**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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| **----------x** | **TRIAL/IAS PART: 16** |
| **CHRIS CARTER,** | **NASSAU COUNTY** |
| **Plaintiff,** | **Index No: 601085-11** |
| | **Motion Seq. No: 1** |
| | **Submission Date: 3/2/12** |
| **-against-** | |
| **HAMLET GOLF & COUNTRY CLUB, INC., MARILYN MONTER, GERALD MONTER and ELLIOTT MONTER,** | |
| **Defendants.** | |
| **----------x** | |

**Papers Read on this Motion:**

**Notice of Motion, Affidavit, Affirmation in Support and Exhibits.....x**
**Affidavit in Opposition and Exhibits.....x**
**Memorandum of Law in Opposition.....x**
**Reply Affirmation and Affidavit.....x**

This matter is before the court on the motion by Plaintiff Chris Carter ("Carter" or "Plaintiff") filed January 5, 2012 and submitted March 2, 2012. For the reasons set forth below, the Court grants Plaintiff's motion and 1) awards Plaintiff judgment against Defendant Hamlet Golf & Country Club, Inc. on the first cause of action in the Complaint in the sum of $158,677.75, plus interest from August 1, 2011; and 2) directs that the action against Defendants Marilyn Monter, Gerald Monter and Elliot Monter ("Individual Defendants") is severed and will proceed. The Court directs counsel for Plaintiff and counsel for the Individual Defendants to appear before the Court for a Preliminary Conference on June 4, 2012 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, 1) granting summary judgment against Defendant Hamlet Golf & Country Club, Inc. ("Hamlet") for breach of contract in the

liquidated amount of $158,677.55, representing the unpaid "Guaranteed Payments" and Professional Golfers' Association ("PGA") dues provided in the contract between the parties, plus interest from the date of breach; 2) granting an immediate trial on the unliquidated portion of damages over and above the liquidated amounts provided in the contract; and 3) upon granting the relief requested above, granting severance of the claims against Marilyn Monter ("Marilyn"), Gerald Monter ("Gerald") and Elliott Monter ("Elliott") (Individual Defendants") to pierce the corporate veil.

Hamlet opposes the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Chiariello Aff. in Supp.) alleges as follows:

At all relevant times, Plaintiff was an A-1 member of the PGA, as well as a designated golf professional in accordance with the PGA's standards. Hamlet owned, operated and maintained a golf course and facilities ("Golf Club") located in Commack, New York. The Individual Defendants were officers, directors or shareholders of Hamlet, and were involved in the management, operation and control of Hamlet's daily business activities.

On or about February 10, 2007, Plaintifff entered into a revised contract ("Contract") with Hamlet, to act as the Golf Club's head golf professional (Ex. A to Compl.). The Contract provided, *inter alia*, that Carter was guaranteed the sum of $125,582.00 in the Third Contract Year ("Guaranteed Payments"). The Contract was renewed via a letter agreement dated October 22, 2009 ("Letter Agreement") (*id.* at Ex. B). The Letter Agreement 1) extended the Contract for an additional 36 month period, to end on October 31, 2012; 2) continued the Guaranteed Payments; and 3) was signed by Marilyn, as Secretary/Treasurer of Hamlet.

Plaintiff was required to staff and operate a full service golf pro shop ("Pro Shop"), and the membership of the Golf Club were required to spend a designated annual minimum at the Pro Shop, which was payable to Plaintiff ("Pro Shop Profits"). In addition, the Contract permitted Plaintiff to retain all sums received for golf lessons provided to members and payments for golf outings held at the Club, and to receive payment of his PGA membership fees. Plaintiff alleges that he fulfilled the Contract through its full term, which expired on October 31, 2009. Despite the expiration of the Contract, Plaintiff continued as the golf professional at the Golf Club without any change in his compensation or other benefits.

Near the expiration of the Contract, and thereafter, Plaintiff requested of Defendants a

renewal of the Contract. Marilyn tendered the Letter Agreement to Plaintiff at a meeting at which Defendants advised Plaintiff, and others, that Defendants were pursuing a sale of the Golf Club. On or about early June of 2011, Hamlet sold all or substantially all of its assets, including the Golf Club, to Clubcorp Hamlet, LLC ("Purchaser"). The terms of the sale ("Sale") did not obligate the Purchaser to assume liability for the Contract. Following the Sale, Purchaser advised Plaintiff that he would no longer be the golf professional at the Golf Club.

The Complaint contains four (4) causes of action: 1) breach of the Contract and Letter Agreement by Hamlet, 2) breach of the Contract and Letter Agreement by the Individual Defendants, against whom Plaintiff seeks to pierce the corporate veil; 3) against Defendants for "fraudulent, negligent and careless conduct" (Compl. at ¶ 61) based on the allegation that, at the time the Letter Agreement was tendered to Plaintiff, Defendants were aware that they would be unable to pay for Plaintiff's services through the end of the Contract Period, and 4) unjust enrichment against all Defendants. Plaintiff seeks damages in the sum of $260,000.

In his Affidavit in Support, Plaintiff affirms the truth of the allegations in the Complaint. He affirms, further, that 1) when Plaintiff tried to discuss his claims with Defendants and Purchaser, they demanded that he vacate the Golf Club and advised him that Hamlet had no funds available; and 2) Plaintiff has attempted, unsuccessfully, to secure employment elsewhere, both in the golf field and in other areas. Plaintiff submits that, pursuant to the Contract and Letter Agreement, Hamlet owes him Guaranteed Payments of $156,977.55 (representing 15 months), plus $1,700 in other income lost consisting of Pro Shop Profits, less income and golf outing fees. Plaintiff avers that he "always understood" the term "Guaranteed Payments" to mean the sum he was entitled to on a monthly basis "so long as I was not terminated for cause or physically unable to fully perform the functions described in [the Contract]" (Carter Aff. in Supp. at ¶ 26). After Marilyn advised him of the Sale, Plaintiff "fully believed" the Guaranteed Payments would continue through October 31, 2012, "as a safety net or severance package in the event I was not retained by the new golf owners" (*id.*). He submits that the reason that Marilyn granted him the extension he had requested was to ensure that he would be compensated through October 31, 2012.

In opposition, Marilyn affirms that Hamlet retained Carter in November of 2003 to serve as the Golf Club's head golf professional for three (3) years. Following the expiration of that agreement, Hamlet further retained Carter to serve as the Golf Club's head professional pursuant to the Contract. The Contract provides that Carter was engaged as an independent contractor

(Contract at p. 1). The Contract provided for a base compensation payable to Carter of $115,000 for the first Contract year, $120,175 for the second Contract year, and $125,582 for the third Contract year (*id.* at ¶ 14(d). The term of the Contract expired on October 31, 2009 (*id.* at ¶ 15).

In or about 2009, Hamlet engaged a broker to secure a purchaser of the Golf Club, and began its negotiations with the Purchaser which purchased the Golf Club in June of 2011. It was because of Hamlet's desire to sell the Golf Club that Hamlet did not enter into a subsequent agreement with Carter upon the expiration of the Contract. Between June and October of 2009, Carter repeatedly requested an agreement extending the term of the Contract for three (3) years, and Marilyn advised Carter that Hamlet could not agree to such an extension, and that his continued employment at the Club, following the expiration of the Contract, would be on an at-will basis.

In July of 2010, Hamlet conducted a meeting with individuals associated with the Golf Club and other golf clubs owned by Hamlet, at which time Hamlet advised the management and professionals of those clubs of Hamlet's intention to sell all of the clubs. At the meeting, Plaintiff insisted on obtaining a letter agreement continuing his engagement as a golf professional. Hamlet tendered the Letter Agreement which contemplated an extension of Plaintiff's engagement, provided the Club was not sold. Marilyn affirms that it was Hamlet and Carter's "shared intention" (Marilyn Aff. in Opp. at ¶ 13) that the remainder of the term of the Letter Agreement would be assumed by the eventual purchaser after the sale of the Golf Club, and Carter was intimately familiar with the details regarding the proposed sale of the Golf Club. Marilyn affirms, further, that the Letter Agreement does not state that Plaintiff's engagement would terminate upon the sale for two reasons: 1) the parties believed that the purchaser would be more likely to consider Plaintiff's continued engagement as an independent contractor if it was reflected in a written contract; and 2) the inclusion of such language might "undermine" Plaintiff's interest in continuing his status as the club professional with the new purchaser (*id.*). Marilyn avers that it was not the parties' intention that Hamlet would be obligated to pay Carter following the Sale, and she never advised Carter that the extensions represented a severance, or safety net.

Marilyn affirms that Hamlet made all payments due to Carter under the Letter Agreement from execution through the Sale. As an accommodation to Carter, in light of the Purchaser's decision not to retain him, Hamlet continued the monthly pro rata payments under the extension agreement for June and July of 2011, as reflected by the check provided. As set forth in the

July 18, 2011 correspondence from Defendants' counsel, those payments were made "as a gesture of good faith and in furtherance of our negotiations" and were sent "without waiving any of our clients' rights" (Marilyn Aff. in Opp. at Exs. C and D). Finally, with respect to Plaintiff's mitigation of damages, Marilyn notes that Carter's Affidavit in Support fails to address whether Plaintiff has received payment from other sources, such as unemployment insurance.

In reply, Plaintiff provides additional information regarding his efforts to mitigate his damages. He affirms that he has continuously sought a position comparable to his position at the Golf Club, and names specific local golf clubs at which he has unsuccessfully applied for employment. He affirms that he was only able to secure part-time golf work for a few weeks in September and October at $10 per hour, and has recently been driving a taxicab part-time, from which he has received approximately $200 per week. In addition, he owes money to vendors for inventory he purchased for the Pro Shop, for which the Purchaser did not fully compensate him. Had he known that his Contract would not be honored through October 2012, he would not have purchased that inventory.

C. The Parties' Positions

Plaintiff submits that 1) the language of the Contract clearly and unambiguously sets forth the compensation and benefits to which Plaintiff is entitled; 2) the Letter Agreement "merely modified" the Contract by extending its term for an additional 36 months, with the Guaranteed Payments set at $125,582.00, the same sum that was paid in the third year of the Contract ("P's Memo. of Law at ¶ 30); 3) all other terms in the Letter Agreement remained unchanged from the Contract; 4) the use of the term "guaranteed payments," and Plaintiff's preparation of the Letter Agreement, demonstrate the parties' intention that payments would continue through the full Contract term; 5) the absence of any reference in the Contract and Guaranty to the possible sale of the Golf Club, and how it would affect Carter's compensation, is proof that the parties intended that Carter be paid through October 31, 2012; and 6) as Carter's payments were guaranteed through October 31, 2012, Carter has a liquidated damage claim of $156,977.55, representing 15 months of guaranteed payments from August 1, 2011 through October 31, 2012, as well as a liquidated damage claim of $1,700.00 for his PGA Membership dues of $850 per year for 2011 and 2012, resulting in total liquidated damages of $158,677.55.

In opposition, Hamlet contends that it has provided evidence creating an issue of fact as to whether it was Carter and Hamlet's intention that Hamlet's obligations under the Letter Agreement would terminate upon the Sale. Hamlet argues, further, that even if Hamlet is liable

under the Letter Agreement, there is an issue of fact with respect to the amount of damages owed to Carter. In light of Plaintiff's obligation to mitigate his damages, the Court should permit discovery on issues including Carter's efforts to secure replacement employment and whether Carter has received collateral source payments.

In reply, Plaintiff submits that the issue of mitigation is not relevant where, as here, the payments were guaranteed. Plaintiff has, nonetheless, provided a reply affidavit detailing Plaintiff's inability to secure alternate employment.

RULING OF THE COURT

A. Summary Judgment Standards

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 of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The 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 A.D.3d 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 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Applicable Contract Principles

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.* at 569, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *South Road Assoc., LLC v. International Business Machines Corp.*, 4 N.Y.3d 272, 277 (2005); *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d 157, 162 (1990). The interpretation of an unambiguous contract provision is a matter for the court. *Greenfield v.*

*Philles Records, Inc.*, 98 N.Y.2d at 569; *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d at 162. Finally, a court should not, under the guise of contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract. *Aivaliotis v. Continental Broker-Dealer Corp.*, 30 A.D.3d 446, 447 (2d Dept. 2006) (citations omitted).

C. Liquidated Damages

Whether a liquidated damages provision represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and circumstances. *JMD Holding v. Congress Fin.*, 4 N.Y.3d 373, 379 (2005). The burden is on the party seeking to avoid liquidated damages to show that the stated liquidated damages are, in fact, a penalty. *Id.* at 380. Where the court has sustained a liquidated damages clause, the measure of damages for a breach will be the sum in the clause — not more or less. *Id.* Thus, liquidated damages are, in effect, an estimate made by the parties at the time they enter into their agreement as to the extent of the injury that would be sustained as a result of breach of the agreement. *Id.* A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. *Id.*

D. Mitigation

Mitigation of damages is generally not necessary when there is a valid liquidated damages clause. *Delvecchio v. Bayside Chrysler Plymouth*, 271 A.D.2d 636, 639 (2d Dept. 2000). The question whether mitigation is thus necessary depends on whether the damages at issue are, in fact, liquidated damages. Significantly, there are no Second Department cases addressing this question. The First Department has, however, reached the issue in *American Capital Access Service Corp. v. Muessel*, 28 A.D.3d 395 (1st Dept. 2006). There, the First Department affirmed the trial court's Order which, *inter alia*, granted defendant's motion for summary judgment on her first counterclaim for breach and repudiation of her employment agreement and directed a money judgment in her favor. *Id.* at 396. The First Department rejected plaintiffs' argument that any damages that defendant recovered should be reduced by money she actually earned or could have earned in mitigation. In so doing the First Department noted, *inter alia*, that the employment agreement contained a no-mitigation clause and a severance provision "which, in essence, was a liquidated damages clause, exempting defendant from mitigating her damages." *Id.*

A party seeking to avail itself of the affirmative defense of failure to mitigate damages

must establish that the injured party failed to make diligent efforts to mitigate its damages, and the extent to which such efforts would have diminished those damages. *Eskenazi v. Mackoul*, 72 A.D.3d 1012, 1014 (2d Dept. 2010), citing, *inter alia*, *Cornell v. T.V. Development Corp.*, 17 N.Y.2d 69, 74 (1966). While the injured party must make reasonable exertions to render the injury as light as possible, *Eskenazi*, quoting *Wilmot v. State of New York*, 32 N.Y.2d 164, 168 (1973), this duty does not extend so far as to require that the party expose itself to unreasonable risk or expense. *Id.*, quoting *Janowitz Bros. Venture v. 25-30 120th St. Queens Corp.*, 75 A.D.2d 203, 213 (2d Dept. 1980). In *Eskenazi*, the Second Department affirmed the trial court's denial of the branches of defendant's motions seeking partial summary judgment limiting the plaintiffs' recovery on their causes of action to recover damages for injury to property for failure to mitigate damages, holding that the defendants had failed to meet their burden of demonstrating, *prima facie*, a lack of diligent effort to mitigate damages on the part of the plaintiffs, or to what extent such efforts would have diminished damages. *Id.*

D. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for summary judgment against Defendant Hamlet on the first cause of action in the Complaint. Taken together, the Contract and Letter Agreement state clearly that Carter was to be compensated through October of 2012. The Court will not imply a term regarding the effect of any sale of the Golf Club on Carter's compensation where the parties themselves failed to insert such a term, and where such an implication would effectively rewrite the parties' agreement. The Court declines to award Plaintiff judgment against Hamlet on the third and fourth cases of action, alleging unjust enrichment and fraud, in light of the fact that a) there is a written contract governing the parties' dispute; and b) the Court views the fraud claim as duplicative of the breach of contract claim.

The Court concludes that Carter did have a duty to mitigate his damages, based on the Court's determination that the guaranteed payment provisions in the Contract and Letter Agreement were not liquidated damages provisions. The Court reaches this conclusion, in part, in light of the absence of any language suggesting that the payments were intended to constitute severance payments to be made to Plaintiff in the event of a breach. The Court also concludes, however, that Plaintiff has demonstrated his entitlement to the damages requested. The Court reaches this conclusion in light of Plaintiff's affirmations regarding his extensive efforts to locate other employment in this difficult economy, and Hamlet's failure to demonstrate a lack of diligent effort to mitigate damages on the part of Plaintiff or provide any evidence to refute

Plaintiff's affirmations in this regard. Accordingly, the Court grants Plaintiff's motion as to Defendant Hamlet Golf & Country Club, Inc. on the first cause of action in the Complaint in the sum of $158,677.75, plus interest from August 1, 2011.

The Court also grants Plaintiff's motion to sever the action against the Individual Defendants. The Court directs counsel for Plaintiff and counsel for the Individual Defendants to appear for a Preliminary Conference before the Court on June 4, 2012 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
May 15, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.