SHORT FORM ORDER

INDEX NO.: 604159-15

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-19-16
SUBMITTED: 2-25-16
MOTION NO.: 004-MD
005-XMD

FRANKLIN FIRST FINANCIAL, LTD.,

Plaintiff,

-against-

CONTOUR MORTGAGE CORPORATION, GREGORY M. BORK and ARTHUR W. MOST II,

Defendants.

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Upon the following efiled documents read on this motion to dismiss and cross-motion to amend; Notice of Motion and supporting papers 53-62; Notice of Cross Motion and supporting papers 64-66; Answering Affidavits and supporting papers 70-74; Replying Affidavits and supporting papers ____; it is,

ORDERED that the motion by the plaintiff for an order dismissing the counterclaims of the defendant Arthur W. Most II pursuant to CPLR 3211 (a) (1) and (7) is denied; and it is further

ORDERED that the motion by the defendants for leave to amend their answer to included a counterclaim for unjust enrichment is denied as academic.

The plaintiff, Franklin First Financial, Ltd. ("Franklin First"), is a mortgage lender whose principal place of business is in New York. The defendant Arthur W. Most II ("Most") was Franklin First's Chief Financial Officer from June 1, 2010, until May 16, 2014. The

defendant Gregory M. Bork ("Bork") was employed by Franklin First as a loan officer and branch manager from September 27, 2012, through March 26, 2015. The terms of their employment with Franklin First were governed by a series of agreements, inter alia, that prohibited them from disclosing Franklin First's confidential and proprietary information to third-parties and competitors and prohibited them from soliciting Franklin First's employees to leave its employ. Most and Bork went to work for the defendant Contour Mortgage Corporation ("Contour"), another mortgage lender and a direct competitor of Franklin First, after leaving Franklin First's employ. The plaintiff alleges that Most and Bork misappropriated and used Franklin First's confidential and proprietary information while employed by Contour and solicited Franklin First's employees to work at Contour in violation of their agreements. On April 6, 2015, Franklin First sent cease-and-desist letters to Most, Bork, and Contour, who responded by denying Franklin First's allegations. This action ensued.

The complaint contains 13 causes of action to recover damages for misappropriation of trade secrets, breach of contract, breach of fiduciary duty, and unfair competition, among other things. By an order of this court dated September 24, 2015, the action was stayed as against Bork; the plaintiff and Bork were directed to proceed to arbitration, and the complaint was dismissed in part against Contour and Most. The defendants subsequently answered the complaint. The answer contains two counterclaims by Most for breach of contract and quantum meruit, respectively. The plaintiff moves to dismiss Most's counterclaims pursuant to CPLR 3211 (a) (1) and (7), and the defendants cross-move for leave to amend their answer for Most to assert a third counterclaim for unjust enrichment.

A motion to dismiss extends the movant's time to answer and, thus, extends the time in which the opposing party may amend his pleading as of right (CPLR 3025 [a]; CPLR 3211 [f]; **Toikach v Basmanov**, 31 Misc 3d 615, 618). Since the plaintiff's motion to dismiss Most's counterclaims extended the defendants' time to serve and file an amended answer, the defendants' cross motion is unnecessary. Accordingly, the cross motion is denied as academic.

The amended answer superceded the original answer (*see*, **Re-Poly Mfg. Corp. v Dragonides**, 109 AD3d 532, 535). The plaintiff, however, does not address the merits of the third counterclaim for unjust enrichment in its reply papers and merely asks the court to reserve decision on the cross motion. The court finds that, under these circumstances, the plaintiff has not elected to apply its motion to dismiss to the amended complaint (*see*, **Sobel v Ansanelli**, 98 AD3d 1020, 1022). Accordingly, the court will consider the dismissal motion as addressed to the first and second counterclaims for breach of contract and quantum meruit only.

The basis of the first counterclaim for breach of contract is a written offer of employment contained in a letter dated May 14, 2010, that was signed and accepted by Most on May 19, 2010, and the first addendum thereto. The parties agree that the letter does not provide for employment for a specific period of time and that Most's employment was at-will. The letter, however, does provide that Most "will receive a bonus structure outline[d] on addendum #1." Addendum #1 sets forth a quarterly bonus structure based on Franklin First's quarterly profits.

The first counterclaim alleges that Franklin First and its president and principal, Frederick Assini ("Assini"), manipulated the books and records to reduce Franklin First's quarterly profits and avoid paying Most the full amount of his bonuses.

The plaintiff contends that the offer-of-employment letter dated May 14, 2010, is not a binding contract because it clearly provided that Most's employment with Franklin First was at-will and that "neither this letter nor any other oral or written representations may be considered a contract for any specific period of time."

It is well settled that neither party has a cause of action for breach of contract when the contract is one for employment at will (**Lerman v Med. Assocs. of Woodhull**, 160 AD2d 838, 839, *citing* **Sabetay v Sterling Drug**, 69 NY2d 329). However, New York has a longstanding policy against the forfeiture of earned wages (**Mirchel v RMJ Securities Corp.**, 205 AD2d 388, 389). Thus, even an at-will employee may enforce an agreement to pay a bonus made at the onset of the employment relationship when such bonus constitutes an integral part of the employee's compensation package (**Id.**). The employer cannot argue that the bonus is discretionary when it is an integral part of the compensation package and it has already been earned by the time the employer decides not to pay it. At that point, the failure to pay it constitutes a breach of the contract of employment (**Simpson v Lakeside Engineering**, 26 AD3d 882, 882-883 [and cases cited therein]). Most alleges that he had an enforceable employment agreement with Franklin First based upon the offer and acceptance of quarterly bonus payments, which were an integral part of his compensation package. Most also alleges that the bonuses were earned, but that, by manipulating the company's profits, Franklin First failed to pay him all that he was entitled to receive.

Relying on language in addendum #1 that "management has the sole right to determine profit," the plaintiff contends that it had no duty to pay bonuses because the bonuses were discretionary. Contrary to the plaintiff's contentions, that language does not indicate that the bonuses were discretionary. In the absence of clear language that a bonus is "purely discretionary," discretion will not be implied (**Doolittle v Nixon Peabody LLP**, 126 AD3d 1519, 1520-1521).

The plaintiff also contends that Most's allegations fail to identify the contract terms that were breached and the quarters and/or years for which Most claims bonuses. In order to state a cause of action to recover damages for breach of contract, the provisions of the contract that were breached must be identified (**Barker v Time Warner Cable, Inc.**, 83 AD3d 750, 751). Most alleges that it was addendum #1 to the offer-of-employment letter dated May 14, 2010, that was breached. Most also alleges that the damages sought are "in excess of $100,000." The court finds that these allegations are sufficiently particular to apprise the court and the parties of the subject matter of the controversy (**Albemarle Theatre v Bayberry Realty Corp.**, 27 AD2d 172, 177-178). The court need not look to see if the claim has been proven in the pleadings. Rather, the court will only look to see if the pleader states a cognizable cause of action (**Bones v Prudential Fin. Inc.**, 17 Misc 3d 656, 660, *revd on other grounds* 54 AD2d 589).

Construing the first counterclaim liberally and accepting the facts alleged therein as true (**Minelli v Soumayah**, 41 AD3d 388, 389), the court finds that it is legally sufficient to state a cause of action for breach of contract. The court also finds that the documentary evidence upon which the plaintiff relies fails to conclusively establish a defense to the first counterclaim as a matter of law (**Leon v Martinez**, 84 NY2d 83, 88). Accordingly, the court declines to dismiss the first counterclaim.

The second counterclaim for quantum meriut alleges that Most was required to perform accounting and management-related services that were outside of the scope of his employment for entities that were owned by or affiliated with Franklin First and/or Assini and that received no compensation for his services. Relying on language in the second addendum to the offer-of-employment letter dated May 14, 2010, the plaintiff contends that Most's job duties included "clos[ing] out the financial (GAAP) based reporting for warehouse lines, banking departments, and **other entities that require monthly reporting**" (emphasis added).

It is well settled that a contract is to be construed in accordance with the parties' intent (**MHR Capital Partners LP v Presstek, Inc.**, 12 NY3d 640, 645). The best evidence of what the parties intended is what they said in their writing (**Greenfield v Phillies Records, Inc.**, 98 NY2d 562, 569). A written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms (**Id.**). A court may not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction (*see*, **Reiss v Financial Performance Corp.**, 97 NY2d 195, 199). Moreover, a court should be extremely reluctant to interpret an agreement as impliedly stating something that the parties have neglected to specifically include (*see,* **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475).

Applying these principles, the court finds that it cannot be determined from the above-quoted language alone exactly what the parties intended and whether the alleged additional services performed by Most were included therein. Moreover, since Most alleges that he performed services that were outside the scope of his employment, the agreement with Franklin first does not completely cover their dispute, and Most may proceed under both quantum meruit and breach of contract (**Clark-Fitzpatrick Inc., v Long Is. R.R. Co.**, 70 NY2d 382, 388-389; **Ashwood Capital, Inc. v OTG Mgt., Inc.**, 99 AD3d 1, 10-11).

The plaintiff contends that Most's quantum-meriut claim is barred by the statute of frauds. However, since Most was an at-will employee, he was not subject to the writing requirement of General Obligations Law § 5-701 (a) (1) (**Hayden v P. Zarkadas, P.C.**, 18 AD3d 500, 501).

Construing the second counterclaim liberally and accepting the facts alleged therein as true (**Minelli v Soumayah**, 41 AD3d 388, 389), the court finds that it is legally sufficient to state a cause of action for quantum meriut. The court also finds that the documentary evidence upon which the plaintiff relies fails to conclusively establish a defense to

the second counterclaim as a matter of law (**Leon v Martinez**, 84 NY2d 83, 88). Accordingly, the court declines to dismiss the second counterclaim.

Dated: May 24, 2016

J.S.C.

ELIZABETH H. EMERSON