Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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WILLIAM F. KAISER, Index No: 11671/01

Plaintiff(s),

-- against --

CITY WASTE SERVICES OF NY INC. and
CITY WASTE SERVICES, INC.,

Defendant(s).
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In this action plaintiff claims breach of contract, quantum meruit, and an account stated, plaintiff and also seeks the imposition of a constructive trust upon the assets of the defendant.

The defendant corporations are waste collection companies. Defendant City Waste Services Inc. is the parent company of defendant City Waste Services of NY Inc. The defendant corporations were incorporated in mid-1998 and Udi Saly was the sole shareholder. The defendant corporations were seeking and negotiating deals to consolidate existing independent waste collectors. In 1998 the defendant corporations were negotiating a deal with nonparty KTI, Inc. in which KTI, Inc. would acquire the defendant corporations. Plaintiff was employed by nonparty KTI, Inc. on January 5, 1998 and as an employee, plaintiff was directed to work on a strategy that involved the acquisition by, defendant corporations of, among others, Baisley Park Republic Carting and Republic Carting Co. Inc.

At the beginning of 1999 the proposed deal for KTI, Inc. to acquire the defendant corporations was abandoned. On January 29, 1999 plaintiff entered into a Finder's Fee Agreement (the Contract) with the defendant corporations, the Contract was executed, on behalf of the defendants, by Udi Saly, the sole shareholder of defendants at that time. In April 1999 ownership of the defendant corporations was shared by Udi Sali, Sam Marlino, Joseph Tesi, Salvatore Tesi and John Tesi, Jr.

It is plaintiff's claim that the defendants closed on two of the deals set forth in the Contract and failed to compensate plaintiff in accordance with the terms of Contract.

Defendants do not dispute the existence of the Contract however, defendants contend that there was no consideration; that by its terms the Contract is null and void; and that the transactions are not complete.

To establish a prima facie case for breach of contract plaintiff must establish that there was a contract, that plaintiff performed under the contract, that defendants failed to perform and that the plaintiff had damages as a result of the breach. *Furia v Furia*, 116 AD2d 694, 498 NYS2d 12; see *Ascoli v Lynch*, 2 AD3d 553, 769 NYS2d 567)

The Contract reads as follows:

> "Pursuant to our discussion in the past two days, and in view of the possibility that KTI, Inc. may not be able to back City Waste in its New York City waste hauling and transfer asset consolidation, I would like to summarize the terms of your compensation for introductions you have made to us in the waste business.
>
> "In the event that City Waste closes on the deals named herein, City Waste will pay you a finders fee in the amount equal to five percent of the final purchase price for the following deals introduced to us:
>
> "1. Baisley Park Carting Co. Inc.
> 2. Republic Carting Co. Inc.
> 3. Crown Recycling Inc.
> 4. Cross County Recycling, Inc.
> 5. P&F Trucking, Inc.
>
> "Your finders fee of 5% of the transferred funds shall be paid within two weeks from transfer of funds to the companies acquired by City Waste either in check, cash or wire transfer or in the form of shares of a publicly traded company if such was the form of payment by City Waste to the acquired companies. Should City Waste assign the aforementioned deals to a third party, this letter will become a part of the assignment agreement.
>
> "This arrangement is null and void if you remain an employee of KTI or or [sic] you become a member of the

> City Waste management team and are an employee of City Waste."

As stated earlier, there is no dispute as to the existence of the Contract. Defendant argues that the contract is invalid for lack of consideration and null and void by its terms. Defendant also argues that the transaction is not complete and therefore payments are not due.

General Obligation Law §5-1105 states that

> A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

Defendant argues that plaintiff failed to prove that he made any introductions to the defendant pursuant to the Contract and therefore, the Contract is invalid.

A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract, (*Goldman v White Plains Center for Nursing Care, LLC*, 11 NY3d 173, 867 NYS2d 27, 896 NE2d 662; see *AGCO Corp. v Northrop Grumman Space & Mission Systems Corp.*, 61 AD3d 562, 878 NYS2d 20). When the terms of the contract are clear and unambiguous the intent of the parties must be found within the four corners of the contract, (*Goldstein v AccuScan, Inc.*, 2 NY3d 811, 782 NYS2d 50, 815 NE2d 657; *Signature Realty, Inc. v Tallman*, 2 NY3d 810, 781 NYS2d 259, 814 NE2d 429; *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 750 NYS2d 565, 780 NE2d 166; *Slamow v Del Col*, 174 AD2d 725, 571 NYS2d 335, aff'd, 79 NY2d 1016, 584 NYS2d 424, 594 NE2d 918; Wood v Maggie's Tavern, Inc., 257 AD2d 733, 683 NYS2d 353; see *Smith v Estate of La Tray*, 161 AD2d 1178, 555 NYS2d 968; see also *Future Sales, Inc. v Fairfield Mall Ltd. Partnership*, 175 AD2d 483, 572 NYS2d 528 and *Frederick v Clark*, 150 AD2d 981, 541 NYS2d 660).

In a plain reading of the Contract, Udi Saly, acknowledges that plaintiff introduced defendants to the companies enumerated in the agreement and therefore plaintiff's performance is established and defendants argument for lack of consideration fails. (General Obligation Law §5-1105)

In accordance with the Contract, if City Waste closes on the deals introduced to them by plaintiff, plaintiff is entitled to a 5% finder's fee. However, if plaintiff remains an employee of KTI or becomes a member of the City Waste management team and is an employee of City Waste, the Contract is null and void.

The defendants executed an Asset Agreement with Baisley Park Carting Co., on January 26, 1999, and a Purchase Agreement with Republic Carting Co., Inc., on February 3, 1999. Based on the evidence before the court defendants closed with Baisley Park Carting Co. on June 15, 1999 and with Republic Carting Co., Inc. on May 25, 1999. The record further establishes that plaintiff was employed by KTI, Inc. until approximately February 8, 1999 and it is undisputed that plaintiff did not become a member of the City Waste management team or an employee of City Waste.

Defendants contend that because plaintiff's employment with KTI, Inc. continued subsequent to the execution of the Contract, the Contract should be deemed null and void. However, accepting defendant's argument would render the Contract null and void on the day of its execution.

Although the Contract is silent as to a time by which the employment conditions must be met, when interpreting a business contract, as here, the tests to be applied are common speech and the reasonable expectation and purpose of the ordinary business person in the factual context, keyed to the level of business sophistication and acumen of the particular parties, BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 840 NYS2d 302, 871 NE2d 1128; Uribe v Merchants Bank of New York, 91 NY2d 336, 670 NYS2d 393, 693 NE2d 740; Baughman v Merchants Mut. Ins. Co., 87 NY2d 589, 640 NYS2d 857, 663 NE2d 898; Michaels v Buffalo, 85 NY2d 754, 628 NYS2d 253, 651 NE2d 1272; see Bombay Realty Corp. v Magna Carta, Inc., 100 NY2d 124, 760 NYS2d 734, 790 NE2d 1163; Album Realty Corp. v American Home Assur. Co., 80 NY2d 1008, 592 NYS2d 657, 607 NE2d 804; Greater New York Mutual Insurance Co. v Mutual Marine Office, Inc., 3 AD3d 44, 769 NYS2d 234; Blumenkrantz v May, 293 AD2d 850, 740 NYS2d 497.

Here, based on the evidence placed on the record, and the totality of the circumstances that led to the execution of the Contract, the court finds that the intention of the parties was to avoid dual compensation for the plaintiff if any of the anticipated transactions closed while plaintiff was an employee of KTI, Inc. or a member of the management team or an employee of the defendant corporations.

At the time that the defendants closed on the transactions

with Baisley Park Carting Co. and Republic Carting Co. Inc. plaintiff was neither an employee of KTI or City Waste, therefore, the Contract is not rendered null and void and plaintiff is entitled to damages.

Plaintiff seeks damages as follows: with respect to Baisley Park Carting Co., $153,822.55, representing 5% of the purchase price for the acquisition of the business assets of Basiley Park Carting Co., plus $13,000 per month for 10 months, representing 5% of the price for the leasehold interests acquired by defendants; with respect to Republic Carting Co. Inc., plaintiff seeks $112,361.55 representing 5% of the amount defendants agreed to pay to acquire Republic Carting Co. Inc.

Pursuant to the terms of the contract plaintiff is entitled to 5% of the purchase price, which shall be paid within two weeks from the transfer of funds to the acquired companies. Since defendants are currently paying the acquisition costs in installment payments, plaintiff is entitled to damages in an amount equal to 5% of the total amount transferred for the acquisitions of Baisley Park Carting Co. and Republic Carting Co. Inc. to date. However, plaintiff has failed to proffer sufficient evidence to demonstrate entitlement to 5% of the leasehold interests acquired by defendants. The uncontradicted testimony is that, as of the time of trial, defendants have paid $800,000 to Basiley Park Carting Co. and $600,000 to Republic Carting Co., Inc.

Accordingly, the court finds in favor of the plaintiff on his cause of action for breach of contract; all other causes of action are dismissed for failure to establish a prima facie case. Plaintiff's claim for 5% of the leasehold interest that defendant corporations purchased from Baisley Park Carting Co. is denied and plaintiff is awarded damages in the amount of $70,000 plus interest, costs and disbursements. The amount awarded represents 5% of the amount transferred to the acquired companies through the date of trial.

Enter judgment.

Dated: August 1, 2012

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JAMES J. GOLIA, J.S.C.