

**Weinstock v Merisel**

2013 NY Slip Op 33243(U)

April 22, 2013

Sup Ct, NY County

Docket Number: 650712/11

Judge: Melvin L. Schweitzer

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER  
Justice

PART 45

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INDEX NO. 650712/11  
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-v-

~~Edward Weinstock~~  
Maisel

MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. ~~001~~  
002

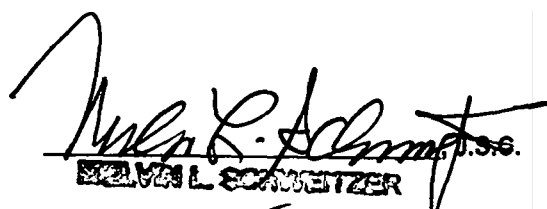
The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

- Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_
- Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_
- Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion <sup>by Plaintiff</sup> ~~is~~ <sup>by Defendant</sup> ~~is~~ <sup>Edward Weinstock</sup> for partial summary judgment on his First Cause of action for Breach of employment contract is GRANTED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 22, 2013

  
MELVIN L. SCHWEITZER

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
~~MERISEL, INC., as successor in interest to MERISEL~~ :  
~~FD, LLC and MERISEL, INC., individually,~~ :  
 Weinstock :  
 Plaintiffs, :  
 :  
 , -against- :  
 Merisel :  
~~EDWARD WEINSTOCK, SPLASH (NEW YORK),~~ :  
~~INC., SPLASH (NORTHWEST) INC., and~~ :  
~~DOMENICK PROPATI,~~ :  
 Defendants. :  
 -----X

650712/11  
 Index No. ~~650010711~~  
 DECISION AND ORDER  
 Sequence Nos. ~~002~~  
 (002)

MELVIN L. SCHWEITZER, J.:

**Background**

Edward Weinstock ("Mr. Weinstock") brings this action against Merisel Inc., (Merisel), Donald Uzzi (Mr. Uzzi), and Michael Berman (Mr. Berman) for the allegedly wrongful termination of his Employment Agreement with Merisel (Agreement). The following facts are taken from the plaintiff's complaint.

Mr. Weinstock was employed by Merisel from October 4, 2006 until February 10, 2011 as president of the Fuel Division (Fuel). The Agreement provided that he could be fired only for cause. Paragraph 8(c) of the Agreement defines "Termination for Cause" as "(i) any breach of the Employment Agreement, (ii) failure to perform job duties, (iii) being convicted of a felony or a crime of moral turpitude, (iv) engaging in misconduct or violence that is detrimental to Merisel, (v) material breach of Merisel's policies or the law, (vi) refusal to follow the reasonable directives of Merisel's board, and (vii) misconduct that materially injures the financial condition of Merisel."

On February 10, 2011, after learning that Mr. Weinstock was named as a deponent in an employment-related lawsuit pending against Merisel, Merisel terminated Mr. Weinstock by letter (Termination Letter) for purported violations of Paragraph 8(c) of the Agreement. The Termination Letter did not explain what grounds Merisel had to terminate Mr. Weinstock. On February 15, 2011, through his attorney, Mr. Weinstock demanded that Merisel “set forth any specific violation or breach” upon which the Termination Letter was predicated. Merisel did not provide any explanation until its CEO’s (Mr. Uzzi) deposition, one year later.

At his deposition, Mr. Uzzi provided the following reasons as a justification for the alleged “cause termination” of Mr. Weinstock: (1) Mr. Weinstock’s purported theft of client Lane Bryant’s Intellectual Property; (2) employees leaving Fuel for a competitor, Splash (Northwest) Inc., (Splash); (3) “not spending as much time in the office as might be warranted”; and (4) failing to set up appointments with two clients (PVH and Lane Bryant). Merisel never specified whether the reasons it offered fell under the definition of “Cause” in paragraph 8(c) of the Agreement.

Mr. Weinstock moves for partial summary judgment on his first cause of action, breach of contract. Defendant contends that the termination was for cause, and permitted by the Agreement.

### **Standard of Review**

On a motion for summary judgment, the movant bears the weighty burden of demonstrating to the court that there exist no genuine issues of fact to be tried, and that on the undisputed facts it is entitled to judgment as a matter of law. *See Zuckerman v City of New York*,

49 NY 2d 557 (1980); *see also Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Because it is a drastic remedy, depriving the litigant of his day in court and having the procedural effect of a dismissal after trial, the remedy should not be granted where there is any doubt as to the existence of a triable issue of fact. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990); *see also Grossman*, 298 AD2d at 226; *Hammond v State*, 157 AD2d 391 (1st Dept 1992); *Barclay v Denkla*, 182 AD2d 658 (2d Dept 1992).

On a motion for summary judgment, facts are to be construed in the light most favorable to the nonmoving party and summary judgment should be denied where there is any significant doubt whether material issues of fact exist or if there is even arguably such an issue. *See Dauman Displays*, 168 AD2d at 205; *see also Bulger v Tri-Town Agency, Inc.*, 148 AD2d 44 (3d Dept. 1989); *Gillick v Knightes*, 279 AD2d 752 (3d Dept 2001). Furthermore, issue-finding, not issue determination, is the purpose of a summary judgment motion. *See Dauman Displays*, 168 AD2d at 205; *see also Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept. 1989).

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

“It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists genuine issue of fact.” *Hantz v Fishman*, 155 AD2d 416, 416 (2d Dept 1989). “Issue finding rather than issue determination is the key to summary judgment and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion.” *Id.*

## Discussion

Plaintiff alleges that defendants breached the Agreement when they fired him in an “[attempt] to further their transparent and pretextual ‘Cause’ agenda” and failed to pay compensation, severance, and wages due to plaintiff under the Agreement.

In order to prevail on a breach of contract claim, the party must only show (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages. *First Investors Corp. v Liberty Mut. Ins. Co.*, 152 F3d 162, 168 (2d Cir. 1998) quoting *Rexnord Holdings, Inc. v Bidermann*, 21 F3d 522, 525 (2d Cir. 1994). Under New York law, summary judgment may be granted in a contract dispute where the language of the contract is “unambiguous.” *Cont’l Ins. Co. v Atl. Cas. Ins. Co.*, 603 F3d 169, 180 (2d Cir. 2010). “It is a basic contract principle that when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms.” *TAG 380, LLC v ComMet 380, Inc.*, 890 NY2d 195, 198 (2008) (citation and internal quotation marks omitted).

In this case, paragraph 8(b) of the Agreement expressly provided that where there is “Termination Without Cause” Merisel “shall pay ... severance in an amount equal to [Weinstock’s] Base Salary, based on [his] compensation for the prior annual period, payable for a one (1) year period.” There was a valid and binding Agreement between Mr. Weinstock and Merisel, Mr. Weinstock performed under the Agreement, and he suffered damages as a result of his termination. The sole question is whether defendants’ theories for Mr. Weinstock’s termination meet the “Cause” standards set forth in paragraph 8(c) of the Agreement, justifying defendants’ termination of Mr. Weinstock.

Where the termination of a contractual employee is purportedly “for Cause,” defendant must at a minimum establish that the misconduct alleged violates the Agreement. *See Bierer v Glaze, Inc.*, No. CV-05-2459 (CPS), 2006 WL 2882569, \*5-6 (EDNY Oct. 6, 2006) (addressing a scenario where defendant terminated plaintiff’s employment contract under various pretextual guises, including purported “illegal activity,” failing to come to the office, and inability to perform due to loss of a business account) (citing *Lazard Freres & Co. v Protective Life Ins. Co.*, 108 F3d 1531, 1540 (2d Cir. 1997)). The defendant makes four separate claims purportedly constituting “Cause” for Mr. Weinstock’s termination.

*(1) Alleged Theft of Lane Bryant Intellectual Property*

Defendants allege that Mr. Weinstock breached his fiduciary duties by stealing client Lane Bryant’s “intellectual property.” Mr. Uzzi swore in the Uzzi Verified Complaint that Mr. Weinstock misappropriated Merisel’s work and services including an alleged hard disc of Merisel’s proprietary work product for the Lane Bryant account containing Lane Bryant’s images.

No Lane Bryant intellectual property was ever missing or misappropriated. Mr. Weinstock asked Merisel IT department about a possibility of a transfer of archive images. Mr. Weinstock made the inquiry on behalf of Lane Bryant, who was interested in a possible transfer of its archive images to a third party. Contemporaneous Lane Bryant emails confirm that it was the client who requested the inquiry. Lane Bryant itself ultimately determined that its server could not “support” the images it requested and “shut that plan down.”

When Merisel informed Lane Bryant that it believed Mr. Weinstock misappropriated their intellectual property, Lane Bryant’s Print Production Manager, Susan Reiser (Ms. Reiser),

responded that it was a “total fabrication.” Ms. Reiser explained to Mr. Berman, Merisel’s Chief Client Officer, as well as to the company’s Corporate Security Manager, that Lane Bryant was “not missing any property.” When Ms. Reiser tried to explain to Mr. Berman that there was “no theft of property,” and that he should stop persisting with this “agenda,” Mr. Berman yelled at her, which led to her decision to stop using Merisel’s services.

Finally, the alleged “theft” of images did not even involve Merisel or Fuel property. The client, Lane Bryant, made clear that the images at issue were their property. *See Bierer*, 2006 WL 2882569 at \*7 (rejecting employer’s cause theory where “no property belonging to Defendant was taken or withheld”). To this day, Mr. Uzzi cannot plausibly allege that Lane Bryant’s images are Merisel’s property.

The evidence proffered by Merisel fails to raise a triable issue of material fact. It has not demonstrated “Cause.”

*(2) Employees leaving Fuel for a competitor, Splash.*

Defendants further allege that Mr. Weinstock convinced employees to join Splash, a competing company. Mr. Weinstock never worked for Splash and there was no indication that he ever transferred business to Splash. Mr. Weinstock confirmed that he was “committed to the company,” was going to stay with the company, and “promised he was with [Merisel].” In fact, Mr. Uzzi let Mr. Weinstock know by email one week before the termination, that he “appreciate[d] your loyalty to Merisel as well as myself.” Plaintiff contends that he “would still be working” at Merisel, but for his termination.

None of the employees who left Merisel ever identified Mr. Weinstock as being a factor or reason for their leaving. There is no evidence that departing employees ever stated,

expressed, or implied that Mr. Weinstock was in any way involved with their departures. After Mr. Weinstock's termination, computer and email analyses by Merisel IT department, and Mr. Berman himself, revealed that there was "not anything particularly suspicious" about Mr. Weinstock.

Since there is no evidence in any way connecting Mr. Weinstock to the employees fleeing Merisel, and joining Splash, the claim cannot constitute "Cause," within the meaning of the Agreement and fails to raise a triable issue of material fact.

(3) Not Spending Enough Time in the Office

Defendants further allege that Mr. Weinstock did not spend "as much time in the office as might be warranted." It is undisputed that no physical time requirement was ever set forth in the eleven-page Agreement between the parties. It is the court's opinion that the conclusory allegation regarding Mr. Weinstock's failure to spend a particular number of hours in the office cannot be considered a "breach of the Employment Agreement" within the meaning of paragraph 8(c) of the Agreement.

Merisel was able to produce around 3,000 emails from Mr. Weinstock's email address showing that he was actively engaged in the activities required of him under the Agreement. For instance, he was performing his sales role, part of which included meaningful interaction with clients outside of the office. In addition, Mr. Uzzi himself expressly admitted that Mr. Weinstock spent a "fair amount of time" with clients like Lane Bryant and PVH. *See Bierer*, 2006 WL 2882569 at \*6 (rejecting employer's theory that "refusal to come to work" at a specified location constitutes material breach, and finding that plaintiff reasonably continued to perform work from home).

Defendants' unsupported claim that Mr. Weinstock failed to spend "as much time in the office as might be warranted" does not constitute "Cause."

*(4) Failure to Set Up Appointments with Phillips Van Heusen and Lane Bryant:*

*Purportedly Causing the Loss of PVH and Lane Bryant Accounts*

Mr. Uzzi in his sworn statements regarding Mr. Weinstock's handling of account issues stated that "[o]n February 3, 2011, plaintiffs' Chief Executive Officer, Donald Uzzi, specifically directed Weinstock to schedule executive meetings between Mr. Uzzi and key Lane Bryant and PVH buying influences ... Weinstock failed and/or refused to comply with the request."

Mr. Uzzi believes that Mr. Weinstock is responsible for Merisel's loss of the two clients.

Merisel does not have contracts with PVH or Lane Bryant obligating them to stay with Fuel. They would work with Merisel on a project-by-project basis. It is undisputed that the clients at issue left Merisel only after Mr. Weinstock, who was their client representative, was terminated.

The evidence is undisputed that Mr. Weinstock was not the cause of Lane Bryant and PVH leaving Merisel. Ms. Reiser stated that she never had any conversations with Mr. Weinstock regarding Lane Bryant leaving Merisel and was not aware of any such conversations. There is extensive testimony in the case establishing that Ms. Reiser made the final decision to terminate the relationship with Merisel only after the unpleasant and rather "abusive" encounter with Mr. Berman, and after Mr. Weinstock was terminated.

Defendants allege that Ms. Reiser's testimony raises significant issues of material fact regarding the time sequence of events, as they argue that Mr. Reiser's emails establish that she intended to move Lane Bryant's business from Merisel to Splash one month before the

encounter with Mr. Berman. The email in question provides that Ms. Reiser wanted to try using Splash for one single project. There is no evidence that at the time she intended to transfer the whole Lane Bryant business from Merisel to Splash. Ms. Reiser also testified that she planned only to “try them [Splash] for a month,” which is consistent with her testimony that she was under constant pressure to find vendors offering lower prices and higher quality than offered by Merisel. In addition, even if the precise order of the events was in question, it would not raise a triable issue of a material fact as there is simply no evidence, either expressly or impliedly, linking Mr. Weinstock to Lane Bryant terminating Merisel.

There is no evidence that Merisel lost the PVH account due to any action of Mr. Weinstock. That account left after Merisel terminated Mr. Weinstock. In fact, Merisel continued to perform services for PVH for a few months after his termination. Mr. Uzzi’s claim that Mr. Weinstock’s failure to set up a meeting or pass along notification of a 10% discount for PVH constituted “Cause” for termination is rebutted by undisputed evidence. Documentary evidence establishes that on February 4, 2011 at 12:29 p.m., Mr. Weinstock informed the Vice-President of Marketing Operations of PVH (his contact at PVH) of the 10% discount. Only seconds later, at 12:30 p.m., Mr. Weinstock confirmed to Mr. Berman that PVH had been informed of the discount. Mr. Berman never identified who the discount should be communicated to, nor did he indicate that it was sent to improper PVH personnel. Mr. Berman even forwarded a copy of the email to another employee, Coby Zekry, noting that the “10% price reduction effective immediately.”

There is clear documentary evidence that one day before he was fired, on February 9, 2011, Mr. Weinstock contacted PVH setting up a meeting. He later forwarded the

communications with PVH regarding the meeting to Mr. Uzzi. All the events giving rise to this claim occurred within one week. There is no evidence in the case that Merisel provided Mr. Weinstock with a deadline for setting up meetings with the two clients, or at least that there was some expectation on the part of Merisel that the meetings be set up within a week or within a certain time frame. The alleged failure to schedule meetings cannot constitute "Cause" for termination as Mr. Weinstock, with full knowledge of Merisel's CEO, Mr. Uzzi, was actively engaged in complying with Mr. Uzzi's requests to set up meetings with the clients up until the day Merisel terminated Mr. Weinstock.

No material facts are in dispute, and the undisputed facts show that Mr. Weinstock's termination was not for "Cause." Merisel has not shown that any misconduct occurred; and the conduct alleged (even if true) fails to meet the "Cause" standards in the Agreement. *See Bierer*, 2006 WL 2882569 at \*5-6 (rejecting employer's pretextual and unsupported "cause" termination theories and finding breach of employment contract); *see also Kleinman v Blue Ridge Foods, LLC*, 934 NYS2d 34, 2011 WL 2899428, at \*6-7 (N.Y. Sup. July 7, 2011) (summary judgment for plaintiff on breach of contract where employer failed to raise triable issues regarding "alleged misrepresentations" by former officer).

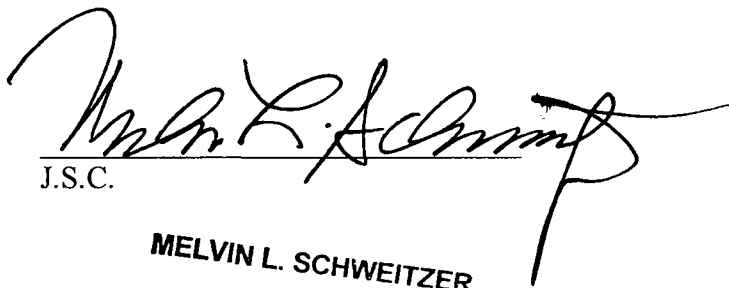
Even construed in the light most favorable to the nonmoving party, facts here fall short of raising a significant doubt as to whether material issues of fact exist or if there is even arguably such an issue. *See Dauman Displays*, 168 AD2d at 205; *see also Bulger v Tri-Town Agency, Inc.*, 148 AD2d 44 (3d Dept 1989); *Gillick v Knightes*, 279 AD2d 752 (3d Dept. 2001).

Mr. Weinstock has satisfied the burden of demonstrating that there exist no genuine issue of material fact and that he is entitled to partial summary judgment on the first cause of action.

ORDERED, that plaintiff's motion for Partial Summary Judgment on his First Cause of Action (Breach of Employment Contract) is granted.

Dated: April 22, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.  
MELVIN L. SCHWEITZER