

Berkeley Research Group, LLC v FTI Consulting, Inc.

2016 NY Slip Op 32154(U)

October 24, 2016

Supreme Court, New York County

Docket Number: 652218/2016

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

-----X
BERKELEY RESEARCH GROUP, LLC.,

Plaintiff,

-against-

FTI CONSULTING, INC.,

Defendant.

-----X
O. PETER SHERWOOD, J.:

DECISION AND ORDER

Index No.: 652218/2016

Mot. Seq. No.: 001

In this action, plaintiff Berkeley Research Group, LLC (BRG), alleges breach of contract against FTI Consulting, Inc. (FTI), arising from defendant FTI's termination of one of two agreements the parties made after an FTI employee, Allen D. Applbaum, resigned to work for BRG. The complaint alleges breach of contract, breach of the implied covenant of good faith and fair dealing, and seeks a declaratory judgment that BRG does not owe FTI certain additional funds under the terms of one of the agreements. On this motion to dismiss the complaint, pursuant to CPLR § 3211 (a) (1) and (7), FTI argues that (1) the unambiguous contract grants FTI the ability to terminate the agreement at will; (2) the claim for breach of the implied covenant is both without merit and duplicative of the breach of contract claim; and (3) BRG's obligation to make payments pursuant to the continuing agreement is independent of the termination of the other agreement and the termination of BRG's obligation is not justified.

I. FACTS

As this is a motion to dismiss, the facts are taken from the complaint and are assumed to be true.

The parties, who are competitors, provide expert and consulting services. On January 8, 2015, Applbaum, who had been employed by FTI since 2006, gave notice of his intent to resign and go to work for BRG (First Amended Complaint [FAC], NYSCEF Doc. No. 14, ¶ 12). He continued to work at FTI for seven more weeks to aid in the transition (*id.*). Applbaum started working at BRG on March 1, 2015 (*id.*, ¶ 13). Subsequently, FTI claimed Applbaum breached the terms of his employment agreement with FTI, including a non-compete clause (*id.*, 14). The parties resolved that dispute by entering into a Settlement Agreement and a separate Subcontractor Agreement (incorporated into the Settlement Agreement by reference) dated March 27, 2015, which *inter alia*,

(1) provided for Applbaum to perform certain services for FTI in connection with two matters Applbaum originated while at FTI (*id.*, ¶ 22), (2) provided for BRG to receive from FTI a portion of the fees earned for his work, (3) obligated BRG to pay FTI 12.5% of revenue generated by work performed by Applbaum and 10% of other BRG employees' work on Applbaum's matters during Applbaum's first year at BRG (*id.*, ¶¶ 14-18), and (4) required BRG to make two payments to FTI - \$250,000 shortly after execution of the Settlement Agreement and \$250,000 on the first anniversary of execution of the agreements (*id.*, ¶ 20). BRG made the first payment only.

On December 15, 2015, approximately eight months after the settlement was entered into, FTI gave notice of termination of the Subcontractor Agreement and Applbaum's involvement in FTI matters (*id.*, ¶ 28).¹ BRG objects to termination of the Subcontractor Agreement and asserts a claim for breach of contract based on FTI's failure "to comply with the express limitation on the right to terminate the Settlement Agreement under Section 4(b)" (*id.*, ¶ 38). BRG also seeks a declaratory judgment that it is not required to make the second \$250,000 payment.

The parties' arguments center around these terms of the agreements:

Subcontractor Agreement ¶ 1(B) (Paragraph 1[B]):

"Subject to Section 4 of the Settlement Agreement, which is incorporated herein, either Party may immediately terminate the Agreement or any Statement of Work by delivering written notice to the other party"

Settlement Agreement § 4 (Section 4):

"(a) BRG and/or Applbaum will act as a subcontractor(s) on all work performed by Applbaum on existing FTI matters, as set forth in the [Subcontractor Agreement]. BRG shall provide to FTI periodic . . . invoices which contain sufficient detail regarding the time spent on FTI Matters and descriptions of the work performed with respect thereto. FTI shall pay to BRG 85% of all revenue collected by FTI on work billed by Applbaum on FTI Matters. Amounts due pursuant to this provision shall be payable to BRG within thirty . . . days of such revenue being collected by FTI.

(b) The Parties agree that a material consideration for Applbaum and BRG of this Agreement is the execution of and compliance with the Subcontractor Agreement ...

¹According to the FAC, eleven (11) days earlier, "several FTI employees with no affiliation to Appelbaum, working in FTI's New York City office, resigned from FTI and joined BRG shortly thereafter" (FAC, ¶ 27).

and further agree that this Agreement shall not become effective until the Subcontractor Agreement has been executed by all parties. . . . The Parties agree to work together to serve the best interests of these two clients and hereby confirm to each other to cooperate in good faith to do so. FTI does not have any present intention of replacing Applbaum as the team leader on these engagements, and it is currently contemplated that he will remain the team leader”

II. ARGUMENTS

A. FTI's Argument

FTI argues that the terms of the two agreements allow it to terminate the Subcontractor Agreement by simply providing written notice for any reason or no reason (Memo at 8-9). While section 4(b) of the Settlement Agreement contained a statement that, as of signing, FTI did not intend to replace Applbaum, it did not prevent such a decision later. Further, BRG does not allege that, while working together, FTI failed to “cooperate in good faith” to serve best interests of the affected clients (*id.* at 9). FTI maintains that, as the unambiguous contract gives it the freedom to terminate the arrangement without restriction or cause, exercise of that option is neither a breach, nor an instance of bad faith (*id.* at 10, citing *Red Apple Child Dev. Ctr. v Community School Districts Two*, 303 AD2d 156, 157 [1st Dept 2003] [“when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms”]). Nor can the implied covenant of good faith and fair dealing negate an “express contractual right to terminate the lease at any time without liability” (Memo at 11, quoting *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004]).

FTI argues that the second claim, for breach of the implied covenant, is duplicative of the breach of contract claim because both claims rely on the same allegations that FTI failed to adhere “to the express limitations set forth in Section 4(b) of the Settlement Agreement” and by wrongfully terminating the Subcontractor Agreement (Memo at 12- 13 citing Complaint at 10).

As to the third claim, for a declaratory judgment, FTI argues that this claim must fail because it depends on a finding that FTI improperly terminated the Settlement Agreement, which it did not do. It had the right to terminate the Subcontractor Agreement in the way it did (*id.* at 13-14).

B. BRG's Opposition

BRG disputes that FTI had a right to terminate the Subcontractor Agreement without cause (Opp at 1). BRG argues that section 4(b) of the Settlement Agreement and paragraph 1(B) of the Subcontractor Agreement, read together, are ambiguous, and that section 4(b) places "an express limitation on any right to terminate the Subcontractor Agreement," in conflict with the broad termination rights described in paragraph 1(B) (Opp at 5, 7-8). BRG argues that "a clear reading [of the terms together] reveals that FTI could not terminate the Subcontractor Agreement before the work on the FTI Matters concluded unless Applbaum or BRG failed to comport with section 4(b)" (*id.* at 9). BRG states that FTI's interpretation would allow it to terminate the agreement and still collect \$500,000, without providing BRG with the benefit of its bargain (*id.* at 8). BRG contends that FTI's interpretation also incorrectly prioritizes the general termination language of Paragraph 1(B) over the more specific requirements of section 4(b) (*id.* at 11 citing *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956] ["if there was an inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls"]).

Further, BRG claims there are issues of fact as to whether BRG and FTI worked together in good faith, as required by section 4(b) (*id.* at 6-7). BRG has alleged that FTI's termination of the Subcontractor Agreement and alleged breach of the Settlement Agreement were "done in the utmost bad faith for non-legitimate reasons" (FAC, ¶ 29). BRG points to the lack of complaints about Applbaum's services, the lack of notice to one client that Applbaum was being terminated, and clients' disappointment at his termination as proof that FTI had no cause to terminate the Subcontractor Agreement (Opp at 7). BRG also argues that the eight months during which the parties acted under the agreements established a course of dealing which illustrates their "intent to have Applbaum continue his work as team leader on the FTI Matters resulting in a revenue source for BRG to fund its lump sum payments to FTI under the Settlement Agreement" (Opp at 10).

As to the claim for breach of the implied covenant of good faith and fair dealing, BRG argues that the claim is separate from the breach of contract claim, noting that the covenant was made explicit in section 4(b) of the Settlement Agreement (*id.* at 13). BRG contends this claim is based on FTI's actions in terminating the Subcontractor Agreement in retaliation for several FTI employees

having left to go to work for BRG (*id.*). BRG also contends this claim is brought in the alternative to the breach of contract claim (*id.* at 13-14).

Finally, BRG argues that its claim for a declaratory judgment should survive, because its obligation to perform under the Settlement Agreement was cancelled by FTI's failure to provide the corresponding consideration (*id.* at 14-15).

C. FTI's Reply

In reply, FTI argues that the contracts are unambiguous and create an unfettered right to terminate at will, as only one interpretation of the clause is reasonable (Reply at 4-8). Regarding BRG's claim that FTI breached the contractual requirement that the parties act in good faith, FTI contends this obligation only applies to pre-termination conduct, and BRG fails to allege FTI acted in bad faith in any way before terminating the agreement (*id.* at 8-9). BRG makes no allegations that FTI had intentions other than those stated in the agreements at the time of signing. All of the other factual issues argued by BRG are irrelevant, as the terms of the agreement are unambiguous and do not govern FTI's conduct in terminating the Subcontractor Agreement, only in acting under the agreements (*id.* at 9).

As to BRG's claim that the covenant of good faith and fair dealing is made explicit in section 4(b), any separate claim for breach of the implied covenant is duplicative of a claim for breach of that term of the contract (*id.* at 9-10). Moreover, the claim is duplicative because it is based on the same conduct and seeks the same relief as the breach of contract claim (*id.* at 10). Further, the covenant of good faith and fair dealing cannot impair the contractual right of a party to terminate a contract without cause (*id.* at 11, citing *Berzin v W.P. Carey & Co., Inc.*, 293 AD2d 320, 321 [1st Dept 2002]; *Red Apple*, 303 AD2d at 157-58 ["It is a well-established principle of law that when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms . . . without court inquiry into whether the termination was activated by an ulterior motive"]).

Regarding the declaratory judgment cause of action, FTI asserts that BRG's obligation to make the lump sum payments pursuant to the Settlement Agreement is separate from and unaffected by termination of the Subcontractor Agreement, and that the terms of the Settlement Agreement included fee sharing for Applbaum's work originated during his first year at BRG, the lump sum

payments to FTI, and BRG/Appplbaum acting as a subcontractor on certain open FTI matters (Reply at 12-13). The lump sum payments were to be made “in connection with the FTI Revenue Share for work originated by Appplbaum *after the effective date of the Settlement Agreement*,” as opposed to already existing matters, which were the subject of the Subcontractor Agreement (*id.* at 13, emphasis in original, citing Settlement Agreement, § 3 [the lump sum payments are “an offset against and shall be deducted from any amounts owed to FTI under” the revenue share provisions]).

III. DISCUSSION

A. Standard CPLR § 3211 (a) (1)

To succeed on a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations, *conclusively establishing* a defense as a matter of law [citation omitted]” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, “the contents of which are ‘essentially undeniable’” (*id.* at 84-85).

B. Standard CPLR § 3211 (a) (7)

On a motion to dismiss a claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take

the allegations of the [pleading] as true and provide [the party opposing the motion] the benefit of every possible inference [citation omitted]. Whether [the party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the facts as alleged in the pleading fit within any cognizable legal theory, not whether there is evidentiary support to establish a meritorious cause of action or counterclaim (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

C. Claim 1- Breach of Contract

In order to state a claim for breach of contract, a plaintiff must allege that: (1) a contract exists between the parties; (2) plaintiff performed under the contract; (3) defendant breached the contract; and (4) plaintiff sustained damages as a result (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). It is undisputed that the Settlement Agreement and the Subcontractor Agreement are valid contracts, and there is no argument that BRG perform. The disputed issue is whether FTI breached section 4 of the Settlement Agreement by terminating the Subcontractor Agreement.

FTI argues that the terms of the Subcontractor Agreement allow it to terminate that agreement at will. BRG responds that the termination clause of the Subcontractor Agreement is ambiguous, given the language in section 4(b) of the Settlement Agreement. “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no

provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The terms of the two agreements are unambiguous and they do not conflict. The Settlement Agreement states that execution and compliance with the Subcontractor Agreement are “material considerations” for BRG entering into the Settlement Agreement (Settlement Agreement § 4 [b]). It also obligates both parties act in good faith to serve the interests of the FTI clients for which Applbaum would be a subcontractor. It does not, as BRG contends, prohibit FTI from terminating the Subcontractor Agreement before completion of the FTI Matters. “[C]ooperat[ing] in good faith” to “serve the best interests of” the FTI clients could include re-staffing the matters. This interpretation does not leave any provision of either contract without force and effect. If the parties had wanted to make the Subcontractor Agreement terminable only for cause, or wished to place other restrictions on termination, they could have done so. They did not.

BRG points to the decision to terminate and the manner in which the staffing change was communicated to clients as evidence of FTI’s failure to cooperate in good faith in violation of section 4 (b) of the Settlement Agreement (Opp at 6-7). Because BRG had the right, without restriction, to terminate the Subcontractor Agreement, exercise of that express contractual right cannot constitute a failure to cooperate in good faith (*see Prod. Products Co. v Vision Corp.*, 270 AD2d 922, 922 [4th Dept 2000][when a party “has an ‘unfettered right’ to terminate the Agreement [, it is not] subject to an implied obligation of good faith; such an implied obligation would be inconsistent with the unfettered right of termination”]). The *Production Products* court also noted that the agreement there had no express provision requiring good faith with respect to termination (*id.*). The good faith provision in the Settlement Agreement similarly does not address termination of the Subcontractor Agreement. Rather, section 4 (b) merely requires the parties to work together in good faith to serve the best interests of the two clients referenced therein (*see* Settlement Agreement, § 4 [b] [“The parties agree to work together to serve the best interests of these two clients and hereby confirm to each other to cooperate in good faith *to do so*”] [*emphasis added*]). Further, the alleged post-termination conduct, failing to give notice to the affected clients . . . , does not amount to the breach of the cooperation requirement.

D. Claim 2- Breach of Implied Covenant of Good Faith & Fair Dealing

It is well settled that within every contract there is an implied covenant of good faith and fair dealings (see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant “embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; see also *6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (see *Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (see *511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promise that a reasonable person in the position of the promisee would be justified in understanding were included (see *511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties’ agreement (see *Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (see *Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (see *Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 222 AD2d 17, 22 [1st Dept 1996]).

This claim is based on FTI’s termination of the Subcontractor Agreement and is pleaded as an alternative to the breach of contract claim. As BRG acknowledges, the requirement of good faith

is embodied in the Settlement Agreement itself (Opp at 13). This claim is also based on the same facts as the breach of contract claim. A “claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts” (Logan Advisors, LLC v Patriarch Partners, LLC, 63 AD3d 440, 443 [1st Dept 2009]). For this reason, the second cause of action must be dismissed. Further, the claim fails because, as termination is expressly authorized by section 1B of the Subcontractor Agreement, such termination cannot qualify as a breach of the covenant of good faith and fair dealing.

E. Claim 3- Declaratory Judgment

The claim for declaratory judgment asks the court to determine that BRG’s obligation to pay the second lump sum payment pursuant to section 3 of the Settlement Agreement is waived by FTI’s failure to provide the consideration, namely the work contemplated by the Subcontractor Agreement (Opp at 14-15). However, as a determination that BRG is excused from performing hinges on a finding that FTI breached the Settlement Agreement, and none of the pleaded facts constitute such a breach, this claim must be rejected.

Accordingly, it is hereby

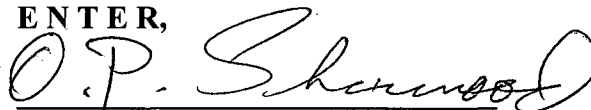
ORDERED that the motion of defendant FTI to dismiss the amended complaint is GRANTED; and it is further

ORDERED that judgment to be entered in favor of defendant FTI Consulting, Inc. and against plaintiff Berkeley Research Group, LLC. dismissing the case in its entirety, together with costs and disbursements as taxed by the Clerk of the Court upon submission of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: October 24, 2016

ENTER,



O. PETER SHERWOOD

J.S.C.