SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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U.S. SECURITY ASSOCIATES, INC.,

Plaintiff,

- v -

DOUGLAS CRESANTE,

Defendant.

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Index No. 161144/2015

DECISION and ORDER

Mot. Seq. 001

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

Plaintiff U.S. Security Associates, Inc. ("U.S. Security" or "plaintiff") brings this action against defendant Douglas Cresante ("Cresante" or "defendant") seeking the recovery of damages arising from defendant's alleged breach of his employment and separation agreements with U.S. Security. In the complaint, plaintiff asserts causes of action for breach of the non-compete provision, breach of the non-solicitation provision, unjust enrichment, unfair competition, tortious interference with contractual relations, and tortious interference with prospective business relations.

Defendant now moves for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint. Defendant submits the affirmation of Michael S. Leinoff, Esq., general counsel to Aron Security, Inc. d/b/a Arrow Security, annexing copies of the complaint, Separation Agreement, and Employment Agreement. Plaintiff opposes.

In analyzing a CPLR 3211(a)(7) motion to dismiss, "where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of the plaintiff." *Sterling Fifth Assocs. v. Carpentille Corp., Inc.*, 9 A.D.3d 261, 261 (1st Dept. 2004). "The motion must be denied 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 quotations omitted).

The following facts are taken from the complaint. U.S. Security is a security company that offers uniformed security guard services for its clients throughout the country. Cresante entered into an Employment Agreement with U.S. Security on April 28, 2014. He was employed as a branch manager, handling the day-to-day management of accounts and staff at U.S. Security's branch in Long Island, New York. His job duties included, *inter alia*, managing client accounts, meeting with prospective clients to assist in the sales process, and participating in the customer acquisition process.

Cresante's employment was terminated approximately one year later, effective April 14, 2015. On April 15, 2015, Cresante entered into a Separation Agreement and Full and Final Release of Claims. Pursuant to the Separation Agreement, U.S. Security paid Cresante $16,963.20 (the "severance payment"), the equivalent of twelve weeks' pay, in several installments beginning on May 29, 2015 and concluding in August 2015.

On May 4, 2015, Cresante began working for Arrow Security, a competitor of U.S. Security. Plaintiff alleges that Cresante's role at Arrow Security involved day-to-day management and client account management, substantially similar duties to the job duties he performed for U.S. Security in the same territory. Plaintiff further alleges that one of the clients that Cresante managed while working as a branch manager for U.S. Security was Mattone Group, and that Cresante "solicited or attempted to solicit Mattone Group on behalf of Arrow Security for the purposes of providing security services." U.S. Security lost its contract with Mattone Group's Jamaica Center to Arrow Security in June 2015.

On August 6, 2015, U.S. Security notified Cresante that his employment with Arrow Security and actions soliciting clients violated Sections VII.A and VII.C of his Employment Agreement and Paragraph 6 of his Separation Agreement, and demanded that Cresante repay the severance payment. Cresante disregarded U.S. Security's demand, though he purportedly ceased working in the Long Island region for Arrow Security effective August 31, 2015.

Paragraph 6 of the Separation Agreement provides:

> 6. Restrictive Covenants. Mr. Cresante acknowledges and agrees that the restrictive covenants set forth in Section VII of the 2014 employment agreement are preserved and reaffirmed through this Separation Agreement as are Section VIII, IX, and X of the 2014 employment agreement. The parties further agree that the eighteen (18) month periods set forth in the restrictive covenants in Section VII

> (A, B and C) of the 2014 employment agreement will commence on the day of separation of employment. The parties further agree that if Mr. Cresante breaches the restrictive covenants in Section VII of the 2014 employment agreement, such breach also constitutes a material breach of this Separation Agreement and thus any and all obligations on U.S. Security under this Agreement would immediately end, including any obligation to pay or continue to pay severance pay.

Section VII(A) of the Employment Agreement contains a non-solicitation provision, which provides, in pertinent part:

> Employee agrees that during Employee's employment with Employer and for a period of eighteen (18) months after the end of Employee's employment with Employer, Employee will not solicit or attempt to solicit (either directly or by assisting others) any business from Employer's customers or prospective customers which are actively being sought by Employer at the time of Employee's termination for the purpose of providing products or services that are competitive with the type of products or services provided by Employer at the time of Employee's termination. * * *

Section VII(C) of the Employment Agreement contains a non-compete provision, which provides, in pertinent part:

> Employee further agrees that for a period of eighteen (18) months after the end of Employee's employment with Employer, Employee shall not (either on the Employee's behalf or on another's behalf) perform job activities of the type Employee conducted or provided for Employer within the two years prior to Employee's termination, for purposes of providing products or services that are competitive with the products or services provided by Employer at the time of Employee's termination. This restriction shall apply only within the territory where Employee is working for Employer at the time of Employee's termination. * * *

With respect to the first and second causes of action for breach of contract, defendant argues that the complaint fails to state a cause of action for breach of the non-compete and non-solicitation provisions because the provisions are unenforceable. Specifically, defendant argues that, because Cresante's termination was "without cause" and the severance payment was conditioned upon his

compliance with the restrictive covenants, U.S. Security created an unenforceable forfeiture-for-competition clause.

Defendant asserts that "it must be concluded that Cresante was terminated without cause" because the Separation Agreement explicitly relies on Section V(C) of the Employment Agreement, and Section V(C) "is predicated on Cresante's termination being 'without cause.'" Defendant then cites *Post v. Merrill Lynch*, 48 N.Y.2d 84 (1979) for the proposition that "[a]n employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services." *Id.* at 89. Relying on *Post*, defendant argues that a restrictive covenant is unenforceable if the employee was both terminated without cause and then asked to choose between a post-employment benefit and the right to compete.

Section V(C) of the Employment Agreement provides for severance payments if the employer terminates the employee "without cause":

> If Employer terminates Employee without cause, Employee shall receive severance payments of four weeks salary plus one week of salary for each full year of service, not to exceed a maximum of thirteen weeks salary, minus legally required withholdings, at Employee's regular base salary. These severance payments are conditioned upon Employee executing a general release of any and all claims Employee may have against Employer at the time of Employee's termination. If Employee is entitled to receive severance payments under this paragraph V.C, then Employee is not entitled to receive the payment or notice period described in paragraph V.B.

Thus, assuming U.S. Security terminated Cresante without cause, Cresante would have been entitled under the Employment Agreement to four weeks salary, plus one additional week for his one year of service, for a total of five weeks of severance payments, conditioned upon his execution of a general release of claims.

Pursuant to Paragraph 2 of the Separation Agreement, Cresante was provided with a twelve-week severance arrangement:

> 2. Consideration. In consideration of his decision to enter into this Agreement, U.S. Security will provide Mr. Cresante with the following: A twelve (12) week severance arrangement at base pay

> covering the period of April 14, 2015 through July 7, 2015 ("the severance period"). This severance period satisfies the requirements of Section V(C) of the 2014 employment agreement. * * *

Paragraph 3 of the Separation Agreement further provides that the twelve-week severance arrangement is "not required" and that it satisfies "any severance requirement" under Section V(C) of the Employment Agreement:

> 3. No Obligation. Mr. Cresante agrees and understands that the consideration described in Paragraph 2 above is *not required* by U.S. Security's policies and procedures. Further, any severance requirement under Section V(C) of the 2014 employment agreement has been satisfied through the severance arrangement described in Paragraph 2.
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> (Emphasis added.)

Contrary to defendant's assertion, it does not follow from the Separation Agreement's mere reference to the severance provisions in the Employment Agreement that Cresante was in fact terminated without cause. The Separation Agreement simply provides for a severance arrangement that is seven weeks more than what would have been required under the Employment Agreement in the case of an involuntary discharge. While the Separation Agreement states that the severance arrangement "satisfies" any severance requirement under the Employment Agreement, the Separation Agreement also states that the severance offered is "not required." Indeed, the express statement that the severance arrangement is not required could indicate that the termination was not involuntary but that U.S. Security nevertheless offered Cresante a special severance arrangement. In any case, this court cannot reach a conclusion as to whether or not Cresante was terminated "without cause" solely on the basis of the above language in the Separation and Employment Agreements.

Moreover, even assuming that U.S. Security terminated Cresante without cause, defendant's argument that U.S. Security created an unenforceable forfeiture-for-competition clause fails. In *Post v. Merrill Lynch*, the Court of Appeals held that

> where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would

> forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand.
>
> 48 N.Y.2d at 89.

U.S. Security offered Cresante a twelve-week severance arrangement in the Separation Agreement as consideration for preserving the non-compete and non-solicitation clauses in the Employment Agreement. While Cresante may have been entitled to five weeks of severance (conditioned upon his release of claims and provided that the termination was without cause), he was not entitled to a twelve-week severance arrangement under the Employment Agreement after only one year of service. Thus, unlike *Post*, where the employer sought the forfeiture of the employee's previously earned pension benefits, here, the employee was offered post-employment severance benefits—benefits to which the employee would not otherwise be entitled—in exchange for preserving the non-compete and non-solicitation provisions in the Employment Agreement. *See Hyde v. KLS Prof'l Advisors Grp.*, LLC, 500 F. App'x 24, 26 (2d Cir. 2012) (cautioning the district court against "extending *Post* beyond its holding" where the district court had relied on *Post* to conclude that "restrictive covenants are *per se* unenforceable in New York against an employee who has been terminated without cause"); *Brown & Brown, Inc. v. Johnson*, 115 A.D.3d 162, 170 (4th Dept. 2014), *rev'd on other grounds,* 25 N.Y.3d 364 (2015) ("[*Post*] held that New York policies preclude the enforcement of *a forfeiture-for-competition clause* where the termination of employment is involuntary and without cause, i.e., a clause requiring the employee to comply with a restrictive covenant in order to continue receiving post-employment benefits to which the employee otherwise would be entitled."); *SecondMarket Holdings, Inc. v. Chakford*, 106 A.D.3d 606, 607 (1st Dept. 2013) (separation agreement's restrictive covenants were not invalid under *Post* because the separation agreement constituted a contract independent of previous employment agreement and employee "received additional benefits other than those he was entitled to under previous employment contracts").

Furthermore, on this record and at this early stage in the litigation, rejection of the restrictive covenants on the basis of reasonableness would be premature, as reasonableness is a fact-based inquiry. *See BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999) ("A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public"); *Chakford*, 106 A.D.3d at 607.

Therefore, this court rejects defendant's argument that U.S. Security created an unenforceable forfeiture-for-competition clause and concludes that plaintiff's allegations with respect to its first and second causes of action for breach of contract are sufficient to withstand dismissal at this stage in the proceedings.

Finally, turning to plaintiff's third cause of action for unjust enrichment,[1] defendant argues that U.S. Security has failed to state a cause of action for unjust enrichment because the cause of action is duplicative of the first two causes of action, which arise under contract. Plaintiff concedes that it cannot recover under both breach of contract and unjust enrichment, but asserts that it has properly stated an unjust enrichment claim as an alternative theory of recovery.

"Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 10 (1st Dept. 2012); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005); *see also Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987) ("A 'quasi contract' only applies in the absence of an express agreement[.]"). A plaintiff may proceed upon a quasi-contract theory of unjust enrichment "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue[.]" *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 405 (1st Dept. 2007).

Here, given that there is no dispute over the existence of the written employment and separation agreements governing the subject matter in issue, plaintiff may not proceed upon a quasi-contract theory of unjust enrichment. The cases that plaintiff cites in support of proceeding with its unjust enrichment claim are distinguishable in that they involve either no contract or alleged oral agreements governing the dispute. *See Beach v. Touradji Capital Mgmt. L.P.*, 85 A.D.3d 674, 927 (1st Dept. 2011) (court erred in dismissing unjust enrichment claim where no contract governing defendants' actions in withholding and reinvesting plaintiffs' compensation existed); *Winick Realty Grp. LLC v. Austin & Associates*, 51 A.D.3d 408 (1st Dept. 2008) (explaining that "the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement"); *Loheac v. Children's Corner Learning Ctr.*, 51 A.D.3d 476 (1st Dept.

[1] Plaintiff withdraws its fourth, fifth, and sixth causes of action against Cresante, for tortious interference with contractual relations, tortious interference with prospective economic advantage, and unfair competition, respectively.

2008) (plaintiff not precluded from bringing unjust enrichment claim in the alternative where "there is a dispute as to the scope of work intended by the original oral contract"). Accordingly, plaintiff has failed to state a cause of action for unjust enrichment.

Wherefore, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted solely to the extent that plaintiff's third cause of action for unjust enrichment is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's fourth, fifth, and sixth causes of action are withdrawn.

This constitute the decision of the Decision and Order of the Court. All other relief requested is denied.

Dated: October 7, 2016

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Eileen A. Rakower, J.S.C.