SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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DAVID SASSON

Plaintiff,

- v -

DEREK LAM INTERNATIONAL, LLC,

Defendant.

INDEX NO. 656458/2018

MOTION DATE 01/11/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

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

Upon the foregoing documents, it is

In this breach of employment agreement action, Plaintiff David Sasson moves for summary judgement pursuant to CPLR § 3212 for an Order granting Plaintiff's breach of contract claim and dismissing Defendant Derek Lam International LLC ("Derek Lam") amended counterclaims.

Plaintiff was employed as Defendant's Chief Operating Officer from April 28, 2014 to his termination on or about November 12, 2018. Plaintiff contends that pursuant to his employment contract Defendant owes him six months of severance and a $25,000 bonus for fiscal year 2017. In opposition, Defendant argues that Plaintiff was terminated for cause which divested him of the right to receive severance and further, that bonuses were awarded at the discretion of Defendant. Specifically, Defendant states that Plaintiff failed to promptly address a 2017 New York State Sales and Use tax Audit, which resulted in a two-year expansion of the

audit period; and that Plaintiff provided false information on a Visa application for a friend, both actions which resulted in Plaintiff's termination.

Analysis

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

In support of his motion, Plaintiff contends that in March 2018, approximately eight (8) months before his termination without cause, Jan-Hendrik Schlottmann ("Schlottmann"), Defendant's Chief Executive Officer (CEO), informed Plaintiff during his annual performance review that he had earned and would be awarded a bonus in the amount of $25,000 for the 2017 calendar year. Plaintiff argues that he was eligible to receive, and in fact, earned a bonus for 2017, but that due to Defendant's financial constraints, he was not paid in violation of his employment agreement. Plaintiff states that on November 12, 2018, during an in-person meeting in New York, Schlottmann informed him that his employment was being terminated "without

cause." He alleges that he was then presented with a Separation Agreement that offered him severance in the amount of five (5) weeks ($27,405), which was significantly less than the six (6) months of severance which he claims he is entitled to, which would be $142,500.

In opposition, Defendant maintains that Plaintiff was terminated with cause and therefore, was not entitled to any bonus or severance as his performance did not meet expectations. Specifically, Defendant contends that Plaintiff was terminated due to two significant acts of malfeasance in 2017 and 2018. These acts were Plaintiff's inaction with respect to the New York State Sales and Tax Audit ("NYS Audit") and his actions in regard to a fraudulent visa application for Nicole Bernsvall ("Bernsvall"), an intern. Plaintiff contends that that from the time he first became aware of the NYS audit, he worked diligently with the Accounts Payable team to retrieve the records and documentation requested and kept Schlottmann apprised of the developments of the audit throughout 2018. Further, Plaintiff states that he and the Accounts Payable team requested and obtained an extension from NYS to provide the requested documentation by November 15, 2018. Plaintiff states that he informed Schlottmann of this and on November 8, 2018, Plaintiff provided all the requested information to NYS.

Further, Plaintiff states that at the request of the Head of Human Resources, he introduced Bernsvall to an immigration attorney, who assisted in the process of having her visa extended. Plaintiff additionally states that the same process was used to assist another employee and that her truthful visa extension application was subsequently granted.

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff maintains that he is

entitled to a bonus and severance under his employment contract. However, Defendant has raised an issue of material fact as to whether Plaintiff's termination was based upon performance issues. Accordingly, Plaintiff's motion for summary judgement on the breach of contract claim is denied.

Defendants' Counterclaims

Defendant asserts six counterclaims: breach of contract, gross negligence, breach of duty of loyalty, breach of fiduciary duty, breach of implied duty of good faith and a claimunder the faithless servant doctrine. Plaintiff seeks summary judgment dismissing all the counterclaims.

Defendant's Amended Answer and Counterclaims recite the same facts in support of all its counterclaim causes of action. Specifically, Defendant alleges that Plaintiff owed a duty as an executive officer to Defendant and that he breached that duty by knowingly, willfully, and/or recklessly: disregarding his obligations to respond to correspondence from New York State, to pay outstanding taxes on behalf of Defendant, and/or report necessary information to tax authorities; falsifying information on immigration documents; approving unearned wages; and wrongly providing reimbursement of Visa fees.

In opposition, Plaintiff contends that from the time he first became aware of the NYS audit he worked diligently with the Accounts Payable team to retrieve the records and documentation requested and kept Schlottmann apprised of the developments of the audit throughout 2018. Further, Plaintiff states that he and the Accounts Payable team requested and obtained an extension from NYS to provide the requested documentation by November 15, 2018. Plaintiff states that he informed Schlottmann of this and on November 8, 2018, Plaintiff provided all the requested information to NYS.

Regarding Defendant's allegations pertaining to Nicole Bernsvall, Plaintiff states that Bernsvall was compensated in the same manner as all college interns were, which was outside the regular payroll system as independent contractors/consultants. He further states that at the request of the Head of Human Resources, he introduced Bernsvall to an immigration attorney who assisted in the process of having her visa extended. Plaintiff additionally states that the same process was used to assist another employee and that Defendant has not shown that any of the information provided on the visa application was indeed false. Bernsvall's visa extension was subsequently granted.

First Cause of Action, Breach of Contract

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff has not sufficiently met his burden of demonstrating that Defendant's breach of contract claim fails as a matter of law. Defendant has submitted evidence that raises a material issue of fact as to the performance and breach of the employment agreement. Accordingly, Plaintiff's motion to dismiss Defendant's counterclaim of breach of contract is denied.

Second Cause of Action, Gross Negligence

Defendant contends that Plaintiff's gross negligence by intentionally, and with a high degree of moral turpitude and wanton dishonesty, disregarding communications with NYS in relation to the tax audit, resulted in Defendant's loss in the amount of at least $51,338.53, which is the interest Defendant owed NYS. In opposition, Plaintiff stated that he complied with all directives from NYS and diligently, with the Accounts Payable team, worked to obtain an extension and pay the appropriate taxes by the due date.

Under New York law, a *prima facie* case of negligence requires a showing of (a) a duty; (b) a breach of duty; (c) a reasonably close causal connection between action and the resulting injury; and (d) "actual loss, harm or damage"(*Integrated Waste Servs, Inc. v Akzo Nobel Salt, Inc.*, 113 F3d 296, 299 [2d Cir.1997]). To constitute gross negligence, "the act or omission must be of an aggravated character, as distinguished from the failure to exercise ordinary care.'" (*Curley v AMR Corp.*, 153 F3d 5, 13 [2d Cir. 1998]). The evidence submitted does not support a claim for gross negligence and accordingly, this counterclaim is dismissed.

Third Cause of Action, Breach of Duty of Loyalty

Plaintiff contends that Defendant's counterclaims for breach of duty of loyalty and faithless servant must be dismissed as Defendant has not demonstrated that Plaintiff's actions rise to the egregious standard required to maintain such claims. Defendant's counterclaims allege that Plaintiff owed a duty of loyalty as an executive officer and that he breached that duty by knowingly, willfully, and/or recklessly: disregarding his obligations to respond to correspondence from New York State, to pay outstanding taxes on behalf of Defendant, and/or report necessary information to tax authorities, falsifying information on immigration documents, approving unearned wages, and wrongly providing reimbursement of Visa fees. Defendant has failed to submit any evidence that would support a breach of duty of loyalty claim. Accordingly, third cause of action on the counterclaim is dismissed.

Fourth Cause of Action, Breach of Fiduciary Duty

To establish a *prima facie* case for breach of fiduciary duty, a plaintiff must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the [counterclaim] defendant, and (3) damages directly caused by the [counterclaim] defendant's misconduct." (*Vill. of Kiryas Joel v Cty. of Orange*, 144 AD3d 895, 898-99, 43 NYS.3d 51, 57 [2d Dept 2016] [*citing Varveris v*

Zacharakos, 110 AD3d 1059, 973 NYS.2d 774 (2013)]]. However, a cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand (*Perl v Smith Barney, Inc.*, 230 AD2d 664, 666, 646 NYS2d 678; *lv. denied* 89 NY2d 803, 653 NYS2d 281; *William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173, 703 NYS2d 439, 442 2000]). Defendant has not alleged any facts that would support a breach of fiduciary duty aside from conclusory statements that Plaintiff falsified Bernsvall's visa application. Accordingly, Defendant's counterclaim for breach of fiduciary duty is dismissed.

Fifth Cause of Action, Breach of Implied Duty of Good Faith and Fair Dealing

Plaintiff contends that Defendant's breach of good faith and fair dealing claim is duplicative of its breach of contract claim and accordingly, should be dismissed. Despite Defendant's opposition, it has not demonstrated any facts that would create an independent duty of good faith outside the scope of the express terms of the employment agreement.

Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant exists, however, only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v American Home Prods Corp.*, 58 NY2d 293, 304 [1983]). "The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]; *see also ELBT Realty, LLC v Mineola Garden City Co., Ltd.*, 144 AD3d 1083, 1084 [2d Dept 2016] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). Moreover, where "there is an express contract addressing the issue in dispute," a claim for breach of the implied covenant must fail (*Cambridge Capital Real Estate*

Invs., LLC v Archstone Enter. LP, 137 AD3d 593, 595 [1st Dept 2016]; *Oppenheimer Holdings Inc. v Canadian Imperial Bank of Commerce*, No. 650936/2013, 2018 WL 3241899, at *6 ([2018]). Accordingly, Defendant's counterclaim of breach of implied duty of good faith is dismissed.

Sixth Cause of Action, Faithless Servant Duty

The faithless servant doctrine is narrowly applied and provides that an employee who is faithless in the performance of their duties is not entitled to recover compensation (*Feiger v Iral Jewelry*, 41 NY2d 928, 928 [1977]; *W. Elec. Co. v Brenner*, 41 NY.d 291, 295 [1977]). Defendant has not alleged any behavior on the part of Plaintiff that would rise to the standard of maintaining a claim under the faithless servant doctrine. Accordingly, Defendant's counterclaims of breach or loyalty and faithless servant are dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgement on his breach of contract claim is denied; and it is further

ORDERED that the Plaintiff's motion for summary judgement as to Defendant's counterclaims is partially granted and the second, third, fourth, fifth and sixth counterclaims are dismissed.

4/8/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE