SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

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RONALD BURKHARDT,

Plaintiff,

- v -

XA, THE EXPERIENTIAL AGENCY, INC. and CMG HOLDINGS, INC.

Defendants.

INDEX NO. 653173/2014

MOTION DATE 10/21/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER.

Upon the foregoing documents, it is

In this action for breach of an employment contract, defendants XA, The Experiential Agency, Inc. ("XA") and CMG Holdings Group, Inc. ("CMG") move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint of plaintiff Ronald Burkhardt ("Burkhardt").

In late January 2014, Burkhardt became the Executive Chairman of XA, a wholly owned subsidiary of CMG. Pursuant to a written Employment Agreement (the "Agreement"), dated February 1, 2014, Burkhardt's duties included generating new

business, interacting with senior client management, and formulating a strategy to maximize XA's profitability. The Agreement set Burkhardt's base annual salary at $200,000, but XA agreed to increase it to $250,000 upon the date that the "current Chief Executive Officer as of the date of this Agreement either resigns from such position or is terminated."

The Agreement set Burkhardt's term of employment as February 1, 2014 to December 31, 2016, and provided, with respect to termination for cause, in pertinent part, as follows:

> The Company shall have the right to terminate the employment of [Burkhardt] under this Agreement, as well as any and all compensation to which [Burkhardt] would otherwise be entitled, . . . if, and only if, [Burkhardt] shall have committed any of the following acts (any such act being hereinafter referred to as "Act of Cause" or "for cause"):
>
> (i) In the event [Burkhardt] shall fail or refuse materially to comply with the duties and responsibilities assigned to him or the policies, procedures or regulations of the Company from time to time reasonably established or shall fail to comply with a written directive of the Board . . .
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> ***
>
> (iii) [Burkhardt] shall have committed any act or acts of such an egregious nature that it would bring discredit to the Company or be detrimental to the reputation, character and standing of the Company

With respect to termination without cause, the Agreement states:

> The Employee's employment with the Company may be terminated by the Company at any time for or without cause provided, however, that, notwithstanding anything contained herein to the contrary, in the event Employee is terminated by Company without cause then

> and in that event Employee shall continue to receive Employee's compensation, benefits and any accrued bonus, as set forth in Section 4 hereof for the remaining term of this Agreement or until Employee has obtained comparable employment or other arrangement for compensation that is not involved in experiential or event driven advertising in competition with the Company (as defined in Section 6 hereof) and does not violate any of Employee's covenants set forth in said Section 6.

The Agreement also contains a noncompete covenant (Section 6), which states that, "[Burkhardt] agrees that while employed by the Company, and for 180 days following the termination of such employment, not to engage, either directly or indirectly, in experiential or event driven advertising, other than as an employee of the Company." XA's remedies for a violation of the noncompete clause are set forth in paragraph 7:

> [Burkhardt] agrees that the rights of the Company provided by Section 6 of this Agreement are special, unique and of extraordinary character and that the Company will be without an adequate remedy at law if [Burkhardt] violates any of those covenants. Accordingly, the Employee agrees that the Company shall be entitled to injunctive relief to enforce such covenants.

XA terminated Burkhardt on or about July 15, 2014. A termination letter from XA to Burkhardt, dated July 10, 2014, states that Burkhardt's employment was terminated for failing to (1) "enhance company culture" by, among other things, referring to certain XA employees as "faggots" and arriving late to the office; (2) take steps "to formulate a strategy to implement changes to make XA profitable"; (3) generate new

business; (4) interact with XA's largest client, NBC; and (4) manage XA management or personnel, "particularly after *all* of the employees of the New York office resigned."

The termination letter states that Burkhardt's behavior violated paragraph 5 (e) (iii) of the Agreement and that Burkhardt also failed to carry out various duties/responsibilities enumerated in Exhibit A of the Agreement.

On October 20, 2014, Burkhardt filed a complaint containing a single cause of action for breach of the Agreement. The complaint alleges that, contrary to the termination letter's proffered reasons for his termination with cause, Burkhardt was terminated without cause. Because Burkhardt believes his termination to be without cause he seeks: (1) approximately $17,000 in salary that he was entitled to receive for the period from mid-March through July 2014, based upon the contractual language to increase his salary from $200,000 to $250,000 annually for that period of time; (b) approximately $120,000 for ongoing compensation for the period between July 15, 2014 and December 31, 2014; (c) $500,000 in compensation from January 1, 2015 through December 31, 2016, calculated at the rate of $500,000 annually; and (d) approximately $58,000, representing the value of benefits he did not receive for the period from July 1, 2014 through December 31, 2016.

XA and CMG now move for summary judgment and contend that Burkhardt breached the Agreement and was, therefore, terminated for cause. XA and CMG state, among other things, that "Burkhardt was hired to 'generate new business, build

relationships with senior management of existing clients (to foster economic growth) and formulate strategy to maximize XA profitability.'" The Company maintains that Burkhardt was terminated because: (a) he failed to generate any new business; (2) he never interacted with the senior management of NBC, and failed to attend "NBC Upfront," XA's "biggest event of the year for its biggest client," and (c) he had no plan for "XA's survival after the departure of XA CEO, Joseph Wagner," and other executive-level employees.

Further according to XA and CMG, before, during, and after Burkhardt's employment with XA, Burkhardt was the 100% owner of Burkhardt Limited, which marketed experiential advertising services to clients and potential clients. XA and CMG argue that immediately after he was terminated, Burkhardt resumed business through Burkhardt Limited, which made experiential advertising a high priority and increased its emphasis on the experiential advertising work it previously had done. Thus, XA and CMG posit that even if Burkhardt was not terminated for cause, "the provisions of the agreement do not entitle him to be paid if he maintains an ownership interest after termination in an entity that he engages in, Experiential Advertising, which he admittedly did in his deposition."

In opposition, Burkhardt argues that the Agreement does not indicate that he was subject to termination for cause if he did not make a certain level of sales by a certain date. It is Burkhardt's contention that it would not have been reasonable to expect him to

generate business within five months, and, therefore, he did not "fail or refuse" to generate business. Further, Burkhardt argues that "nothing in the Agreement purports to link 'for cause' with any of the 18 job activities Burkhardt was to perform; and that nothing in the Agreement suggests that failure to perform one of the duties is a 'for cause' event." He argues that there are material factual questions concerning whether he performed these responsibilities.

Finally, Burkhardt argues that he has not engaged in the experiential marketing business since he was terminated from XA. Further, he argues that the noncompete covenant is unenforceable, because it does not protect any legitimate business objectives of XA.

Discussion

A party moving for summary judgment is required to make a prima facie showing of its entitlement to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The party opposing summary judgment must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Termination for Cause

Under New York law, where "the satisfactory performance of duty is the condition upon which the continuation of employment depends, it is the employer's prerogative to

determine whether the employee is, in fact, living up to the terms of his or her employment." *Golden v. Worldvision Enters.*, 133 A.D.2d 50, 51 (1st Dept. 1987). Moreover, employers do not usually need an objective basis for their dissatisfaction and "the only requirement, and indeed the only relevant point of inquiry by a court, is whether the employer's dissatisfaction was genuine." *Id.* This is especially true in situations concerning the job performance of "high-level managers." *Id.*

Burkhardt testified at his deposition that, under the Agreement, he was responsible for generating new business, and, although he tried to bring in clients to XA during his five-month employment there, he did not successfully do so. He further testified that "[i]t was [his] understanding that there is a lag time of many months, sometimes even years between an initial presentation to a potential client and the client's signing on with an agency."

With respect to his work for XA on the NBC account, he testified at his deposition that, after the senior executives left XA, he tried to establish a relationship with NBC. Prior to that, he did not feel the need to create such a relationship because "[t]he client was happy and money was coming in, and the staff was doing a good job with the work."

Burkhardt additionally testified that Joe Wagner ("Wagner"), XA's CEO at the time, was "resistant" to Burkhardt contacting NBC, "insisting there was no reason." Burkhardt testified that Wagner "discouraged" him from attending the UpFront event. After Wagner left in April 2014, Burkhardt reached out to NBC's liaison. Burkhardt

contends that Wagner was not cooperating with him; he testified that it was "to [Wagner's] advantage to see me fail . . . "[b]ecause I came in over him and he resented me, in my opinion."

Burkhardt further avers in his affidavit that within weeks of his taking the position at XA, the head of public relations at XA resigned. According to Burkhardt, this "resignation was wholly unrelated to anything I did or said." Likewise, Burkhardt states, the resignations of executive staff, within a couple of months of his employment at XA, was not a consequence of any of Burkhardt's actions. He states that he worked with Wagner for only a few months and that within a month of Wagner's leaving, Wagner's XA associates also left XA. Burkhardt avers that he "made efforts, many of them successful, to identify individuals who could perform the duties of the departed employees."

Finally, Burkhardt notes in his affidavit that, during the term of his employment when he was not working in XA's New York office, "[he] was either in the firm's Chicago office or meeting with potential clients or potential creative partners with whom [he] was discussing coming on board at XA in some capacity."

Burkhardt's submissions raise questions of material fact as to whether he was fired for cause. XA and CMG argue that Burkhardt concedes that, during his employment at XA, he did not obtain new clients, did not meet with NBC, that several members of the XA executive staff resigned within weeks of the commencement of Burkhardt's

employment, and that there were periods of time when he was not working in the New York office. In his sworn testimony, however, Burkhardt offers several explanations for these circumstances that undercut the position of XA and CMG that their "dissatisfaction" with Burkhardt's work "was genuine," and raise questions of fact about whether he was fired for cause. For example, Burkhardt's submissions raise questions about whether his failure to obtain new clients within the five months of his employment was a violation of his responsibilities under the Agreement, or whether he fulfilled his contractual obligation through his ongoing attempts to attract new clients, and whether he could have obtained any new clients for XA in the short period of time he was employed.

For the foregoing reasons, I deny summary judgment in favor of XA and CMG dismissing the breach of contract cause of action.

Noncompete Provision

XA and CMG allege that immediately following his termination from XA, Burkhardt "resumed conducting business through Burkhardt Limited" – a company wholly owned by Burkhardt that marketed experiential advertising services. XA and CMG believe that, even if Burkhardt was not fired for cause, he is not entitled to any compensation because his post-termination employment with Burkhardt Limited violated Section 6 of the Agreement.[1]

[1] Section 6 limited Burkhardt "for 180 days following the termination of [his] employment. . . [from] having an active ownership or other financial interest in" the business of experiential or event driven advertising.

In addition, XA and CMG argue that Burkhardt's work at Burkhardt Limited also violated Section 5 (c) of the Agreement, entitled "Covenants Relating to Customers and Prospective Customers," in that his post-termination employment involved experiential work, and that consequently no further compensation, benefits or any accrued bonus are due him even if he was terminated without cause.[2] To support this contention, XA and CMG cite Burkhardt's March 1, 2016 deposition testimony, during which he stated that after his termination from XA, he resumed his work at Burkhardt Limited, making experiential advertising a priority and increasing its emphasis on this type of advertising.

According to Burkhardt's testimony, after his termination from XA, he returned to Burkhardt Limited, a company that he solely owns. Burkhardt testified that Burkhardt Limited worked primarily in branding and advertising, and increased its work in experiential advertising at some point after he left XA. This type of work could prohibit his receipt of continued compensation under the language of paragraph 5 (c). When asked whether Burkhardt Limited offered its services to do experiential advertising

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[2] Section 5 (c) of the Agreement provided for the continued payment of compensation to Burkhardt, after termination and for the remaining term of the Agreement until

> [Burkhardt] has obtained comparable employment or other arrangement for compensation that is not involved in experiential or event driven advertising in competition with the Company (as defined in Section 6 hereof) and does not violate any of Employee's covenants set forth in said Section 6.

continuously for the last ten years, Burkhardt responded: "In theory, except when I was working full-time."

Burkhardt submitted an affidavit in opposition to this summary judgment motion, in which he avers: "Since my termination from XA, I have not earned any money from experiential advertising or marketing. I have not obtained employment comparable to that provided for in the Employment Agreement."

I find that Burkhardt's deposition testimony and affidavit do not fix a precise time when Burkhardt began engaging in experiential advertising – *i.e.*, whether it was within 180 days of his leaving XA, and, thus, whether, under paragraph 5 (c) of the Agreement, this work prohibited Burkhardt from receiving compensation. There are questions of fact as to when Burkhardt returned to his work at Burkhardt Limited and the nature of that work which preclude summary judgment for XA and CMG based on the noncompete provisions of the Agreement.

In accordance with the foregoing, it is

ORDERED that defendants XA, The Experiential Agency, Inc.'s and CMG Holdings Group, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that counsel for the parties shall appear for a pre-trial conference at 60 Centre Street, Room 208 on November 29, 2017 at 2:15pm.

This constitutes the decision and order of the Court.

10/12/2017
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE