SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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SCOTT CANTINI,

Plaintiff, Index No.511713/2022

- against - October 25, 2022

SPORTINSURANCE INC. AND SPORTUNDERWRITERS INC., Decision and Order

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss portions of the complaint on the grounds those claims fail to state any cause of action. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Amended Complaint [NYSCEF Doc. No. 14] on March 19, 2018 the plaintiff executed employment contracts and option agreements with the defendants. Pursuant to those agreements the plaintiff was hired as the chief executive officer of both corporations and was entitled to certain stock options in the event of termination. Section 15(i) of both agreements states that "Cantini acknowledges and agrees that, regardless of any location in which Cantini resides during the term of this Agreement, Cantini's service to the Company will take place in New York State" (Employment Agreements, ¶15(i) {NYSCEF Doc. Nos. 15,16]). On December 22, 2021 the defendants informed the

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plaintiff that he was in violation of the above noted provision since he had moved to Portugal and that he was required to cure such breach within thirty days [NYSCEF Doc. Nos. 21,22]. The plaintiff responded, through counsel, to the letters send by defendants and in fact notified the defendants of his resignation for good cause pursuant to various provisions of the employment agreements [NYSCEF Doc. Nos. 23,24]. On January 24, 2022 the defendants terminated the plaintiff's employment. Further, the plaintiff never exercised their stock options in the time frame noted by the defendants. The plaintiff asserts he did not miss any deadline and has sued alleging breach of the option agreements among other causes of action. The defendants move to dismiss the causes of action related to the option agreements and the plaintiff has moved seeking to amend the complaint in that regard.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will

later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Vague and speculative allegations unsupported by any facts are insufficient to establish a claim of breach of contract (Jones v. Voskresenskny, 125 AD3d 532, 5 NYS3d 16 [1st Dept., 2015]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

The allegations the defendants breached the option agreement is premised upon the assertion the plaintiff was terminated without cause. The Amended Complaint asserts the plaintiff cured any alleged residency requirement and "was present in New York City from January 20, 2022 until February 5, 2022" (see, Amended Complaint, ¶72). Thus, the plaintiff argues the termination was without cause. The option agreements do not contain any

provisions concerning terminations with or without cause. Rather, they simply state that the plaintiff may exercise the options until ninety days following the "termination date" and if not exercised within ninety days such options will be forfeited (see, Option Agreements, ¶4 [NYSCEF Doc Nos. 17,18]). Thus, while the option agreements do not discuss the appropriateness of any terminations, they focus upon the 'termination date' as the trigger permitting such options. The precise termination date is not defined in the option agreements themselves, thus the employment agreements must be examined.

The employment agreements provide that "the Company may terminate Cantini's employment at any time without Cause upon not less than one hundred eighty (180) days' prior written notice to Cantini" (see, Employment Agreements, ¶5(a)(i). Thus, the plaintiff argues that the termination letter sent on January 24, 2022 did not become effective until July 23, 2022 since a termination without cause is not effective for one hundred and eighty days. Surely, there are questions as to the precise termination date of the plaintiff and whether the right to exercise the options expired on April 24, 2022 as argued by the defendants. There is no merit to the argument the Amended Complaint itself admitted the termination date was January 24, 2022. Paragraph 10 of the Amended Complaint states that the plaintiff "was terminated allegedly "for Cause" by Defendants on

January 24, 2022" (id). That can hardly be termed a concession the plaintiff was terminated for cause. This is especially true since the Amended Complaint repeatedly asserts the termination was without cause. Thus, the very next paragraph explains the plaintiff returned and cured the alleged residency requirement and "as a result, the Companies did not have "Cause" for terminating Cantini's employment" (id at ¶ 11). Further, in Paragraph 73, the Amended Complaint asserts that "Cantini's termination was not for "Cause" as defined in the Employment Agreements" (id). Moreover, in paragraphs 76 and 77 the Amended Complaint terms the termination "impermissible termination for cause" (id).

The defendants counter that the plaintiff had ninety days in which to exercise the options and that remained true whether he was terminated for cause or without cause. The ninety day time-frame in which to exercise the option begins upon the termination date and that date is the true dispute in this case. Thus, it is certainly correct that the plaintiff had ninety days in which to exercise his option. The only question is when those ninety days begun. The defendants argue the start day was they day they terminated him, namely January 24, 2022. The plaintiff asserts it was July 23, 2022, one hundred and eighty days after he was terminated without cause. Therefore, the propriety of the breach of contract causes of action rooted in the options clauses are

inextricably connected to the facts surrounding the actual termination itself. Therefore, whether the plaintiff validly exercised the options or missed the deadline to do so depends on the nature of his termination and whether it was for cause. The factual questions preclude the dismissal of the two breach of contract causes of action. The case of Kahn v. New York City Department of Education, 79 AD3d 521, 915 NYS2d 26 [1st Dept., 2010] does not demand a contrary result. That case deals with the time in which to commence actions where other notices regarding termination are defective. The court noted there that any such deficiencies do not abrogate the statute of limitations and do not extend the time in which to commence an action. The defendants argue that like the holding in Khan (supra) "defendants' alleged failure to provide 180 days' notice does not affect the termination date" (see, Memorandum of Law in Support, page 9 [NYSCEF Doc. No. 47]). However, as explained, the correct date of termination is not dependent on any notice, rather, it is only dependent on cause of without cause. Therefore, that case has no relevance to this case where the action was timely commenced and the only issue is whether the plaintiff exercised his options in a timely manner. Consequently, the motion seeking to dismiss those causes of action is denied.

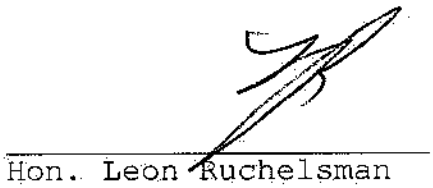
Likewise, the motion seeking to amend the complaint to further amplify the pleadings is granted.

The motion seeking to dismiss the claim for a violation of the covenant of good faith and fair dealing is granted. The claims is duplicative of the breach of contract cause of action (AJW Partners LLC v. Itronics Inc., 68 AD3d 567, 892 NYS2d 46 [1st Dept., 2009]).

So ordered.

ENTER:

Dated: October 25, 2022
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC