

Petitt v LMZ Soluble Coffee, Inc.
2016 NY Slip Op 30709(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 652968/2015
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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MARY PETITT,

Plaintiff,

-against-

Index No. 652968/2015
Motion Date: 1/7/2016
Motion Seq. No. 001

LMZ SOLUBLE COFFEE, INC.,

Defendant.

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BRANSTEN, J.

Plaintiff Mary Petitt (“Petitt”) brings this action against Defendant LMZ Soluble Coffee, Inc. (“LMZ”) for breach of the parties’ employment agreement. Specifically, Petitt alleges that she was terminated prior to the expiration of a fixed, five-year term of employment at LMZ and is therefore entitled to damages for lost compensation, among other things. LMZ moves to dismiss the complaint, arguing that the employment agreement did not provide for a fixed duration of employment, so, as an at-will employee, Petitt was terminable at any time.

For the reasons that follow, Defendant’s motion to dismiss is granted.

I. Background

a. The Complaint

Plaintiff Mary Petitt (“Petitt”) has been involved in the worldwide coffee industry for many years, and for a time, she was Executive Vice President of the Columbian Coffee Federation, Inc. (Complaint (“Compl.”) ¶¶ 1, 6.) In July 2014, she was

approached by a recruiter from LMZ Soluble Coffee, Inc. (“LMZ”) about a possible position at LMZ as Chief Executive Officer (“CEO”). Compl. ¶ 7. At the time, Petitt was employed as an international consultant to the International Trade Center (“ITC”) in Geneva, Switzerland. Compl. ¶ 8. LMZ, a family-owned company, advised Petitt that the CEO position was an interim position, which would last for five years before the family heir would take over. Compl. ¶ 9.

From August 2014 to October 2014, Petitt and LMZ’s Advisory Board, along with LMZ’s President, Jonathan Feuer (“Feuer”), participated in numerous interviews and negotiations regarding the CEO position. Compl. ¶ 12. On October 9, 2014, LMZ offered Petitt the position through a written offer letter (the “CEO Offer”), signed by Feuer. Compl. Ex. A. The letter begins, “I have finished 5 months of work with my advisory team and we have completed a Strategic Plan, conducted a CEO search and finished the outline for a transition plan...”¹ Compl. Ex. A. The letter continues,

Not only were you a finalist in this effort, you are the one I want to lead our family business, and take it to a new level. You have all the skills, ethics, approachability and reputation that fit perfect with our company’s history and its needs going forward. This has been a deeply considered decision, as I have poured my heart and soul into leading LMZ for the past 25 years and now want to step back from the day-to-day, while knowing the Company is in hands that I trust. You are the one.

¹ The “Strategic Plan,” executed August 2014, states that “[a] new CEO search will be conducted with an objective of getting the current CEO’s son ready to take the role in 3-5 years.” (Affirmation of Janet C. Neschis “Neschis Affirm.” Ex. A (“Strategic Plan”) at 2). “Talent development succession” was included in the plan as a 5-year goal. Neschis Affirm. Ex. A at 4.

Compl. Ex. A. The letter concludes, "The attached page outlines the details of the offer. I hope you find them as compelling and rewarding as I intend them to be." Compl. Ex. A.

The attached page, titled "Re: CEO Compensation Package," is divided into three sections (the "Compensation Package"). Compl. Ex. A at 2. Section I states that the annual salary is \$350,000. Compl. Ex. A at 2. Section II, outlining the annual bonus, states that the target bonus is \$150,000, based on three criteria. Compl. Ex. A at 2. The first criteria provides:

- 60% attributable to increases in net profit before taxes and other distributions, plus 10% on net profit above annual targets as follows:
 - FY 2015: \$3.0MM
 - FY 2016: \$3.5MM
 - FY 2017: \$4.0MM
 - FY 2018: \$4.5MM
 - FY 2019: \$5.0MM

Compl. Ex. A at 2. The remaining two criteria provide for an additional 20% attributable to either "new channel development" or "leadership development for Ethan Feuer," Petitt's designated successor. Compl. Ex. A at 2.

Section III, outlining deferred compensation, sets out the following:

- Up to \$2.0 MM earn-in over 5 years based on three criteria:
 - (A) 50% attributable to annual increase tonnage volumes from current 5,000 MT/annum. Parameters and metrics to be agreed between Chairman and CEO.

(B) 30% attributable to annual increase in gross sales with annual targets of:

-FY 2015: \$125MM

-FY 2016: \$150MM

-FY 2017: \$200MM

-FY 2018: \$250MM

-FY 2019: \$300MM

(C) 20% attributable to organizational development. Parameters and metrics to be agreed between Chairman and CEO.

Compl. Ex. A at 2. Section III further provides,

- Annual deferred compensation awards will be calculated annually in accordance with the maximum amounts indicated below, and paid over a three year period commencing one year following separation or at the end of the fifth year of employment, whichever is later.

-FY 2015: \$300K

-FY 2016: \$350K

-FY 2017: \$400K

-FY 2018: \$450K

-FY 2019: \$500K

Compl. Ex. A at 2. And finally, “[i]n the event of a transfer of ownership of the Company...the Deferred Compensation referenced above will be paid in cash, only for any prior fiscal years earned.” Compl. Ex. A at 2.

After accepting the position, Petitt served as CEO from December 1, 2014 until termination on June 1, 2015. Compl. ¶ 1. On August 27, 2015, Petitt filed the complaint, alleging that LMZ breached the employment agreement. Compl. ¶¶ 25-42.

II. Discussion

Defendant LMZ has filed a motion to dismiss for failure to state a cause of action, arguing that Petitt's employment agreement with LMZ did not provide for a fixed term of employment, rendering Petitt an at-will employee, terminable at any time. In opposition, Petitt maintains that the agreement provided for a five-year term of employment and, as such, she is entitled to the compensation she otherwise would have been paid as CEO. Pursuant to the reasoning below, the complaint must be dismissed.

A. Motion to Dismiss Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

B. Petitt's Claim for Breach of Employment Agreement

In New York, it is well-settled that “absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party.” *Rooney v. Tyson*, 91 N.Y.2d 685, 689 (1998) (citing *Matter of De Petris v. Union Settlement Assn.*, 86 N.Y.2d 406, 410 (1995)). The presumption may be triggered “when an employment agreement fails to state a definite period of employment, fix employment of a definite duration, establish a fixed duration or is otherwise indefinite.” *Rooney*, 91 N.Y.2d at 689 (internal citations omitted). In *Rooney*, the Court further explained that

A sensible path to declare New York law starts with these two steps: (1) if the duration is definite, the at-will doctrine is inapplicable, on the other hand, (2) if the employment term is indefinite or undefined, the rebuttable at-will presumption is operative and other factors come into the equation.

Rooney, 91 N.Y.2d at 689. Thus, the “threshold determination” is one of definiteness, and only if a court “discern[s] no term of some definiteness,” will it consider other factors to rebut the at-will presumption. *Rooney*, 91 N.Y.2d at 690-91; *see also Matter of De Petris*, 86 N.Y.2d at 410 (same).

Here, the CEO Offer and Compensation package, read together, do not contain a term of “some definiteness.” *Rooney*, 91 N.Y.2d at 690-91. First, the CEO Offer does not contain any language referencing duration of employment. Looking to the Compensation Package, there is, again, no language guaranteeing Petitt a five-year term

of employment. Indeed, the language therein expressly contemplates her employment could end before the fifth year. For example, Section III of the Compensation Package, states that “Annual deferred compensation awards will be calculated annually...and paid over a three year period commencing one year following separation or at the end of the fifth year of employment, whichever is later.” Compl. Ex. A. Section III further provides that deferred compensation would be “paid in cash, only for *any prior fiscal years earned.*” Compl. Ex. A (emphasis added). Thus, these documents do not set any “definite” term of employment, and so, this Court finds, the rebuttable presumption of at-will employment applies. *Rooney*, 91 N.Y.2d at 690-91.

Nonetheless, Petitt maintains that the measure of her compensation, beginning in “FY 2015” and ending in “FY 2019” is “pegged to a five-year term.” (Plaintiff’s Brief in Opposition at 7). She argues that the language providing for deferred compensation of “up to \$2.0MM earn-in over 5 years...” supports the proposition as well. Unfortunately for Petitt, New York law is clear that payment schedules, measured yearly or otherwise, do not establish a fixed period of employment. *See, e.g., Chase v. United Hospital*, 60 A.D.2d 558, 559 (1st Dep’t 1977) (“The fact that compensation is measured by a specific period of time does not bind a party to a term of that or any other period.”); *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 176 (1st Dep’t 1987) (“Although plaintiff was to be paid on the basis of an annual compensation rate, this fact, as such, did not obligate defendant to retain him for that term or for any other period.”); *Coffey v.*

Tetragenetics, Inc., 40 A.D.3d 1247, 1248 (3d Dep't 2007) (“[T]his letter agreement contained no promises or assurances regarding the length of plaintiff’s employment. References to the end of 2004 in the letter pertained to merely to the timing of her salary review and discretionary performance bonus; such references in no way constituted an agreement to fix her employment...”). Thus, the Compensation Package, as outlined above, is nothing more than a payment schedule, providing for incremental increases in bonuses and compensation on an annual basis, and does nothing to rebut the at-will presumption.

Next, Petitt argues that the Strategic Plan, referenced in the CEO Offer, confirms that her employment was fixed at five years, and should be considered alongside the offer letter. (*See Neschis Affirm. Ex. A*). Pursuant to the Strategic Plan, a “new CEO search will be conducted with an objective of getting the current CEO’s son ready to take the role in 3-5 years.” *Neschis Affirm. Ex. A* at 2. Petitt also relies on the fact that “talent development for succession” is included in the plan’s list of 5-year goals. *Neschis Affirm. Ex. A* at 4. Again, this language does not state a definite term of employment, and, if anything, undermines Petitt’s position that her term was fixed.

First, the Strategic Plan indicates that one goal was to have the family heir ready to succeed Petitt in “3-5 years,” which demonstrates the parties understood her term could expire before five years. Further, including “talent development for succession” as a five-year goal in no way guarantees Petitt’s employment for five years. Instead, the

language refers to Ethan Feuer, and his timeline for succession.² Thus, the Strategic Plan does nothing to rebut the at-will presumption or, in any way, establish a definite term of employment. *See, e.g., Coffey v. Tetragenetics, Inc*, 40 A.D.3d 1247, 1248 (3d Dep't 2007) (“[T]his letter agreement contained no promises or assurances regarding the length of plaintiff’s employment. References to the end of 2004 in the letter pertained to merely to the timing of her salary review and discretionary performance bonus; such references in no way constituted an agreement to fix her employment...”).

Nonetheless, Petitt maintains that courts have considered similar documents before, and found that the documents provide for a fixed term of employment. Petitt first directs the Court to *Crabtree v. Elizabeth Arden Sales Corporation*, where the Court of Appeals was asked to determine whether an unsigned memorandum could be considered along with a signed agreement to enforce a fixed term of employment. *Crabtree*, 305 N.Y. 48 (1953). There, the Court found that language in the unsigned memorandum, specifically the notation that the plaintiff had “2 years to make good,” was sufficiently definite to rebut the at-will presumption. *Crabtree*, 305 N.Y. at 57. The Court explained,

Quite obviously, as the courts below decided, the phrase signifies that the parties agreed to a term, a certain and definite term, of two years, after which, if plaintiff did not “make good,” he would be subject to discharge.

² This language explicitly refers to the language contained in Section I of the Compensation Package, “leadership development for Ethan Feuer,” one of the criteria to be considered in determining Petitt’s deferred compensation. Compl. Ex. A at 2.

Crabtree, 305 N.Y. at 57. In finding that the parties expressly contemplated a two-year term of employment, the Court noted that the remainder of the memorandum, a scale of wages and incremental salary increases, supported that conclusion. *Crabtree*, 305 N.Y. at 57-58.

In this case, however, the documents lack similarly definite language. This Court agrees that by its contingent—“if” “then”—nature, “2 years to make good” provides the requisite definiteness. In fact, as noted above, certain language in the documents before this Court undermines the argument that the term was fixed at five years. For example, the Compensation Package provides that deferred compensation would “paid over a three year period commencing one year following separation or at the end of the fifth year of employment, *whichever is later.*” Compl. Ex. A at 2 (emphasis added). Thus, Petitt’s reliance on the case is inapposite.

Next, Petitt argues that the facts here are similar to those in *Nausch v. AON Corporation*, where the First Department reversed the lower court’s dismissal of the complaint, finding that additional documentary evidence demonstrated the parties’ intentions for a fixed term of employment. *Nausch*, 2 A.D.3d 101, 103 (1st Dep’t 2003). There, the employment agreement stated that the plaintiff’s decedent was specifically recruited to develop \$5 million in business over the next five years as CEO of the

defendant corporation.³ *Nausch*, 2 A.D.3d at 102. The agreement also had payment schedule, which contained annual salary, guaranteed bonuses, and incentive compensation.⁴ *Nausch*, 2 A.D.3d at 102.

On appeal, the First Department looked beyond the terms of the agreement, and found that additional documentation “underscored” the conclusion of a fixed term of employment for five years, including the following, among other things: (1) memoranda indicating that the decedent required a three-to-five year term of employment; (2) memoranda providing for a five-year schedule for new business, which included the decedent’s compensation schedule and guaranteed bonuses; and (3) notes indicating that a three-year contract versus a five-year contract had been considered and discussed with the decedent, and that he preferred a five-year contract. *Nausch*, 2 A.D.3d. at 103. The Court concluded that the “evidence, viewed in the aggregate, makes clear that both parties intended the agreement to cover five years of employment.” *Nausch*, 2 A.D.3d. at 103.

³ The letter agreement in *Nausch* states, in relevant part, “You will apply your best efforts in developing [the company] into a major Satellite Brokerage Facility. At this time, our long range goal for SRI will be to develop an estimated \$5,000,000 annualized book of space business over the next 5 years.” *Neschis Affirm. Ex. C.*

⁴ The letter further provides, “Guaranteed bonus of \$100,000 for Year 1 of your employment; \$100,000 during Year 2 of your employment and \$50,000 for Year 3 of your employment.” *Neschis Affirm. Ex. C.*

Distinguishing the facts here from those in *Nausch* is a quick task. First, Petitt's CEO Offer does not state *any term* of employment, nor does it set fixed monetary goals over a specific period of time. Notably absent from either the CEO Offer or the Compensation Package are any references to "guaranteed bonuses," which were explicitly provided for in the *Nausch* hiring document. *Nausch*, 2 A.D.3d at 102. Furthermore, looking to LMZ's Strategic Plan, submitted by Petitt to rebut the at-will presumption, this Court finds no language that suggests the parties discussed, intended or decided on a five-year term of employment, as the First Department found in *Nausch*. Indeed, the Strategic Plan makes no reference to Petitt, whatsoever.

Accordingly, in construing the facts in the light most favorable to Plaintiff, the Court concludes that Petitt's employment agreement lacks a "definite" term of employment, and she was, as a matter of law, an at-will employee of LMZ. *Rooney v. Tyson*, 91 N.Y.2d 685, 689 (1998). As such, Petitt was terminable at any time, and she has, therefore, failed to state a cause of action. LMZ's motion to dismiss the cause of action for breach of contract must be granted.

Since Plaintiff's remaining cause of action for declaratory judgment is based on the existence of an employment agreement for a period of five years, it must also be dismissed.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant's motion to dismiss is granted; and the complaint is dismissed with costs and disbursements to Defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York

April 13, 2016

ENTER



Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN
J.S.C.