Meraki NYC LLC v Iervasi
2020 NY Slip Op 32865(U)
July 31, 2020
Supreme Court, Richmond County
Docket Number: 152304-2017
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

_____x

IAS PART 6

ORDER

MERAKI NYC LLC,

Plaintiffs,

- against –

Index Number: 152304-2017

Hon. Justice
Judith N. McMahon

ASHLEY IERVASI, KRISTEN BOYLES,
JESSICA GERARDO, MICHAEL GATTO,
AMANDA CIRAMI, NICOLE DURVAL
and ASHLEY NICOLE SALON, LLC,

Defendants.

_____x

Plaintiff's motion, pursuant to CPLR § 3212 seeking partial summary judgment on the issue of liability as against Defendants Ashley Iervasi, Kristen Boyles, Jessica Gerardo, Michael Gatto, Amanda Cirami, and Nicole Durval (motion sequence 003) is denied; Defendants' motion, pursuant to CPLR § 3212 seeking summary judgment and dismissing the case (motion sequence 002) is granted as detailed herein.

This is an action for Breach of Contract and to enforce a "non compete clause" between the Plaintiff and six (6) former employees, as well as the salon in which the former employees now work.

The Defendants were employed by Gemmette Hair Studio ("Gemmette") in 2015, a majority as Hair Stylists. In 2015, the owner of Gemmette presented the Defendants with a proposed contract ("the First Contracts") for them to sign if they wanted to continue as employees. The First Contracts contained a non-compete clause, which stated that for a period of six (6) months after termination of employment, the Defendants cannot be employed by a hair salon within a three (3) mile radius of Gemmette. The First Contracts also contained a clause which stated that "the employer may terminate this contract, without cause within one (1) weeks' notice".

In October of 2016, Shane Sorrento, entered into an asset purchase agreement with the owners of Gemmette to purchase the business, which Mr. Sorrento renamed as (Plaintiff) Meraki NYC LLC ("Meraki"). Mr. Sorrento co-owns Meraki with his wife.

As an addendum to the Gemmette purchase agreement, there is a "List of Asset Purchases" which includes "5,000.00 for a Covenant Not to Compete". There is no specific mention as to the First Contracts which Gemmette had executed with the Defendants, and there is no mention of the Defendants individually in the Gemmette purchase agreement.

In September of 2017, Shane Sorrento, presented Defendants with a new employment contract ("the Second Contracts").

At his Examination Before Trial, Mr. Sorrento testified as follows:

> **Q**. Did you ever tell [Defendants] that if they didn't sign the contract they would not be working?
>
> **A**. We told them as a condition for future employment there may not be an opportunity for them to continue working with us.
>
> **Q**. Which broken down is it saying that if you don't sign the contract, you are terminated?
>
> **A**. It wasn't that clear because they did in fact come back to work for us.
>
> …
>
> **Q**. Prior when I asked you did you word it like that you said it wasn't that clear cut. Is it safe to say that if they weren't going to sign it, you would terminate them?
>
> **A**. These agreements were contingent of further employment, yes.

All parties agree that none of the Defendants signed the Second Contracts. All parties also agree that Plaintiff gave Defendants a deadline to execute the Second Contracts and on the day of that

deadline, September 27, 2017, Defendants all appeared at the salon and informed Plaintiff that they would not sign the Second Contracts. The parties further agree that following that meeting, Defendants cleared their personal effects out of Meraki and were no longer employees of Meraki.

The parties purport to disagree as to why the Defendants were no longer employees. Plaintiff argues that Defendants quit, Defendants allege that Plaintiff carried through with their statement that if Defendants did not execute the Second Contracts they could not continue to work at Meraki, and Defendants were fired because they did not execute the Second Contracts.

Both sides have made motions for summary judgment. Plaintiff has moved for partial summary judgment on liability for Plaintiff's allegations related to the non compete clause. Defendants have moved for summary judgment to dismiss all of Plaintiff's allegations.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

"At the outset, we note that noncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests…Where the employer terminates the employment relationship without cause, "his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture." *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 859 N.E.2d 503 (2006).

Plaintiff has failed to make a prima facie showing of damages or any other basis upon which this Court could find the non-compete clause reasonable and necessary to protect valid business interests or as a basis for damages for Defendants' alleged breach of contract. "In order to recover damages for breach of contract, [Plaintiff was] required to prove damages resulting from that breach, and their failure to do so was fatal to that cause of action." *Alpha Auto Brokers, Ltd. v. Cont'l Ins. Co.*,

286 A.D.2d 309, 728 N.Y.S.2d 769 (N.Y.A.D. 2nd Dept. 2001). Plaintiff's offered proof of damages is the purported difference in income, as reported to the Internal Revenue Service, between the years when the previous owners operated Gemmette and when Plaintiff purchased the business. Plaintiff offers no explanation as to how the Defendants caused that difference or even considers any other factors that could have caused the difference.

More importantly, even if this Court were to find the non-compete clause reasonable and necessary, by Plaintiff's own testimony, Plaintiff's continued willingness to employ Defendants was entirely premised on Defendants' willingness to sign the Second Contracts. Plaintiff testified that Defendants who did not sign the Second Contracts could not continue to work at Meraki. By Plaintiff's own testimony, the First Contracts would no longer be honored after September 27, 2017. Under either party's narrative of what was said at the September 27, 2017 meeting, Plaintiff was unequivocal that they would no longer honor the terms of the First Contracts, which can only be interpreted as Plaintiff terminating the First Contracts, as per their right under the terms of the First Contracts. Plaintiff's words and deeds destroyed the mutuality of obligation on which the covenant rests, thus negating Plaintiff's ability to impose a forfeiture under the terms of the First Contracts.

Defendants are also seeking summary judgment on the remainder of Plaintiff's allegations. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 668 N.E.2d 1370 (1996).

At his Examination Before Trial, Mr. Sorrento testified as follows:

> Q.…but you don't know if necessarily while they were still employed that Ashley Nicole, because you named them as a Defendant, if they interfered to try to take them from you?
>
> A. I could not tell you the answer to that as I do not know.

Q. You have no evidence of that specific area, not that they left?

A. If the question is did they have conversations -

Q. Lured them out, interfered with your contracts?

A. I couldn't tell you that.

Plaintiff has not delineated any specific conduct of any Defendant that actually constitutes the tortious interference Plaintiff alleges Defendants committed. As noted above, Plaintiff has also failed to substantiate damages Plaintiff claims to have suffered as a result of the alleged tortious interference.

"[Courts] have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980). Plaintiff has failed to produce evidentiary proof in admissible form sufficient to require a trial or even offer an excuse for the failure to meet this requirement.

There are no questions of fact as to essential elements of either party's claims. "The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance. If the language is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence." *Atl. Shores Builders & Developers, Inc. v. Federico*, 174 A.D.3d 843, 103 N.Y.S.3d 308 (N.Y.A.D. 2nd Dept. 2019). Plaintiff has no legal basis to enforce any of the terms of the First Contracts because by Plaintiff's own testimony, he terminated the First Contracts with notice to Defendants as per Plaintiff's right, as expressed in the plain language of the First Contracts.

ORDERED Plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that Defendants' Motion for summary judgment seeking dismissal is granted, and it is further

ORDERED that Plaintiff's Complaint is dismissed as to all Defendants, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 31, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.