

Legendyk v Bourgondien
2013 NY Slip Op 33092(U)
November 21, 2013
Supreme Court, Suffolk County
Docket Number: 12671-2012
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NO. 12671-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

*Present:*HON. EMILY PINES

J. S. C.

Motion Date: 04-04-2013

Submit Date: 11-21-2013

Motion No.: 001 MOTD

X

ADRIANUS LAGENDYK,

Plaintiff,

- against -

K. VAN BOURGONDIE & SONS, INC., JOHN F.
VAN BOURGONDIE, SR., JOSEPH P. VAN
BOURGONDIE, and DEBORAH D. VAN
BOURGONDIE,

Defendants.

X

ORDERED that the plaintiff's motion (001) for partial summary judgment in his favor is granted solely on the first cause of action; and it is further

ORDERED that the parties are directed to appear at a status conference in Part 46 on Monday, December 23, 2013.

In this breach of contract action, the plaintiff, Adrianus Lagendyk, alleges that the defendants, K. Van Bourgondien & Sons, Inc. ("the corporation"), John F. Van Bourgondien, and Deborah D.

Van Bourgondien have failed to pay the plaintiff his retirement benefits pursuant to an agreement (“the Retirement Agreement”) executed by the parties on December 20, 1994. Pursuant to the Retirement Agreement, the defendants agreed to pay the plaintiff the sum of \$45,000 per year for ten years upon his retirement at age 65 in return for the plaintiff’s continued employment with and loyalty to the corporation. The record reveals that the defendants were in the business of importing and selling flower bulbs from Holland and other horticultural products. The record reveals that the plaintiff worked over twenty-seven years for the corporation and retired in 2008. There is no dispute that, although the defendants paid the plaintiff for three years, the payments ceased in 2011. This action was subsequently commenced by filing on April 23, 2012.

The complaint alleges that the corporation was formed in New York and has a principal place of business in Babylon, New York. The complaint contains eight causes of action, alleging breach of contract against the various defendants and for a judgment declaring that the retirement agreement is valid as against the various defendants. The complaint also alleges that in addition to the corporation, the defendants operated their business through subsidiaries K. Van Bourgondien & Sons of Virginia, Inc. and Simple Pleasures Flowerbulbs & Perennials, Inc., which the individual defendants caused to file for Chapter 11 bankruptcy in January, 2012. The complaint also alleges that prior to the bankruptcy filings, the individual defendants caused the corporation and operating subsidiaries to pay themselves and their family members over \$500,000 in the year prior to the bankruptcy filings and also caused the subsidiaries to pay \$135,000 to a new company called Crucir LLC. The defendants served an answer which asserted general denials.

The plaintiff now moves for partial summary judgment on the first cause of action alleging breach of contract against the corporation and on the fifth cause of action seeking a judgment declaring that “the Retirement Agreement remains in full force and effect, that all provisions of the Retirement Agreement are fully enforceable against the corporation, and that the corporation is required to make payments to the plaintiff of \$45,000 annually for the remaining term of the Retirement Agreement.”

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 (1985); *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 (2d Dept 1994). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 (1986).

To state a cause of action for breach of contract in New York, a plaintiff must allege the existence of a contract, performance by plaintiff, breach by defendants of a particular contractual provision, and damages sustained by plaintiff as a result of the breach. *Kraus v Visa Int’l Serv. Ass’n.*, 304 AD2d 408, 408, 756 NYS2d 853 (1st Dept 2003).

Turning to the plaintiff's application for partial summary judgment on the first cause of action, the Court finds that the plaintiff demonstrated, prima facie, his entitlement to judgment as a matter of law on the issue of liability. In support of his motion, the plaintiff submits the pleadings, his personal affidavit, a copy of the Retirement Agreement, and a copy of bankruptcy proceedings. The plaintiff avers in his affidavit that he worked faithfully for the defendants from November 1, 1980 until after his sixty-fifth birthday on April 14, 2008. His duties included quality control of products, developing improved shipping methods and inventory control, and advised the corporation principals on the subject of horticulture. He rose to the level of Vice President of Inventory Control. He states that the defendants offered him a retirement package as an enticement to remain with the corporation. The corporation's principal, defendant John Van Bourgondien and the plaintiff initially entered into the Retirement Agreement on October 1, 1987, and executed an amended Agreement on December 20, 1994.

The plaintiff further states that the defendants also operated their business through subsidiaries named K. Van Bourgondien & Sons of Virginia, Inc. and Simple Pleasures Flowerbulbs & Perennials, Inc. ("Simple Pleasures"), both of which are incorporated in the State of Delaware. The plaintiff states that Van Bourgoniens used the operating subsidiaries to satisfy obligations of the corporation as well as the Van Bourgondien family. When the plaintiff retired at age 65, he was paid from the Simple Pleasures payroll until the payments ceased. The plaintiff states that he performed all of his obligations under the Retirement Agreement. On May 3, 2011, the plaintiff states that he was informed by the defendant John Van Bourgondien that the retirement payments would end. Therefore, the plaintiff states that the corporation breached the Retirement Agreement by failing to continue payments to him after April, 2011, causing him monetary damages

The Retirement Agreement provides at paragraph B, section (2) (a), in part, that “if Lagendyk retires from his employment with the Company at age sixty-five or later, * * *, the Company shall pay to Lagendyk the sum of \$45,000 per year for ten years, * * *.”

Plaintiff having demonstrated his entitlement to judgment as a matter of law, the burden then shifted to the corporation to respond with rebutting admissible evidence demonstrating a triable issue of fact with regard to whether the Retirement Agreement is valid and whether the corporation performed under the terms of the Retirement Agreement, which it failed to do. In opposition, the corporation submits the personal affidavit of the defendant John Van Bourgondien, Sr. and an affirmation by counsel. Mr. Van Bourgondien, wherein he opposes a second motion by the plaintiff on the subject of discovery, which was withdrawn by counsel and is not presently before the Court. Moreover, the affirmation by counsel is not probative in a motion for summary judgment since she has no personal knowledge of the transaction. *Zuckerman v New York, supra*. Thus, the corporation has failed to submit any admissible evidence which would raise a triable issue of fact.

Turning to the fifth cause of action, the plaintiff has failed to demonstrate his entitlement to a declaratory judgment as a matter of law. It is well settled that such a cause of action is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract. *Main Evaluations, Inc. v State of New York*, 296 AD2d 852, 745 NYS2d 355 (4th Dept 2002); *Apple Records v Capitol Records*, 137 AD2d 50, 529 NYS2d 279 (1st Dept 1988).

Accordingly, the plaintiff's motion for partial summary judgment is granted in his favor solely on the first cause of action. The parties are directed to continue discovery on the remaining causes of action and damages.

Dated: November 21, 2013
Riverhead, New York



EMILY PINES
J. S. C.

☐ Final
☒ Non Final

TO:

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