Adjami v Spa Week Media Group, Ltd.
2015 NY Slip Op 30691(U)
April 28, 2015
Supreme Court, New York County
Docket Number: 161663/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CAROLINA A. ADJAMI,

Plaintiff,

Index No. 161663/2014

DECISION and ORDER

- against -

Mot. Seq. 001

SPA WEEK MEDIA GROUP, LTD.,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Carolina A. Adjami ("Plaintiff" or "Adjami") moves for summary judgment in lieu of complaint against defendant, Spa Week Media Group, Ltd. ("Defendant" or "Spa Week") in the amount of $50,000. Plaintiff claims to have entered into an employment agreement (the "Employment Agreement") with Defendant, dated October 28, 2013. Plaintiff claims that the Employment Agreement contains an automatic renewal provision automatically extending Plaintiff's employment for an additional term of one year, "unless either party provides written notice of termination of this Agreement not later than thirty days prior to the expiration of the Initial Term" of the Employment Agreement. Plaintiff claims that she was to be compensated at the rate of $50,000 per year. Plaintiff claims that Defendant terminated the Employment Agreement without notifying Plaintiff as required under the Employment Agreement, thereby triggering the automatic renewal provision and obligating Defendant to pay $50,000, Plaintiff's compensation for the extended term of one year.

In support, Plaintiff submits: a copy of the Employment Agreement; the affidavit of Adjami, dated November 18, 2014; a copy of an email, dated October 24, 2014, notifying Adjami of the termination of her employment; and, a copy of a letter, dated November 4, 2014, from Plaintiff's attorney, advising Defendant that Plaintiff's employment was not effectively terminated pursuant to the Employment

Agreement and demanding payment in the amount of $50,000 plus earned commissions.

Defendant opposes. Defendant cross-moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Defendant and against Plaintiff and dismissing Plaintiff's complaint. In support, Defendant submits: the attorney affirmation of Scott J. Sholder, dated January 12, 2015; a copy of Plaintiff's motion for summary judgment in lieu of complaint; copies of a series of letters, dated November 4, 2014 through November 6, 2014, exchanged between Plaintiff's counsel and Defendant's counsel; the affidavit of Cheryl Reid ("Reid"), Defendant's president and Chief Executive Officer, dated January 9, 2015; and, a copy of an email exchange, dated October 24, 2014, between Plaintiff and Reid, regarding Plaintiff's notice of termination.

Plaintiff and Defendant entered into an Employment Agreement dated October 28, 2013 whereby Adjami would perform services and undertake duties and responsibilities including the "management and growth of SEMG's existing Corporate Sales/Sponsorship program" for a term of one year. Such term automatically renewed "Unless either Party provides written notice of termination of this Agreement not later than thirty (30) days prior to the expiration of the Initital Term." Defendant did not provide such notice; however, pursuant to the agreement, SWMG did terminate the Agreement, and "SWMG shall not pay Employee for any unearned portion of her annual salary."

Plaintiff asserts that the Initial Term renewed. Nevertheless, emails show that Plaintiff concluded performing services October 24, 2014.

Turning first to Plaintiff's motion for summary judgment in lieu of complaint, CPLR § 3213 provides that, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document. (*Id.*). The test "is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument is read in the first instance." (*Weissman*, 88 N.Y.2d at 445).

Here, Plaintiff fails to meet her burden of demonstrating that the Employment Agreement is an "instrument for the payment of money only" within the meaning of CPLR § 3213. Although the Employment Agreement contains an automatic renewal provision, the Employment Agreement does not contain a liquidated damages provision in the event of termination without formal written notice within the relevant time. In addition, the Employment Agreement permits Defendant to terminate Plaintiff's employment "at any time for any reason." (Employment Agreement ¶ 6.01). The Employment Agreement provides that, in the event of such termination, Defendant "shall not pay Employee for any unearned portion of her annual salary". (Employment Agreement ¶ 6.02). Accordingly, the balance due and owing to Plaintiff under the Employment Agreement—if any—cannot be determined without reference to outside proof and Plaintiff's motion for summary judgment in lieu of complaint is denied.

As for Defendant's cross-motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Where a motion for summary judgment in lieu of complaint is denied, the moving and answering papers typically are deemed the complaint and answer, respectively, "unless the court orders otherwise." (CPLR § 3213). Thus, if plaintiff's claim plainly fails on the merits, the court may grant summary judgment for the defendant, denying the motion and dismissing the action. (*Weissman*, 88 N.Y.2d at 445 [1996]).

The Employment Agreement states:

> NOTICES. All notices, consents, and other communications hereunder shall be in writing and shall be given (and shall be deemed to have been duly given upon receipt) by hand delivery, by prepaid overnight courier (providing written proof of delivery), by confirmed facsimile transmission, or

> by certified or registered mail (return receipt requested and first-class postage prepaid) . . .

(Employment Agreement ¶ 8.05).

Here, it is undisputed that Defendant notified Plaintiff of her termination verbally and via email. Plaintiff does not dispute having received such notice. Indeed, Defendant submits copies of an email exchange between Plaintiff and Reid, dated October 24, 2014, discussing Plaintiff's termination. In the course of that exchange, Plaintiff requests documentation for purposes of obtaining unemployment benefits. Plaintiff makes further requests in that exchange, including: "an official letter of termination indicating that my position was eliminated yesterday on October 23rd"; Plaintiff's final paycheck; and, "the commission for the 1 contract that I brought in . . . prior to my termination."

Accordingly, Plaintiff's claim for breach of the Employment Agreement's notice provision plainly lacks merit. (*Suarez v. Ingalls*, 282 A.D.2d 599, 600 [2d Dep't 2001] ["Strict compliance with the contract notice provisions was not required because the plaintiff does not claim that she did not receive actual notice, or was prejudiced by the deviation."]).

Insofar as Plaintiff does not claim to have continued working for Defendant after October 23, 2014, Plaintiff fails to raise any issue of fact as to whether she is entitled to receive any portion of her annual salary beyond the date of her termination. However, to the extent that she claims she earned a commission which was not paid, monies may remain outstanding. Defendant moves for summary judgment and claims the outstanding commission had been paid. Defendant provides no proof in admissible form demonstrating such payment.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that Defendant's cross-motion for summary judgment in favor of Defendant and against Plaintiff is denied; and it is further

ORDERED that the Plaintiff's moving papers are hereby deemed the complaint in this action and the Defendant's answering papers are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 205, 71 Thomas Street, on July 28, 2015, at 9:30 AM.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 28, 2015

Eileen A. Rakower, J.S.C.