Moore v Scherer
2020 NY Slip Op 31357(U)
May 11, 2020
Supreme Court, Kings County
Docket Number: 519329/2017
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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MUSA MOORE,

Plaintiff,

-against-

LARRY SCHERER and STATE & BROADWAY INC.,

Defendant.
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Index No.: 519329/2017
Motion Date:12-9-19
Mot. Cal. No.:

DECISION/ORDER

The following papers numbered 1 to 4 were read on these motions:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of aw	2
Answering Affirmations/Affidavits/Exhibits/Memo of Law	3
Reply Affirmations/Affidavits/Exhibits/Memo of Law	4
Other	

Upon the foregoing papers, the motions are decided as follows:

In this action for breach of contract and fraud in the inducement, by Notice of Motion dated October 7, 2019, the defendants, LARRY SCHERER ("Scherer") and STATE & BROADWAY INC. ("S&B"), move for an order pursuant to CPLR 3212 awarding them summary judgment dismissing the plaintiff's complaint in its entirety. By Notice of Cross-Motion dated December 1, 2019, plaintiff, MUSA MOORE, moves for summary judgment, in his favor, on both causes of action and seeks judgment for unpaid salary and commissions in the amount of $110,707.71, plus interest. Both motions are consolidated for disposition.

S&B is an Albany-based lobbying firm. Defendant Scherer is a Founding Member of S&B and operates the firm with his partner and the firm's cofounder, Jacqueline S.L. Williams. The plaintiff was previously employed by the New York State Public Employees Federation

("PEF"), as a government relations consultant and had been engaged in political consulting since 2000, representing candidates running for public office, particularly, in Kings County, New York.

On November 13, 2015, the plaintiff and S&B entered into a contract of employment pursuant to which plaintiff was to commence employment with S&B on November 16, 2015 at an annual salary of $80,000. The contract also entitled the plaintiff to forty percent (40%) of all revenue received from any new clients that he brought to S&B, health benefits (which defendants contend plaintiff declined), the option to join S&B's 401(k) plan after six months, two weeks of annual vacation days, and three personal days. The contract provides: “Employee understands that this contract constitutes employment at the will of the employer and mutual understanding between the parties” and that “[t]his Agreement constitutes the complete understanding between the parties, unless amended by a subsequent written instrument signed by the employer and the employee."

Defendants contend that at the time the contract was entered into, the plaintiff represented that he was a party to a consulting contract with PEF that he estimated would generate revenues in the amount of $50,000 and that he could bring the PEF contract to S&B when he began working for it. Defendants maintain that everyone understood that the employment contract was contingent upon plaintiff securing the PEF contract for S&B.

For various reasons, plaintiff could not bring PEF in as an S&B client. When this became apparent, the plaintiff agreed to accept a $50,000 decrease in his annual salary. On December 11, 2015, Ms. Williams advised S&B's payroll company to reduce plaintiff's salary from $80,000 to $30,000. Defendants maintain that plaintiff agreed to the reduction of his salary, without complaint until on or around August 10, 2016, when he was terminated.

Defendants contend that S&B decided to terminate plaintiff because, on August 9, 2016, it discovered that plaintiff was seeking to void his contract with S&B and open his own lobbying firm, "Moore Consultancy," and that he had already solicited S&B clients to void their contracts with S&B and re-sign with his new entity.

After he was terminated, plaintiff commenced this action alleging causes of action against the defendants for breach of contract and fraud in the inducement. With respect to the cause of action for breach of contract, he alleged that he performed all his duties under the employment contract and that the defendants breached the contract by failing to pay him his rightful salary and his earned commission. He alleged in his complaint that at the time he was terminated, he was owed $40,222.22 in salary and $39,600.00 in commissions.

With respect to his cause of action for fraud in the inducement, he alleged that in November of 2015, S&B represented to him that once he brought in $50,000 in revenues, he would be made an equal partner and a shareholder agreement would be entered into entitling him to profits exceeding the salary and commission he was entitled to under the contract. He alleged that these representations were false, that defendants knew them to be false, that he reasonably relied on these representations when entering into the employment contract, that by June of 2016, his efforts generated revenues in excess of $50,000 and that when he asked to become a full partner, the defendants reneged on the bargain. On the fraud in the inducement claim, plaintiff is seeking compensatory damages in the approximate amount of $102,465.00 and punitive damages exceeding $300,000.

I. Defendant's Motion for Summary Judgment:

A. The Cause of Action for Fraud in the Inducement:

With respect to plaintiff's cause of action for fraud in the inducement, defendants maintain that the plaintiff cannot demonstrate the element of justifiable reliance, which is a necessary element of the claim.[1] As indicated above, plaintiff contends that in order to induce him to enter into the employment contact, S&B represented to him that once he brought in revenues in the amount of $50,000, he would be made an equal partner and a shareholder agreement would be entered into entitling him to profits exceeding the salary and commission he was otherwise entitled to under the contract. Defendants contend the plaintiff admitted at his deposition that defendants made no such representations. The Court has reviewed the portion of plaintiff's deposition transcript where he was questioned about these alleged representations (Page 34/Line 2 to Page 36/Line 5) and finds that plaintiff clearly testified that he was promised a partnership if he brought in an excess of $50,000. While he was unclear as to what exactly was said to him as to how the partnership would be achieved, he clearly testified that he was promised a partnership and never, as defendants contend, admitted that he was never offered a partnership.

Notwithstanding the above, defendants correctly contend that the plaintiff, as a matter of law, cannot demonstrate that he justifiably relied upon S&B's alleged oral representations (*see Stone v. Schulz*, 231 A.D.2d 707, 708, 647 N.Y.S.2d 822, 823) as these representations are in direct conflict with the employment contract which specifically provided: "Employee understands that this contract constitutes employment at the will of the employer and mutual understanding between the parties" and that "[t]his Agreement constitutes the complete

[1] "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v. Huntington Learning Ctrs., Inc.*, 78 A.D.3d 896, 898, 911 N.Y.S.2d 442; *see Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 910 N.E.2d 976).

understanding between the parties, unless amended by a subsequent written instrument signed by the employer and the employee." Where, as here, there is a "meaningful" conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a justifiable reliance upon the oral representation (*Bango v. Naughton,* 184 A.D.2d 961, 963, 584 N.Y.S.2d 942; *see also, Citibank v. Plapinger,* 66 N.Y.2d 90, 95, 495 N.Y.S.2d 309, 485 N.E.2d 974; *Brisard v. Compere,* 214 A.D.2d 528, 530, 624 N.Y.S.2d 632; *Clanton v. Vagianelis,* 187 A.D.2d 45, 48, 592 N.Y.S.2d 139).

Similarly, where, as here, a plaintiff is offered only at-will employment, he or she will generally be unable to establish reasonable reliance on a prospective employer's representations for purposes of establishing fraud (*see Epifani v. Johnson,* 65 A.D.3d 224, 230, 882 N.Y.S.2d 234, 240; *Marino v. Oakwood Care Ctr.,* 5 A.D.3d 740, 741, 774 N.Y.S.2d 562; *Arias v. Women in Need,* 274 A.D.2d 353, 712 N.Y.S.2d 103; *Tannehill v. Paul Stuart, Inc.,* 226 A.D.2d 117, 640 N.Y.S.2d 505; *Clark v. Helmsley Windsor Hotel,* 214 A.D.2d 365, 625 N.Y.S.2d 159; *Mayer v. Publishers Clearing House,* 205 A.D.2d 506, 613 N.Y.S.2d 190; *Bower v. Atlis Sys.,* 182 A.D.2d 951, 582 N.Y.S.2d 542; *cf. Navaretta v. Group Health,* 191 A.D.2d 953, 595 N.Y.S.2d 839; *Stewart v. Jackson & Nash,* 976 F.2d 86). Since there was no familial or fiduciary relationship between the parties, contrary to plaintiff's contention, there is no basis to apply a different standard (*see Braddock v. Braddock,* 60 A.D.3d 84, 871 N.Y.S.2d 68; *Frank Crystal & Co. v. Dillmann*, 84 A.D.3d 704, 704–05, 925 N.Y.S.2d 430, 431–32).

In sum, defendants established their prima facie entitlement to summary judgment dismissing the fraud in the inducement claim and plaintiff failed to raise a triable issue of fact. Accordingly, that branch of defendants' motion for summary judgment dismissing plaintiff claim of fraud in the inducement is granted.

B. The Cause of Action for Breach of Contract:

(1) Failure to Pay Plaintiff's Salary:

Defendants contend that plaintiff's claim that the defendants breached the employment contract by failing to pay him his full salary of $80,000 fails as a matter of law because, as an at-will employee, S&B was entitled to unilaterally modify his compensation at any time. They maintain that "case law dictates that when parties have an employment contract terminable at will, the contract can be modified and different compensation rates fixed without approval of the other party since the dissatisfied party has a right to leave his employment" (*Gen. Elec. Tech. Services Co. v. Clinton*, 173 A.D.2d 86, 88 (3d Dep't 1991) (internal citations omitted). Defendants maintain that, as here, where an employer changes an at-will employee's compensation, the employee is "deemed to have accepted" the "new compensation terms" by choosing to remain in the employer's employ post modification (*Kronick v. L.P. Thebault Co., Inc.*, 70 A.D.3d 648, 649; *Bottini v. Lewis & Judge Co., Inc.*, 211 A.D.2d 1006, 1007). Defendants further maintain that the provision in the contract that the contract "constitutes the complete understanding of the parties, unless amended by a subsequent written instrument" is not a bar to plaintiff's ratification of S&B's reduction of his compensation. Defendants contend that "courts have not hesitated to uphold an orally modified agreement even in the face of a no oral modification clause when subsequent conduct essentially changed the written terms of the contract" (*Cantor v. Boston Children's Health Physicians, LLP.*, 64 Misc. 3d 1233(A), 2019 WL 4124728 at 4 (Sup. Ct. Westchester Co. 2019) and it is clear that plaintiff willingly accepted the reduced compensation for eight months before his employment was terminated.

Assuming, *arguendo*, that the defendants established their entitlement to summary judgment dismissing plaintiff's claim for unpaid salary, plaintiff raised a triable issue of fact by

submitting his own affidavit stating that the parties agreed that his salary would be reduced by $50,000 only on a temporary basis and until he brought in revenues in the amount of $50,000 representing the amount he was supposed to bring in from PEF. Specifically, he stated as follows:

> Defendants seem to argue that because I accepted a reduction in salary, that I forfeited my full salary… as stated in the Contract. This is untrue. Because we lost the PEF deal, I wanted to be fair with S&B. I did agree to a TEMPORARY reduction in salary until I had brought in a lobbying contract for at least as much. Once I did that, I would be paid the full $80,000 including the difference from what I had previously received in reduced salary. This would restore us to exactly the original deal we had made which was $80,000 for bringing in an initial deal of $50,000. As it happens, I brought in lobbying deals through my efforts worth over $200,000 or four times the value of the PEF contract. Why on earth then would Defendant assert that I wouldn't be entitled to my full salary?

(2) Failure to Pay Commissions:

With respect to plaintiff's claim that he is owed commissions, defendant Scherer submitted an affidavit stating that plaintiff has presented no evidence that he is entitled to commissions and that on that basis alone, the Court should dismiss that prong of plaintiff's breach of contract claim. However, "[i]t is a defendant's burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff's proof" (*Quantum Corporate Funding, Ltd. v Ellis*, 126 A.D.3d 866, 871, 6 N.Y.S.3d 255; *see Bivona v. Danna & Assoc., P.C.*, 123 A.D.3d 959, 960, 999 N.Y.S.2d 860; *Kempf v. Magida*, 116 A.D.3d 736, 737, 982 N.Y.S.2d 916; *Gamer v. Ross*, 49 A.D.3d 598, 600, 854 N.Y.S.2d 160). Only when a defendant makes a prima facie showing of entitlement to summary judgment does the burden shift to the plaintiff to raise an issue of fact requiring a trial (*see Valley Ventures, LLC v. Joseph J. Haspel, PLLC*, 102 A.D.3d

955, 956, 958 N.Y.S.2d 604; *Schadoff v. Russ*, 278 A.D.2d 222, 223, 717 N.Y.S.2d 284). 222, 223, 717 N.Y.S.2d 284). Since defendants failed to submit evidence establishing, prima facie, that the plaintiff did not earn commissions, their motion for summary judgment dismissing plaintiff's claim for commissions must be denied regardless of the sufficiency of the plaintiffs' papers in opposition (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Salcedo v. Demon Trucking, Inc.*, 146 A.D.3d 839, 841, 44 N.Y.S.3d 543).

Even if defendants had met their burden of demonstrating prima facie that the plaintiff did not earn any commissions prior to being terminated, the plaintiff submitted evidentiary proof in opposition to the motion raising a triable issue of fact. In this regard, plaintiff averred in an affidavit submitted in opposition to the motion that he brought in business from several entities, including Watermark Capital Group and Avant Gardner LLC, that generated significant revenues and that he was not paid his appropriate commissions.

(3) The Punitive Damages Claim:

Turning to that branch of defendants' motion for summary judgment dismissing plaintiff's claim for punitive damages, contrary to the plaintiffs' contention, punitive damages are not recoverable in an ordinary breach of contract case (plaintiff's only remaining cause of action), as their purpose is not to remedy private wrongs but to vindicate public rights. Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally (*see New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 315–316, 639 N.Y.S.2d 283, 662 N.E.2d 763; *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339,

634 N.E.2d 940). Punitive damages are available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available and is sufficiently egregious to warrant the additional imposition of exemplary damages. A party must demonstrate not only egregious tortious conduct, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d at 316, 639 N.Y.S.2d 283, 662 N.E.2d 763; *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d at 613, 612 N.Y.S.2d 339, 634 N.E.2d 940). Here, the defendants showed that even if plaintiff's allegations prove to be true, their conduct was not egregious or of high moral turpitude, and thus was not actionable as an independent tort. Furthermore, there is no evidence of a pattern of egregious conduct directed toward the public at large. Accordingly, plaintiffs motion insofar as it seeks summary judgment dismissing plaintiffs claim for punitive damages is granted.

II. Plaintiff's Cross-Motion:

Pursuant to CPLR 3212(a), courts have "considerable discretion to fix a deadline for filing summary judgment motions," so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown" (*Brill v. City of New York*, 2 N.Y.3d 648, 651, 781 N.Y.S.2d 261, 814 N.E.2d 431; *see* CPLR 3212[a]). In Kings County and in this Part a party is required to make a motion for summary judgment no more than 60 days after the note of issue is filed, unless it obtains leave of the court on good cause shown *(Popalardo v. Marino*, 83 A.D.3d 1029, 1030, 922 N.Y.S.2d 158; *see Kennedy v. Bae*, 51 A.D.3d 980, 981, 857 N.Y.S.2d 509). Here, defendants correctly contend that plaintiff's cross-motion is untimely since the note of issue was filed on August 6, 2019 and the cross-motion was filed on December 2,

2019, well more than more than 60 days thereafter. Plaintiff failed to establish good cause to excuse the delays (*see* CPLR 3212[a]; *Luciano v. H.R.H. Constr., LLC,* 89 A.D.3d 578, 579, 933 N.Y.S.2d 17; *Giudice v. Green 292 Madison, LLC,* 50 A.D.3d 506, 858 N.Y.S.2d 111). Accordingly, plaintiff's cross-motion must be denied.

Accordingly, it is hereby

ORDERED that branch of defendants' motion for summary judgment dismissing plaintiff's cause of action for fraud in the inducement and his claim for punitive damages is **GRANTED**; it is further

ORDERED that branch of defendants' motion for summary judgment dismissing plaintiff's cause of action for breach of contract and plaintiff's cross-motion for summary judgment are **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 11, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020