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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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DONNA MEROLA, Index No. 652306/2013

Plaintiff

- against - Motion Sequence No. 001

KAHN LUCAS LANCASTER, INC.,

Defendant.

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SCARPULLA, J.:

Plaintiff Donna Merola ("Merola") commenced this breach of contract action to recover severance pay and benefits pursuant to her employment agreement ("Employment Agreement") with defendant Kahn Lucas Lancaster, Inc. ("KLL"). KLL now moves for summary judgment dismissing the complaint.

KLL manufactures and sells children's clothing. Between January 2011 and February 2011, Merola met with Howard Kahn ("Kahn"), KLL's Chairman and then Chief Executive Officer, to negotiate possible employment with KLL. In February 2011, KLL made a verbal offer of employment to Merola. Merola countered, requesting an increase in her base salary and a severance provision. Following employment term discussions, KLL sent an Employment Agreement, dated June 16, 2011, to Merola. Merola accepted employment with KLL as its Senior Vice President of Sourcing and Production and executed the Employment Agreement on June 21, 2011.

Under the Employment Agreement, Merola's "Duties" are described as follows:

> As a member of the senior management, you will be responsible for various senior management endeavors. You

> will report directly to Colleen Kelly, President, who will be primarily responsible for evaluating your performance. You will serve as Senior Vice President of Sourcing and Production and be assigned duties and responsibilities which, in the reasonable discretion of [KLL], are consistent with your position. Your base compensation is being paid to you based on [KLL's] expectations that you will perform the duties required of you by the President or whomever you report to, including without limitation, meeting the following performance expectations based on the [following] metrics ...

The Employment Agreement's explanation of the metrics that Merola's performance would be measured against consisted of a list of KLL's 2009 and 2010 costs for late deliveries, air freight charges and compliance chargebacks. It further listed the following "performance expectations":

- Return to at least 2009 performance on Late Delivery and Air Freight performance as a % of sales
- Positive variance between change in overhead and gross profit
- KSS report card [a rating Kohl's issued to its vendors] improvement to a 'B' for the first six months of 2012
- Create Factory Report Card for measuring delivery and quality performance
- Measure and consistently improve [KLL's] turn time from acceptance of order to shipping the retailer.
- Measure and consistently improve hanger appeal of garments. Measurement to be done through sales surveys.

Merola was entitled to a guaranteed bonus of $25,000 after her first year of employment at KLL. And, for the period of June 20, 2011 to June 30, 2012, Merola was eligible for a "Special Interim Bonus" of between 15 and 50 percent of her base salary depending on whether Merola met the performance metrics set forth in the Employment Agreement. Merola's performance was to be reviewed at her one-year anniversary, and

"new goals and objectives may be established" for Merola at that time.

In the event of Merola's termination of "employment for any reason without Cause," the Employment Agreement provides that Merola would continue to receive her base compensation and medical benefits for a period of 12 months following termination. In relevant part, the Employment Agreement defines "Cause" as:

> the occurrence of any of the following events, as determined by [KLL], whose determination shall be final and binding: (i) a material breach by you of your obligations under this letter agreement or a failure by you to perform your assigned duties for [KLL], which breach or failure you fail to cure within ten (10) days following your receipt from [KLL] of written notice of such breach or failure.

In June 2012, at the conclusion of her first year of employment at KLL, Merola received her guaranteed bonus of $25,000. At this time, Merola contends, KLL neither provided her with a performance review nor modified her objectives as required by the Employment Agreement.

In November 2012, Merola's boss, Colleen Kelly ("Kelly"), told Merola that KLL wanted to cut $3 million from the operating budget due to a downturn in business. Subsequently, lay-offs were conducted. Merola states that Kelly informed her that she was not included in the lay-offs because Kahn did not want to pay Merola's severance.

On January 8, 2013, Kelly gave Merola her performance review ("Performance Review") six months later than required under the Employment Agreement. Merola posits that at the Performance Review she was told for the first time during employment by KLL that she was "not performing under the Agreement."

At her deposition, Kelly testified that, at the time of the Performance Review, she did not have the final numbers to determine whether Merola actually met performance expectations concerning late delivery, air freight and achieving a positive variance between change in overhead and change in gross profit. Despite the lack of these benchmark figures, Kelly found that Merola failed to fulfill the following objectives: (1) KSS report improvement to a B for the first six months; (2) measure and consistently improve the company turn time; (3) measure and consistently improve garment hanger appeal; and (4) create factory report card for measuring delivery and quality performance. For Merola's overall performance, Kelly rated her as "Does Not Meet Expectations."

The Performance Review concluded with a notice to cure, stating that "this performance evaluation shall also serve as written notice in accordance with the terms of [Merola's] offer letter that she has 10 days from the date she receives this evaluation to cure the performance deficiencies noted herein."

According to Merola, on January 16, 2013, Kelly informed Merola that Friday, January 18, 2013, would not actually be her last day because the alleged claim of Cause was being withdrawn and that, instead, Kahn wanted Merola to produce a plan to solve KLL's operational issues by January 18, 2013. That same day, Kelly emailed Kahn and Jennifer Richardson, KLL's Head of Human Resources, stating: "I just told [Merola] that she was not being terminated on Friday. I said we wanted to give her a chance to respond to the 10-day cure and we would review her response and make our decision."

On January 17, 2013, Merola sent an email to Kahn (who was out of town) requesting a one-week extension of time to complete the plan because: a) 1.5 days' notice

was insufficient time to construct the plan; b) Merola thought that Kahn should be present for the discussion; and c) Kelly had agreed that an extension would be okay. In the email, Merola also raised her concern that KLL's conduct was motivated by a desire to "orchestrate my termination in such a way as to try and avoid paying me the severance monies due under my June 20, 2011 contract." Kahn did not respond to the email. Then, on January 18, 2013, Merola's employment was terminated.

KLL contends that it is entitled to summary judgment dismissing Merola's complaint because Merola failed to perform the objectives in the Employment Agreement and was given a 10-day notice to cure prior to her termination. KLL also argues that, pursuant to the Employment Agreement, it had the "final and binding authority" to determine whether or not Merola failed to perform her duties and, therefore, Merola may not challenge its finding of cause.

In opposition, Merola counters that nothing in the Employment Agreement limited her duties to the objectives or required the performance of all of the objectives. Rather, Merola argues, "a failure to perform assigned duties is a common sense, subjective evaluation that would require a showing that, under the totality of the circumstances, [Merola] was not working hard and performing her assigned duties on any level." Merola also argues that KLL acted in bad faith to manufacture cause in order to terminate her without paying severance and that issues of fact exist with respect to whether she met the objectives. Lastly, Merola urges the court to find that, because KLL withdrew the 10-day notice to cure, Merola's termination was without cause as a matter of law.

Discussion

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant '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.'" *Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dept. 2012) (citation omitted). Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Id.* Moreover, on a motion for summary judgment, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 315 (2004) (citation omitted).

In addition, CPLR 3212 (b) states that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." *See also Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 429-430 (1996) ("a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court").

In interpreting a contract, the court must consider the parties' intentions, "[t]he best evidence of [which] . . . is what they say in their writing." *Banco Espírito Santo, S.A. v. Concessionária Do Rodoanel Oeste S.A.*, 100 A.D.3d 100, 106 (1st Dept. 2012) (internal quotation marks and citation omitted). A clear and unambiguous document on its face "must be enforced according to the plain meaning of its terms, and extrinsic

evidence of the parties' intent may be considered only if the agreement is ambiguous." *Id.* (internal citation omitted).

Here, the Employment Agreement defines "Cause" as meaning "the occurrence of any of the following events, as determined by the Company, whose determination shall be final and binding" and lists as one such event the "failure by [Merola] to perform [Merola's] assigned duties for the Company." Additionally, the Employment Agreement explicitly lists several objectives among Merola's duties. As such, "according to the plain meaning of [the Employment Agreement's] terms," KLL had the discretion to determine whether a failure to perform the objectives was grounds for termination for cause. *Banco Espírito Santo, S.A.*, 100 A.D.3d at 106.

Although the Employment Agreement conferred the discretion to determine cause on KLL, KLL did not have the right to exercise such discretion in bad faith, to manufacture cause where none existed. *See Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) ("[w]here the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion"). Therefore, the Employment Agreement does not prevent Merola from challenging KLL's determination that she was terminated for cause for failing to perform her duties.

KLL argues that Merola was terminated for cause because she generally failed to achieve her objectives under the Employment Contract. However, Merola's direct supervisor stated, in an email sent three days before Merola was allegedly terminated for "cause," that Merola "has not performed a material breach of her duties in my opinion."

KLL claims that cause exists because Merola failed to return the air freight charges to what they were in 2009. In support, KLL points to $454,330.60 in air freight charges it incurred for 2012, which constituted .53% of its sales, above the 2009 figure of .38%. I note, however, that at the time of Merola's Performance Review, KLL did not know whether Merola failed to meet this metric and therefore could not have based its decision to terminate Merola on such alleged failure.[1]

Moreover, Merola raises issues of fact with respect to whether she actually successfully reduced air freight charges to at least 2009 levels. According to Merola, approximately $200,000 in air freight charges was attributable to errors and delays in KLL's sales and design departments, which were outside Merola's control, and not related to her performance. Bernstein affirmation, exhibit 1 at 77-78, 81; *see also id.*, exhibit 2A at 165-166 (Kelly testified that she did not think that the additional air freight charges reflected poorly on Merola); *see also id.*, exhibit 12 at DM-298 (October 9, 2012 email from Merola to Kahn and Kelly, stating that, due to delays with art design and late sales orders, among other things, KLL would have to incur $250,000 in air freight or "miss cancel dates," to which Kahn responded: "Understood. Customer service is most important"). Accordingly, whether KLL relied on Merola's alleged failure to reduce air

[1] *See* Sacks Aff., Ex. J at KAHN 1324 (Performance Review stated that whether Merola met the air freight performance metric was "TBA"); Bernstein Aff., Exh. 2B at 240 (Kelly testified that KLL did not wait to get all the numbers, which is why the Performance Review stated "TBA" for several objectives, including air freight); *id.*, exhibit 16 (January 5, 2013 email from Kelly to Kahn, entitled "Donnas review," stating that Kelly was missing numbers, which she expected to have in three weeks, and Kahn's January 6, 2013 response, stating: "we don't need the numbers. The notice should be given tomorrow").

freight charges in bad faith to justify her termination is an issue of fact that may not be determined on this summary judgment motion.

Next, KLL contends that Merola did not achieve "KSS report improvement to a B for the first six months" of 2012. *See* Bernstein affirmation, exhibit 12 at KAHN 7328 (Kohl's supply chain performance score card showing that KLL earned "Bs" for April and May only). Merola testified that she discussed KLL's sporadic performance on Kohl's scorecard with Kelly on numerous occasions and that Kelly told her that this was an impossible metric, that it was not costing KLL money, that it was not a priority and that Merola had bigger things to focus on. Bernstein affirmation, exhibit 1 at 78-79, 103-104, 122-123. Indeed, Kelly testified that she did not consider this objective to be "super important" (Bernstein affirmation, exhibit 2A at 200), thought that it was unrealistic, "really, really hard" (*id.*, exhibit 2B at 245), not achievable within the 18-month time frame of Merola's employment with KLL (*id.*, exhibit 2B at 316), and did not believe that the failure to receive "Bs" caused KLL a loss of business or money. *Id.*, exhibit 2B at 317. Merola's Employment Agreement stated that Kelly determined Merola's duties, thus, if Kelly instructed Merola to focus on other tasks, rather than to pursue this objective, then Merola's alleged failure to achieve KSS report improvement may not support a good faith finding of cause to terminate Merola. Whether Kelly so instructed Merola raises an issue of fact.

KLL also argues that it had cause to terminate Merola based on her failure to use sales surveys to improve hanger appeal of garments (*i.e.*, the general appearance of garments in stores). According to the Performance Review, "measures were taken to

improve the hanger appeal of the garments but no formal sales surveys were taken." KLL points to Kelly's testimony that hanger appeal had "[n]ot really" improved during Merola's tenure at KLL and that Merola never asked for sales surveys to be created. However, it is undisputed that KLL did not have sales surveys in place for Merola to use in measuring hanger appeal, and Kelly testified that creating such surveys was not Merola's responsibility.

Merola testified that, despite the lack of such surveys, she performed toward this objective by: instituting new packaging and finishing guidelines for KLL's factories; training the factories on implementing such guidelines; and frequently examining products in stores. At her deposition, Kelly stated that Merola took steps to improve hanger appeal by changing the factories' packaging guidelines, but that the garments still "didn't look great." As further evidence that Merola improved hanger appeal during her tenure, Merola points to a letter from Walmart, stating that KLL qualified for the store's Quality Excellence Program, which "reward[ed] Suppliers for delivering product which m[et] [Walmart's] expectations and ultimately deliver[ed] quality product to [its] customer," based on KLL's performance from February 1, 2012 to July 31, 2012. Thus, issues of fact exist with respect to whether KLL properly relied upon Merola's alleged failure to improve the hanger appeal of KLL's garments and whether she had an obligation to obtain sales surveys to do so.

KLL next alleges that Merola failed to create a Factory Report Card summarizing the performance of KLL's factories based on delivery and quality. The Performance Review stated that "[f]actory report card completed for delivery performance but not for

quality." Merola states that she did, in fact, create such a report card and submits a January 9, 2013 email to her team, containing a "KLL Vendor Base Factory Report Card," which graded factories based on the following categories: delivery, quality, price and overall. Here again, Merola has raised an issue of fact as to whether KLL relied in good faith on Merola's alleged failure to create a factory report card that graded quality to terminate her for cause.

Lastly, KLL contends that "[a]lthough there was no formal measurement for company turn time," or the time from when an order was placed into KLL's system to when the product was delivered, "it was clear it did not improve during Merola's tenure." With the exception of Kelly's statement that "we all knew [turn time] hadn't gotten better," KLL does not offer any competent evidence of Merola's failure to achieve this objective. Merola agrees that KLL's software did not have the ability to track this metric, and states that her requests for enhancements to the system went unheeded. Further, Merola insists that she improved turn time, because she "changed the entire sourcing footprint in [her] first year at [KLL]," by increasing allocations to China by 50%, which had lead times of three-and-a-half to six weeks shorter than the previously used Vietnam and Bangladesh. She also argues that, because reducing turn time would reduce late deliveries and air freight performance, her success with respect to air freight and late deliveries indicates that turn time had decreased.

In sum, Merola has raised numerous issues of fact regarding whether KLL acted in good faith when it allegedly terminated Merola for cause, or whether the decision to

terminate Merola for cause was made in bad faith for the purpose of avoiding the payment to Merola of contractually required severance. *See Forrest,* 3 N.Y.3d at 315.

Furthermore, there is a question of fact as to whether KLL performed under the Employment Agreement. Plaintiff's claims that her "for cause" termination followed KLL's rescission of the contractually required notice to cure and that KLL failed to issue a second cure notice. The testimony and documents on this issue are unclear as to whether the notice to cure was actually rescinded and whether it was rescinded by someone with the authority to do so. Thus, at this time, I decline to find, as Merola requests, that because of KLL's alleged rescission of the 10-day notice to cure, Merola's termination was without cause as a matter of law.

In accordance with the foregoing, it is hereby

ORDERED that defendant Kahn Lucas Lancaster, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that plaintiff Donna Merola's request for this Court to "search the record" and grant summary judgment in her favor is denied; and it is further

ORDERED that all parties shall appear for a pre-trial conference before the Court at 60 Centre Street, Room 208, on September 21, 2015 at 2:15 pm.

This constitutes the decision and order of the Court.

Dated: July 29, 2016

ENTER:

SALIANN SCARPULLA JSC