

<b>Kaplan v Continuum Health Partners, Inc.</b>
2011 NY Slip Op 33730(U)
January 11, 2011
Supreme Court, New York County
Docket Number: 107226/2010
Judge: James A. Yates
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: James A. Yabs  
Justice

PART 49

Lawrence A. Kaplan,

INDEX NO. 107226-10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Continuum Health Partners,

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

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

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING  
DECISION ~~NO. 107226-10~~ DATED 1-11-11

Dated: 1-11-11  
JAN 11 2011

James A. Yabs

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):



of our offer to you to join our department as the Director of Clinical Chemistry for the Beth Israel Medical Center of the Continuum Hospital Partners of New York. The information herein detailed is contingent upon final approval by the Administration of Continuum Hospital Partners.

The following are the terms of the proposed agreement and a contract containing these terms in the near future (subsequent to the acceptance of our offer). As per our discussions we anticipate you joining our staff to be primarily located at ...[the] Petrie Division. The start date is tentatively planned, as per your indication, for September 2004. Your base salary will be \$160,000. As per our discussion, we agree to a mutually acceptable daily workweek schedule. The benefits provided ...will be identical to those of the other professional members of our staff [.]..."

The letter was signed by Dr. Bruce Wenig who had ultimate responsibility for all Continuum laboratories. The letter also informed him that a contract containing the proposed employment agreement would follow in the "near future." An employee handbook was mailed along with the letter.

It is undisputed that Dr. Kaplan never received a written employment contract. Nor is there evidence of approval by Continuum's Administration. Nonetheless, in September 2004, Dr. Kaplan commenced his employment as one of the directors of the Petrie Laboratory. In February 2006, Continuum hired Dr. Patricia Luhan as Executive Director for Pathology & Laboratory Medicine. As of May 2006, the Continuum laboratories had three directors, including plaintiff at Petrie. Dr. Kaplan was discharged by defendants on or about August 16, 2006. The two remaining directors had more seniority than plaintiff. Defendants allege that plaintiff's dismissal was a reduction in workforce or reorganization of the Department of Pathology. However, he was not told the reason for his dismissal, nor was he given a letter to that effect. In 2007, defendant filed a pro se complaint against Beth Israel Medical Center with the United States District Court for the Southern District (Docket No. 07-8842), alleging an age discrimination (under the Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. §§ 621-634). A year after filing his original complaint, in November 2008, he retained an attorney and filed a motion for leave to amend his complaint. On November 16, 2009, Dr. Kaplan amended his complaint, adding four additional causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing; promissory estoppel; and

quantum merit - - all state law claims. By decision dated March 31, 2010, the Honorable Robert J. Patterson Jr. granted Beth Israel's motion for summary judgment and dismissed the first count, the employment discrimination cause of action. The court declined to exercise supplemental jurisdiction over the added state law claims (See 28 U.S.C. 1367 [c] [3]). The claims were dismissed without prejudice to plaintiff's refiling in state court.

## DISCUSSION

### **The Motion to Dismiss: The Legal Standard**

Defendants move to dismiss the action on two different grounds: (1) "a defense is founded on documentary evidence" pursuant to CLR 3211 (a)(1); and (2) "the pleading fails to state a cause of action" pursuant to CLR 3211 (a)(7).

In a motion to dismiss, the pleadings are to be afforded a liberal construction (see CLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). As well, the Court must accept the facts as alleged by plaintiff as true, and must afford plaintiff the benefit of every possible inference (see *E.C. I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]), unless flatly contradicted by any documentary evidence submitted with the pleadings (see *Lanate Bombardier, Ltd. v Mallow*, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

Under CLR 3211 (a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law (*Leon v Martinez, supra*). In asserting a motion to dismiss under CLR 3211 (a)(7), the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginsburg*, 43 NY2d 268]).

### **First Cause of Action: Breach of Contract**

The elements of a breach of contract claim are: (1) an agreement exists between plaintiff and defendant; (2) performance of the contract by plaintiff; (3) breach of the agreement by defendant by failing to perform its obligations; and (4) damages suffered by plaintiff resulting from the breach. See *J.P. Morgan Chase v J.H. Elect. of N.Y., Inc.*, 69 AD3d 802, 803 (2d Dept 2010). "[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Kosson v Algaze*, 203 AD2d 112, 112-113 (1<sup>st</sup> Dept 1994), *affd* 84 NY2d 1019 (1995).

In this case, Defendants dispute the existence of a contract. Defendants argue that the June 30, 2004 Letter of Intent is not an enforceable contract between the parties and therefore, this cause of action must be dismissed as a matter of law. Plaintiff argues that the June 30 Letter of Intent is a preliminary binding agreement.

Under New York law, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v Francis*, 26 NY2d 466 (1970). As a general matter, courts express reluctance about the binding nature of "letters of intent." Preliminary agreements such as a letter of intent or memorandum of understanding are not intended to bind either party to the contemplated transaction, except in rare circumstances where the agreement clearly manifests the intent to be bound. See *Shann v Dunk*, 84 F3d 73, 77 (2d Cir 1996). There are two types of preliminary agreements: (1) the binding preliminary agreement, and (2) the binding preliminary commitment. *Gorondensky v Mitsubishi Pulp Sales, Inc.*, 92 F Supp 2d 249, 254 (SD NY 2000), *affd* 242 F3d 365 (2d Cir 2000). The binding preliminary agreement is created "when the parties agree on all points that require negotiation . . . but agree to memorialize their agreement in a more formal document.'" *Id.* quoting *Adjustrite Sys., Inc. v GAB Business Servs., Inc.*, 145 F3d 543, 548 (2d Cir 1998). Consequently, a letter of intent may constitute a binding agreement if it only needs a formal writing for its full expression.

On the other hand, a binding preliminary commitment is created "when the parties agree on certain major terms, but leave other terms open for further negotiation." *Id.* quoting *Adjustrite*, 145 F3d at 548. With the latter, the parties commit to negotiate in good faith to reach a final agreement. *Id.* (internal quotations omitted).

In determining whether the parties intended to be bound by a binding preliminary agreement, the Court must examine four factors: (1) the language of the agreement; (2) the existence of open terms; (3) whether there has been partial performance; and (4) the necessity of putting the agreement in final form as indicated by the customary form of such transactions. *Id.* at 254-255. The Court must also consider "the context of the negotiations resulting in the preliminary agreement." *Gorodensky v Mitsubishi Pulp Sales (MC), Inc.*, 92 F Supp 2d 249 (SD NY 2000) (internal citations omitted). Based solely on the contents of the Letter of Intent and the reasonable inferences that may be drawn from it, the Court finds that the Letter of Intent was not a binding preliminary

agreement.

Plaintiff argues that a letter of employment may constitute an enforceable agreement where the parties moved forward, the employee provided services and the conduct of the employer and employee demonstrate the mutual assent to be bound (*Howard v Greenbriar Equity Group, LLC*, 20 Misc 3d 1140(A), 2008 NY Slip Op 51806(U) (Sup Ct, NY County 2008). Additionally, an employment letter can be a binding agreement when it provides that the terms will take effect.

Here, the June 30 letter indicates a willingness to hire Dr. Kaplan, and contains the definiteness required of an offer. However, Dr. Kaplan and Dr. Wenig, the letter's signatory, did not have a meeting of the minds as to the length of employment or whether employment was terminable at will. The letter provided the initial framework from which the parties might later negotiate that vital term, but it explicitly states "The following are the terms of the proposed agreement." There is no room to infer other terms not mentioned in the letter. It outlines areas of agreements such as job title, base annual salary, and an undefined reduced work schedule. It says nothing about the duration or conditions of termination. Duration may have been intended by one or the other parties to the letter as an item which could be included in the formal contract which was to be drafted, but it is not part of any stated agreement.

As well, in the letter, it is evident that Dr. Wenig made his offer conditional on plaintiff's and Continuum Hospital Partners' acceptance. It can be argued that the course of conduct which ensued demonstrates an acceptance of the terms contained within the letter, but the letter and the course of conduct cannot be read to include other vital terms of employment which were not agreed upon or even discussed. Based on the letter's language, the promise of a contract to follow and the expressed condition that the Hospital's approval was necessary, it is unreasonable to imply important terms and conditions such as duration to have been part of Wenig's offer. To overcome the presumption that employment is at will, Plaintiff must show that the contract was for a specified duration, or that he expressly conditioned acceptance of the job on the employer's assurance that he would not discharge him without cause *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 (1982). Here, plaintiff has failed to show that the alleged contract was for a specified duration, that he accepted employment on the condition that he would only be discharged for cause, or that his discharge was limited by agreement. *Lerman v Med. Assocs. of Woodhull, P.C.*, 160 AD2d 838 (1<sup>st</sup> Dept 1990). Accordingly, the contract is presumptively for employment at will and defendants may not be

charged with a breach thereof.

**Second Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing**

Defendants argue that plaintiff fails to state a cause of action in pleading breach of the implied covenant of good faith and fair dealing. Under New York Law, parties to an express contract are bound by an implied duty of good faith and fair dealing. "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*Forman v Guardain Life Insurance Co. of America*, 76 AD3d 886 [1<sup>st</sup> Dept 2010] [internal citations omitted]). However, the contract here, even if one can be imputed from the letter and the course of conduct, merely bound the parties to a level of compensation, a title, and a daily workweek schedule to be agreed upon. Terminating at will employment does not injure any right that Plaintiff had under the purported contract.

**Third Cause of Action: Promissory Estoppel**

Dr. Kaplan maintains that Dr. Wenig has a contract requiring "good cause" before termination. As such, he infers that he is entitled to a similar contract. However, there is no claim that an explicit promise was made to him regarding termination.

Although the theory of promissory estoppel allows enforcement of a promise even in the absence of an enforceable contract, New York law does not recognize promissory estoppel as a valid cause of action when raised in the employment context (see *Dalton v Union Bank of Switzerland*, 134 AD2d 174 [1<sup>st</sup> Dept 1987] [granting motion to dismiss promissory estoppel claim in an employment-related case under New York law] ["[A] change of a job, even with increased emoluments and advanced status, is not sufficient to call promissory estoppel into play.")).

In any event, the Complaint fails to allege the requisite promise that was definite and clear or an unconscionable injury. As a matter of law, the Complaint is insufficient to state a claim for promissory estoppel. See e.g. *Swerdloff v Mobil Oil Corp.*, 74 AD2d 258, 263-264 (2d Dept 1980) (allegation that plaintiff worked "endless hours" and gave up opportunity to buy interest in another venture in reliance on defendant's oral promise that he would be given a dealership did not state a claim for promissory estoppel); *Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 52-53 (1<sup>st</sup> Dept 1985) (plaintiff's move to New York from Canada and rejection of other employment opportunities in reliance on defendants'

alleged promise of employment for five years did not support promissory estoppel claim).

Because plaintiff fails to state a cause of action under the doctrine of promissory estoppel, the third cause of action is dismissed.

#### **Fourth Cause of Action: Quantum Merit**

The Court is satisfied that plaintiff has stated a cause of action in implied contract or quantum merit. A cause of action under a quasi contract theory "only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). "In order to make out a claim in quantum merit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Moors v Hall*, 143 AD2d 336, 337-338 [2d Dept 1988]). Dr. Kaplan claims that his \$160,000 salary was based upon an understanding that he would cut his hours to an 80% schedule, when in fact he worked full time. While defendants' suggestion that "comp days" may have been given in exchange for work beyond the agreed upon work schedule could constitute a defense, Dr. Kaplan states the elements of this cause of action sufficiently to meet the requirements of notice pleading.

Under the theory of quantum merit, plaintiff also seeks additional compensation for his teaching duties. Defendants do not contest that plaintiff had teaching duties; however, they contend that teaching was part of a Clinical Director's duties. See *Freedman v Pearlman*, 271 AD2d 301,304 (1<sup>st</sup> Dept 2000) (motion to dismiss quantum merit claim granted where plaintiff failed to plead that services allegedly rendered were so distinct from his employment duties and of such a nature that it would be unreasonable for the employer to assume that they were provided without expectation of further compensation). However, whether the hours worked by Kaplan exceeded that for which he was properly compensated is an issue of fact, which is best resolved after discovery, at trial or in a motion for summary judgment. Accordingly, this motion to dismiss the quantum merit claim is denied.

Notwithstanding survival of this claim at this juncture, it should be noted that Dr. Kaplan further claims that he is entitled to payment because his name was not removed from paperwork at the

facility for eight months. To the extent that the hospital benefitted by improper use of his name, if the allegation is to true, he has no lawful claim to the improperly obtained funds. Accordingly, the quantum merit claim is limited, at this time, to under-compensation for work performed beyond the 32-hour work schedule.

Accordingly, it is hereby

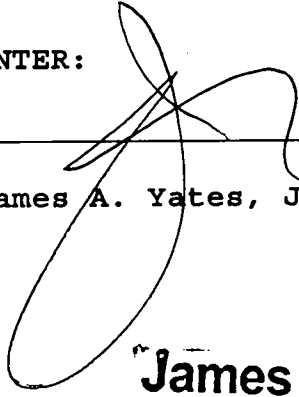
**ORDERED** that the motion to dismiss the Complaint is granted as to the First (Breach of Contract), Second (Breach of the Implied Covenant of Good Faith and Fair Dealing) and Third Causes of Action (Promissory Estoppel); and it is further

**ORDERED** that the motion to dismiss the Fourth Cause of Action for Quantum Merit is denied and the Clerk of the Court is to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: January 11, 2011

ENTER:

  
\_\_\_\_\_  
James A. Yates, J.S.C.

JAN 11 2011

**James A. Yates**