled to deference, particularly where high-level management employees are involved" (***Trieger v. Montefiore Medical Center***, 15 AD3d 175, 176 [1st Dept 2005]). However, this Court determines that there remain factual issues as to whether the defendants had cause to terminate the plaintiff's employment.

Defendants rely heavily upon plaintiff's allegedly unapproved vacation as cause for his discharge. Thus, defendants claimed in their June 15 termination letter to the plaintiff that going on this trip constituted "gross misconduct and insubordination." However, plaintiff argues that this vacation was previously approved by the defendants in March 2009, a fact that the defendants do not clearly dispute in their reply papers. Rather, at his sworn deposition, William J. Spaker testified that he was "open" to the idea of the plaintiff going on the subject vacation (Tr., pp. 184, 187). Defendants submit that since they had heard nothing further about the trip after the original mention in March 2009, they assumed plaintiff was not going to follow through with his travel plans.

While defendants correctly note that insubordination may be a cause for termination, the question in this case is whether the basis of plaintiff's termination, i.e., going on the trip, constituted insubordination, and whether insubordination constitutes "willful and serious misconduct," a basis for "cause" termination under the Employment Agreement.

Based on the evidence submitted, documenting plaintiff's arguably insubordinate and disrespectful behavior however, and in light of the conflicting testimony regarding the approval of the vacation, this Court cannot rule as a matter of law whether the supposed "cause" for termination was in fact a pretext. Accordingly, the parties' motions for summary judgment as to the first cause of action, for breach of the employment agreement, are **denied**.

Second Cause of Action:
Declaratory Judgment

CPLR 3001 provides that the "Court may render a declaratory judgment...as to the rights and other legal relations of the parties to a justiciable controversy..."

In plaintiff's second cause of action, plaintiff seeks a declaration that he "is under no further obligation to offer his stock to defendants and defendants have no further right to purchase" his stock. Alternatively, in his third cause of action, plaintiff seeks a declaration that defendants are obligated to repurchase the plaintiff's shares and, by failing to do so, they breached the Shareholder Agreement.

Plaintiff claims that on May 8, 2009, he desired to sell his shares after conversations with a potential buyer. Plaintiff acknowledges that at that point he did not have a third party offer. Nevertheless, plaintiff sent to the defendants a notice in which he offered the stock back to the corporation and to the defendants. Defendants contend that because the plaintiff did not produce or attach a third party offer, and because defendants have no express or implied contractual obligation to repurchase his shares of Willex, they should be awarded summary judgment dismissing plaintiff's second and third causes of action.

The language of the relevant "Right of First Refusal" provision in the Shareholders Agreement is clear. Article I, Section 2(a) states, in pertinent part, as follows:

> 2. Right of First Refusal
>
> (a) Prior to offering, or accepting an offer, for sale of stock in the Corporation, a Shareholder...shall first offer the stock to the Corporation and then to [the Spakers]...The offering Shareholder shall provide written notice to the remaining Shareholders and the Corporation of the third party offer and shall attach a copy of the third party offer to such notice.

The interpretation of a plain and unambiguous contract is an issue for the court to rule upon as a matter of law (***Greenfield v. Philles Records***, 98 NY2d 562, 569 [2002]; ***WWW Assoc. v. Giancontieri***, 77 NY2d 157, 162 [1990]).

By the plain language of the Shareholders' Agreement, plaintiff was required to

provide written notice to the other shareholders of a third party offer and attach a copy of the offer to his notice. Since plaintiff, admittedly, never served a proper notice of a third party offer, the defendants right of first refusal did not take effect.

Accordingly, plaintiff's motion for summary judgment as to his second cause of action for declaratory judgment is **denied**. Defendants' motion for summary judgment as to the second cause of action is **granted** to the extent of declaring that the right of first refusal provision is in full force and effect.

Third Cause of Action:
Breach of the first refusal provision in the shareholder agreement

By the plain language of the shareholder agreement, even if plaintiff had served a proper notice of third party offer, the other shareholders would not be required to purchase his shares. Accordingly, defendants' motion for summary judgment is granted to the extent of dismissing the third cause of action for breach of the shareholder agreement. Plaintiff's motion for summary judgment with respect to the third cause of action is **denied**.

Fourth Cause of Action:
Defamation

Plaintiff alleges that on June 9, 2009, William J. wrote to Echo Law, Purchasing Manager, Mark Lincoln, Director of Strategic Operations, and Wing Lo, General Manager, all with MKS Instruments, Inc., "I would like to apologize for the tone and content of Doug's email to your team last week...I was not aware that it was sent to you...I assure you and your team that communication will be professional and cordial and directed to the appropriate MKS personnel moving forward...please accept my apologies for any confusion that last week's email from Doug may have created."

Plaintiff claims that this email and the statements therein was false and defamatory and that said false and defamatory statements harmed his reputation and related directly to his business. Plaintiff claims that these statements constituted slander *per se* (Complaint, ¶¶47-52).

As a preliminary matter, the court notes that this claim sounds not in slander but in libel. Slander constitutes the oral utterance of defamatory falsehoods that constitute an injury to a person's reputation, while libel represents a similar falsehood by written, symbolic or

pictorial means (***Morrison v News Syndicate Co., Inc.***, 247 AD 397 [1st Dept. 1936]).

Furthermore, statements by an employer about an employee's work performance, constitute a non-actionable expression of opinion (***Farrow v. O'Connor, Redd, Gollihue & Sklarin, LLP***, 51 AD3d 626 [2nd Dept. 2008]; ***Ott v. Automatic Connector, Inc.***, 193 AD2d 657, 658 [2nd Dept. 1993]). (*Id*). It is plain that the allegedly defamatory statement about the plaintiff to MKS – the implication that his communication to MKS was unprofessional and/or uncordial in tone and character – is a nonactionable statement of opinion.

Affording the plaintiff the benefit of every non-favorable inference, this Court simply cannot find that the alleged statements constituted defamation *per se* because the statements do not go to his ability to perform his trade *generally*, but merely accuse him of a single instance of workplace misconduct unrelated to his ability to execute his professional abilities (***Armstrong v. Simon & Schuster***, 85 NY2d 373 [1995]; ***Casamassima v. Oechsle***, 125 AD2d 855 [3rd Dept. 1986]). Even to the extent that William J.'s statement or any part of it could possibly constitute *per se* defamation, application of the "single instance" rule requires that the plaintiff plead special damages which he clearly has not done. The "single instance rule" dictates that where the alleged defamatory language "charg[es] a party with a single dereliction in connection with his or her trade, occupation or profession...it is not deemed actionable unless special damages are pleaded and proven" on the theory that this language does not accuse a party of general ignorance or lack of skill (***D'Agrosa v. Newsday, Inc.***, 158 AD2d 229 [2nd Dept. 1990]). The apologetic email to MKS regarding plaintiff's unauthorized transmission of a threat of a lawsuit clearly falls within the "single instance rule" exception because it does not indicate that plaintiff was unprofessional or uncordial *generally*; rather, it merely indicates that he had behaved improperly within the context of one single unauthorized communication to a customer. The complained of apology cites to only a single message, not multiple messages.

Thus, even if the statement at issue was false, the statement is still not defamatory as a matter of law. Therefore, defendants' motion for summary judgment dismissing the fourth cause of action for defamation is also **granted**.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

This shall constitute the decision and order of this Court.

Dated NOV 10 2011

Stephen A. Bucaro
J.S.C.

ENTERED
NOV 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE