

Berlinghof v Long Island Fiber Exchange, Inc.

2014 NY Slip Op 30196(U)

January 10, 2014

Sup Ct, Suffolk County

Docket Number: 20956-2011

Judge: Emily Pines

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

COPY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 07-16-2013; 10-01-2013
Motion Submit Date: 10-08-2013
Motion Sequence No.: 006 MD
007 MD

_____ X

KURT E. BERLINGHOF,
Plaintiff,

- against -

LONG ISLAND FIBER EXCHANGE, INC.,
Defendant.

_____ X

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ORDERED that the plaintiff's motion for summary judgment (Mot. Seq. 006) and the defendant's cross-motion for summary judgment (Mot. Seq. 007) are denied.

This action case arises out of an Employment Agreement dated June 16, 2010 (the "Agreement"), between plaintiff, Kurt E. Berlinghof ("Berlinghof"), as "Employee" and defendant Long Island Fiber Exchange, Inc. ("LIFE"), as "Company." The Agreement provides, in relevant part:

1. Retention of Services; Term. The Company hereby retains the services of Employee, and Employee agrees to furnish such

services, upon the terms and conditions hereinafter set forth. Subject to earlier termination on the terms and conditions hereinafter provided, and further subject to certain provisions hereof which survive the term of the employment of Employee by the Company, the term of this Agreement shall be comprised of a three (3) year period of employment commencing on June 16, 2010 (the "Commencement Date") and ending on June 16, 2013 and shall be extended thereafter for additional one-year periods unless or until the Company or Employee provides no less than 60 days prior notice to the other party of the termination of this Agreement at the end of the then current term of employment (the "Termination Notice"). The foregoing shall not be construed to limit the right of the Company to terminate Employee's employment pursuant to Section 9 of this Agreement.

* * *

9. Termination

* * *

(c) If the Company terminates this agreement or Employee's employment hereunder for any reason other than (I) "for cause" as set forth in Section 9(a) hereof or (ii) a termination by the Company pursuant to Section 5 . . . then, as liquidated damages, the Company shall pay to Employee the amount of two million dollars (\$2,000,000), due and payable within (60) sixty days of termination date. Employee and the Company acknowledge that the foregoing provisions of this Section 9(c) are reasonable and are based upon the facts and circumstances of the parties at the time of entering into this Agreement, and with due regard to future expectations. The amount to be paid to Employee pursuant to this Section 9(c) shall constitute the sole and exclusive remedy of Employee and Employee shall not be entitled to any other or further compensation, rights or benefits hereunder or otherwise, except federal COBRA benefits. The amount to be paid to Employee pursuant to this section 9(c) shall be contingent upon the execution by Employee of a release in the form

attached hereto as Exhibit A.

The term of the Agreement was reduced from three years to one year by a written Amendment to Employment Agreement dated September 10, 2010.

LIFE sent Berlinghof a letter dated March 29, 2011, stating, in relevant part:

Long Island Fiber Exchange, Inc. ("LIFE") hereby provides you with formal notification of its decision not to renew your July 16, 2010 Employment Agreement with LIFE, as amended on September 10, 2010 ("Employment Agreement"). By its terms and consistent with this notice, your Employment Agreement will expire and terminate effective July 16, 2011.¹

LIFE sent another letter to Berlinghof dated June 15, 2011, which states, in relevant part:

In March 2011, Long Island Fiber Exchange, Inc. ("LIFE") provided you with formal notice of non-renewal and termination of your current June 16, 2010 Employment Agreement with LIFE, as amended on September 10, 2010 ("Employment Agreement"). In accordance with this notice, your Employment Agreement shall expire and terminate effective June 16, 2011.

* * *

In the interim, effective June 17, 2011, you will become an employee at will, and will no longer be covered by the terms and conditions of your former Employment Agreement. If you wish to continue your employment with LIFE on and after June 17, 2011 as an employee at will, we are offering you the salary and variable compensation set forth on the attached Exhibit A. If you stay as an employee at will, you will be paid according to, and agree to accept, these compensation arrangements.

By letter in response dated June 17, 2011, Berlinghof demanded the \$2,000,000 which he

¹ It is undisputed that date of July 16, 2010 in the letter was in error and should have read June 16, 2010, pursuant to the dates in the Agreement.

claims LIFE was obligated to pay pursuant to paragraph 9(c) of the Agreement due to LIFE's termination of the Agreement. Berlinghof also states in this letter that he will execute a release as required by paragraph 9(c) in order to facilitate payment. He further rejects the offer to continue with LI Fiber as an at will employee.

Berlinghof's demand for payment of \$2,000,000 was rejected by LIFE and Berlinghof commenced this action on July 1, 2011. The complaint sets forth two causes of action, one claiming breach of contract, and the other seeking a declaratory judgment that LIFE is liable to Berlinghof in the amount of \$2,000,000.

By Decision and Order dated November 28, 2011, this Court (Pines, J.) denied LIFE's motion to dismiss the complaint pursuant to CPLR 3211 and Berlinghof's cross-motion for summary judgment stating, in relevant part:

After a fair reading of the Agreement and considering the Oral Argument presented by counsel, the Court finds that the agreement, when read as a whole, may reasonably lend itself to more than one interpretation. Therefore, the Court finds that the defendant, LI Fiber has failed to demonstrate its entitlement to dismissal of the Complaint and therefore the motion is denied.

* * *

Turning to the case at bar, the Court finds that the terms of the Agreement as to the Termination clause contained therein is ambiguous at best. Where an agreement contains an ambiguity, the court may look at extrinsic evidence to determine the intent of the parties (*see, Tierney v. Drago* 38 AD3d 755).

Although the plaintiff has offered additional information he believes supports his position as to the intent of the parties, the Court denies the motion for Summary Judgment without prejudice. Since this case is in its initial stages, and discovery has not yet taken place the Court directs the parties to enter into a discovery order. At the end of discovery, either party may move for Summary judgment without further leave of Court.

Notably, neither party appealed this Court's order dated November 28, 2011.

Discovery has been completed and both parties now move for summary judgment.

Discussion

The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Here, upon review of the submissions in support of both the motion and cross-motion for summary judgment, including affidavits and deposition testimony of the parties, the Court finds that neither party has made a prima facie showing of entitlement to judgment as a matter of law. The submissions fail to eliminate the existence of all triable issues of fact. The affidavits and deposition testimony reveal the existence of contradictory assertions regarding the intent of the parties with regard to the application paragraph 9(c) of the Agreement. For example, Berlinghof testified that there were discussions between the parties about him being entitled to payment pursuant to paragraph 9(c) if LIFE terminated the Agreement at the end of its term. However, Michael Power, LIFE's President, specifically refutes this testimony and states that whether non-renewal of the Agreement by LIFE would entitle Berlinghof to payment under paragraph 9(c) was never discussed. Accordingly, due the existence of issues of fact as to the parties intent, the motion and cross-motion

are denied.

Although both parties now argue that the Agreement is not ambiguous, the Court declines to re-visit that issue as the order dated November 28, 2011, determined that issue and neither party appealed therefrom.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: January 10, 2014
Riverhead, New York



EMILY PINES
J. S. C.