

Sarfati v Covenant Mgt. Group, LLC

2019 NY Slip Op 30878(U)

March 28, 2019

Supreme Court, New York County

Docket Number: 653390/2015

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

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DANNY SARFATI and PHRONESIS ADVISORS,
LTD.,

Index No. 653390/2015

Plaintiffs,

-against-

COVENANT MANAGEMENT GROUP, LLC,
COVENANT ADVANTAGE FUND II MM, LLC,
COVENANT ADVANTAGE FUND II, LLC,
COVENANT ADVANTAGE FUND MM, LLC and
LAURENCE ROBERTS,

DECISION AND ORDER

Defendants.

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MELISSA ANNE CRANE, J.S.C.:

These competing summary judgment motions arise in a dispute over two personal service agreements pursuant to which plaintiff Danny Sarfati (Sarfati) performed services as a securities trader. The court consolidates motion sequence numbers 003 and 004 for disposition.

Sarfati, a New York resident, is the sole owner of plaintiff Phronesis Advisors, Ltd (Phronesis), a Delaware corporation. Phronesis is in the consulting business. Defendant Covenant Management Group, LLC (Covenant Group) is a Delaware LLC. Laurance Roberts (Roberts) is the managing member of Covenant Group. The three Covenant Fund defendants (the Covenant Funds) are investment vehicles Covenant Group utilizes,

and are all Delaware LLCs (Complaint, ¶¶ 4-6). They allegedly are all now defunct along with Covenant Group, having never recovered from the financial crisis of 2008.

Pursuant to a June 9, 2007 employment agreement (Complaint, exhibit A, the Employment Agreement), Covenant Group agreed to employ Sarfati as a trader and managing director, at an annual rate of \$500,000, plus benefits, for his services, on an at will basis. Roberts guaranteed the

“payment of the \$500,000 salary pursuant to the terms and conditions of the Employment Agreement and [Roberts] shall be entitled to invoke any defense, condition, breach, counterclaim, or set-off [that Covenant Group] has, or may have, with regard to the guaranty and payment of said Salary”

(Employment Agreement, ¶ 3 [a]).

The Employment Agreement also included a \$1 million signing bonus (the Signing Bonus), subject to a promissory note. That note provided for Sarfati to repay, in installments, if his employment ended by specified dates.

Covenant Group allegedly failed to pay Sarfati between April 2009 and August 2010. Sarfati alleges that he continued to perform services during this period, despite not being paid, because of Roberts's assurances that he would pay Sarfati (Complaint, ¶¶ 11-15).

By agreement dated October 1, 2010, Phronesis entered into a consulting agreement with Covenant Group, that was allegedly acting on behalf of the Covenant Funds (the Consulting Agreement, Complaint, exhibit B), pursuant to which Phronesis agreed that Sarfati would perform trading services at the rate of \$26,000 a month. In March 2015, defendants allegedly stopped paying on the Phronesis Agreement (*id.*, ¶¶ 17-19). Roberts did not guarantee the Phronesis Agreement. By email dated February 23, 2015, Sarfati informed Roberts that he was terminating the contract, effective February 27, 2015 (Strain affirmation, exhibit D).

The complaint contains seven causes of action sounding in breach of contract, quantum meruit, and unjust enrichment, each stated separately on the two contracts, respectively against Covenant Group and Roberts and the Covenant Funds and Roberts. Sarfati also asserts the fourth cause of action, based on Labor Law § 191 for unpaid wages, against Covenant Group and Roberts.

Defendants filed an answer essentially denying the central allegations of the complaint, and asserting affirmative defenses including statute of limitations and payment in full. This court denied defendants' motion for leave to assert a counterclaim that Sarfati obtained the signing bonus based on

fraudulent representations.

In motion sequence no. 003, plaintiffs move for summary judgment seeking \$495,286.39 on their claims relating to the Employment Agreement, and \$188,000 on their claims relating to the Consulting Agreement. In motion sequence 004, defendants move for summary judgment dismissing the complaint.

In support of his motion for summary judgment, Sarfati submits his own affidavit, annexing a spreadsheet (the Spreadsheet) that Covenant prepared. It lists all payments made to him, including two entries, each for \$333,000, for forgiveness of debt related to the incentive payment. Sarfati represents that Covenant provided the Spreadsheet to him in response to his requests for pay stubs. The Spreadsheet has no title and is not dated. However, Defendants do not dispute the authenticity or accuracy of the Spreadsheet. The Spreadsheet indicates that the most recent payment was September 1, 2010, at which time Sarfati alleges that Covenant owed him \$495,286.39 in salary. Sarfati also annexes a June 22, 2010 email from Menachem Ungar (Ungar), the director of operations at Covenant Group, listing payments to Sarfati from June 29, 2007 through June 1, 2010 (*id.*, exhibit C). Sarfati also submits the affidavit of Aaron Pressman (exhibit D to Sarfati aff), the CPA

responsible for the Covenant account, attesting to the accuracy of the Spreadsheet.

Sarfati states that

"[b]y late September 2010, defendants owed me \$495,286.39 in salary and Roberts advised me that Covenant would not meet its obligations under the Employment Agreement. Thus, I terminated the Employment Agreement, without waiving my right to receive the salary of \$495,286.39"

(Sarfati aff, ¶ 11).

Sarfati terminated the Consulting Agreement by email dated February 23, 2015 (Strain affirmation, exhibit E) to Ungar and Roberts, citing health and financial concerns. Sarfati states that he terminated the Consulting Agreement on November 4, 2015, allegedly because of nonpayment, with \$188,000 allegedly owed to him. Ungar responded on the same date that

"[w]e will pay the Dec invoice today or tomorrow, the Jan 2015 invoice will be paid with the Feb 2015 payment. Please confirm that you rescind your resignation and will stay on board with the Covenant Funds"

(Strain affirmation, exhibit E).

Sarfati has presented sufficient evidence to plead a prima facie cause of action for both breach of the Employment Agreement and for violation of Labor Law § 191 for unpaid wages due under the Employment Agreement.

Phronesis has also sufficiently pleaded a prima facie case of breach of contract involving nonpayment. Sarfati states that he continued to work under the Consulting Agreement in reliance on promises that he would be paid (Sarfati tr at 65).

In opposition to Sarfati's and Phronesis' motions, defendants submit the contracts and deposition transcripts. Roberts testified in his deposition that, in April 2009, he and Sarfati

"renewed the agreement due to the awful performance and we agreed at that time that he's now going to have to accept a lower salary"

(Roberts tr at 81). Roberts testified further that Covenant paid Sarfati "the lesser agreed amount" from April 2009 through January 2010 (*id.* at 83-84).

Paragraph 14 of the Employment Agreement provides:

"[t]his agreement may not be amended or modified except in writing signed by both parties and supported by new consideration"

(Sarfati affirmation, exhibit A).

Roberts acknowledged in his deposition that he had not produced a writing amending the Employment Agreement (Roberts tr at 85).

Plaintiffs argue that the alleged oral agreement is barred by General Obligations Law 15-301, which provides, as pertinent:

"A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent"

(*id.*, subd. 1).

Both agreements contain provisions that require a writing as set forth in General Obligations Law 15-301 for modification. Sarfati denies agreeing to a reduction in pay under the Employment Agreement, and argues that, even if he had, such an agreement would be void under section 15-301. Under the Consulting Agreement, Sarfati testified at his deposition with respect to the reduced payment to him of \$28,000: "that was the agreed upon amount ... if they paid me the money, there must have been an agreement" (Sarfati tr at 58-59).

The prohibition of section 15-301 "does not apply to an executed agreement" (*Mot Parking Corp. v 86-90 Warren St., LLC*, 104 AD3d 596, 596 [1st Dept 2013]).

"Generally, a written agreement which prohibits oral modification can only be changed by an executory agreement . . . in writing. However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification. [I]n order to be unequivocally referable, conduct must be inconsistent with any other explanation"

(*Hannigan v Hannigan*, 104 AD3d 732, 736 [2d Dept 2013]).

Here, the parties did execute the reductions in salary. Thus, questions of fact continue including whether the parties made an oral agreement. If proved, that agreement would take the alleged oral modifications outside the purview of General Obligations Law 15-301.

Defendants have not established their defense of waiver as a matter of law, considering Sarfati's assertions of reliance upon Roberts' repeated assurances that plaintiffs would be paid. Therefore, questions of fact as to the alleged oral agreements and waiver remain.

Accordingly, it is

ORDERED that the motion by plaintiffs Danny Sarfati and Phronesis Advisors, Ltd., for summary judgment (Motion Sequence No. 003), on their complaint, seeking \$495,286.39 on their claims relating to the Employment Agreement, and \$188,000 on their claims relating to the Consulting Agreement, is denied; and it is further

ORDERED that the motion of defendants for summary judgment dismissing the complaint (Motion Sequence No. 004) is denied.

Dated: 3-28-2019

E N T E R:



J. S. C.

HON. MELISSA A. CRANE
J.S.C.