

**Guthart v Chernoff Diamond & Co., LLC**

2015 NY Slip Op 30903(U)

May 20, 2015

Supreme Court, Suffolk County

Docket Number: 03043/2012

Judge: Ralph T. Gazzillo

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Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

**\*\*Amended\*\***

Mot. Seq. 002 MD  
003 MG

Hon. RALPH T. GAZZILLO  
A.J.S.C.

<hr/>		X
Steven Guthart,	:	
	:	
Plaintiff(s),	:	
	:	
- against -	:	
	:	
Chernoff Diamond & Co., LLC,	:	
	:	
Defendant(s),	:	
<hr/>		X

Upon the following papers, read on this motion pursuant to CPLR 3212; Notice of Motion and supporting papers; Cross-Motion and supporting papers; Reply Affirmation and supporting papers; sur-reply it is,

**ORDERED** that the motion is denied, and it is further

**ORDERED** that the cross- motion is granted solely to the extent that is seeks to dismiss the portion of plaintiff's complaint that seeks to recover a 2.5% Equity Share in defendant's Risk Management Division, and it is further

**ORDERED** that counsel for movant shall serve a copy of this Order with Notice of Entry upon the defendant personally, within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Plaintiff herein commenced this action seeking to recover unpaid salary he claims is due to him pursuant to an employment contract between the he and the defendant. The salient facts are not in dispute. Specifically, plaintiff was employed by the defendant pursuant to an employment agreement dated March 15, 2010 wherein plaintiff agreed to be employed by defendant as the Director of Operations for the Risk Management/Property & Casualty Insurance Division of the defendant's company commencing April 1, 2010. It was agreed pursuant to the employment contract that the plaintiff's annual base salary would be \$215,000 and that plaintiff was entitled to certain bonuses conditioned upon the happening of events specified in the contract. Plaintiff's employment was terminated by the defendant on June 1, 2011. Plaintiff became employed by another employer on October 24, 2011.

The relevant portions of the subject agreement (entitled "Employment & Business Agreement") is Paragraph 2(b), Paragraph 4 (a-b), Paragraph 5 and Schedule 1.

Paragraph 2 (entitled "Term of Employment") states as follows:

2. Term of Employment

The term of the Employee's employment under this Agreement shall continue until:

( a )Sixty (60) days (the "Notice Period") after the Employee gives notice to the Employer terminating such employment; or

( b ) During the first twenty-four (24) months following the effective date of this Agreement (the "Initial Term"), six month (the "Extended Notice Period") after the Employer gives notice to the Employee terminating such employment; or

( c ) After the Initial Term (60) days after the Employer gives notice to the Employee terminating such employment.

Paragraph 4 (a-b) states:

4. Compensation

So long as the Employee is employed hereunder, the Employer shall pay to the Employee, as compensation for his services during each full year that this Agreement is in effect, and the Employee agrees to accept as full payment therefore:

(a) In respect of the Employees' performance of his duties as described Article 3 above, a salary of \$215,000 payable as such times as other employees of the Employer at substantially the same level of responsibility and remuneration as the Employee are paid, plus;

(b) In respect of the Employee's agreement to Article 6 hereof, \$50,000 per annum, plus;

Paragraph 5 states:

5. Vacation and Benefits

(a) Subject to the policies of the Employer as may, from time to time be modified, the Employee shall be entitled to vacations in each year of service hereunder to be taken as such time or times as the Employee reasonably deems appropriate subject to prior approval by the Employer.

(b) In addition to the compensation under Paragraph 4 hereof, during the term of this Agreement the Employee shall continue to be entitled to receive such benefits as are generally provided to employees of the Employer as described in the Chernoff Diamond & Vo., benefits bok, a copy of which is attached hereto as Exhibit A. Such benefits are subject to change at the discretion of the Employer.

Regarding Paid Time Off (PTO), the employee handbook states that “You will receive 50% of the day for any unused “PTO” you have remaining on January 15<sup>th</sup> of the following year (to a maximum of 10 days). That paragraph contains a footnote that reads “In the event of your voluntary termination (as of the date notice is given) or involuntary termination, you are no longer eligible for accrued or future Bank Time (paid time off) unless other arrangements have been previously agreed upon by a Partner.”

Plaintiff argues that paragraph 2(b) entitled him to be paid as an employee for the entire six month period following his receiving notice of his termination regardless of whether he became re-employed during that time period. Plaintiff asserts that defendant failed to pay him the employment compensation in the sum of \$14,269.23. Plaintiff asserts that this provision of the agreement was discussed at length between the parties and that it ultimately agreed upon that plaintiff would be entitled to the full six months of salary regardless of whether he was employed by another company or not.

In its cross-motion defendant argues that although the specific language of the agreement does not state that becoming re-employed would terminate its obligations, it points out that letter correspondence and emails between Alexander Chernoff and the plaintiff establish that both parties intended that to be the case. Specifically, defendant points to an email exchange that he had with the plaintiff prior to finalizing the Employment Agreement wherein defendant’s principal Alexander Chernoff wrote, in pertinent part to the plaintiff as follows: “... If the firm effects a termination prior to the completion of 24 months of service, we will pay six months base pay, both parts, unless you secure a position prior to the end of six months, in which case we will pay pro-rata.” Defendant further points to correspondence between it and the plaintiff wherein defendant confirmed in writing to the plaintiff that “[w]e regret that things did not work out” and further that “[d]uring the Notice Period, so long as you are not employed by another firm and not otherwise in breach of the employment agreement, compensation will be paid and benefits continued”. In addition, defendant cites to a series email exchanges between plaintiff and defendant’s Controller/Director of Accounting Ernest Gulotta on July wherein plaintiff is asked as to his employment status in July and August 2011 and advises that he is not employed. In addition, defendant asserts that an August 4, 2011 e mail from its employee Mindy Wolff requesting that plaintiff remove an indication that he was an employee of defendant’s on his “Linkedin” profile establishes that plaintiff is not entitled to the recovery he seeks.

Plaintiff also claims entitlement to payment for 50% of his unused “paid time off” (PTO) pursuant to Paragraph 5 entitled “Vacation and Benefits” (which refers to the employee handbook) totaling \$15,288.46. In opposition, defendant argues that “there is nothing in Mr. Guthart’s Employment Agreement that makes him eligible for compensation in respect to Paid Time Off (i.e. personal, vacation or sick time) either (1) after the Notice Date or (ii) that was not taken prior to his date of termination”. Defendant further argues that since plaintiff was paid his full salary without the obligation to report for work during the Notice Period he had his “Paid Time Off”.

Lastly, plaintiff claims he was entitled to subscribe to a 2.5% equity interest in the defendant’s company and that he exercised his right to same under the employment agreement. The parties arguments outline a simple question for the Court to answer; i.e. does Paragraph 2(b) the subject employment agreement imply that the term of employment end when an employee becomes re-employed. In opposition to plaintiff’s claim regarding the equity interest, defendant

argues that, pursuant to Paragraph 3 of Schedule 1 of the Employment Agreement, plaintiff was not entitled to exercise an option until he had completed “36 months of continuous employment following the date upon which such subscription occurred”.

In constructing the terms of a contract, the judicial function is to give effect to the parties intentions (*Mallad Construction Co., v. County Federal Savings and Loan Association*, 32 NY2d 285). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (*Seligman v. Mount Arafat Cemetary, Inc.* 112 AD2d 928). An agreement should be read as a whole so as to give each section meaning. Where contract’s language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of parties intent or to rules of construction to ascertain the contract’s meaning (*Bethlehem Steel Co. V. Turner Construction Co.*, 2 NY2d 456). However where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (See, *Bray Terminals, Inc. V. Grand Union Co.*, 74 AD2d 965). Additionally, because the defendant drafted the employment contract, any ambiguity in its terms must be construed strongly against the defendant. (See *Arbeeny v. Kennedy Executive Search, Inc.*, 71 A.D.3d 177, 182, 893 N.Y.S.2d 39 (1st Dep’t 2010); *Brodsky v. Levy*, 161 A.D.2d 1120, 1121, 555 N.Y.S.2d 941 (4th Dep’t 1990).

Therefore, plaintiff’s submissions are thus sufficient to demonstrate prima facie its entitlement to judgment with respect to its claims for salary and for Paid Time Off (see, *Citibank v. Jones*, 272 AD2d 81 5).

Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014).


In its cross-motion, defendant acknowledges that the language of the employment agreement does not contain conditions or specific language which would allow it to discontinue paying plaintiff’s salary and paid time off. It is undisputed that no where in the parties agreement does it specifically state that the employee’s status would be terminated during the Notice Period if the employee became re-employed. However, the correspondence between the parties raises a question of fact as to whether it was the intention of the parties to pro rate plaintiff’s salary if he became re-employed following a voluntary termination and whether he was also entitled to PTO.

Since the defendant has presented sufficient facts that would require a trial on those two claims, both parties’ motions for summary judgment on must be denied.

The Court finds differently however, with respect to plaintiff’s claim for a 2.5 % equity share of defendant’s company. Defendant has produced a copy of the contract and its Schedule 1 which clearly states that employees may exercise their option for equity shares only when

employed for 36 continuous months. Since it is undisputed that the plaintiff was not employed by the defendant for 36 months, plaintiff has failed to establish its entitlement to summary judgment on that claim. On the contrary, defendant has established its right to summary judgment on that claim and, as such, plaintiff's claims for same is dismissed.

Dated: 5/20/15  
Riverhead, N.Y.

  
Hon. Ralph P. Gazzillo  
A.J.S.C.

Non-Final Disposition

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