

Rajan v Thesys Tech., LLC

2023 NY Slip Op 30497(U)

February 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652927/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

-----X

SRINIVASA RAJAN,

Plaintiff,

- v -

THESYS TECHNOLOGIES, LLC, THESYS CAT LLC, MIKE
BELLER

Defendants.

-----X

INDEX NO. 652927/2020

MOTION DATE 09/09/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for

DISMISS

Plaintiff, Srinivasa Rajan (plaintiff) commenced this action alleging damages for breach of contract and wage and hour violations stemming from his employment with defendants Thesys Technologies, LLC (Thesys Tech), Thesys CAT LLC (Thesys CAT) and Mike Beller (Beller) (collectively, defendants). Defendants now move pursuant to CPLR 3211 (a)(1) and (7) to dismiss the complaint. The motion is opposed. For the following reasons, defendants' motion is granted in part.

FACTUAL ALLEGATIONS

According to the complaint, plaintiff was employed as Thesys CAT's Chief Information Security Officer (CISO) from February 28, 2018 through April 15, 2019. Thesys CAT is a Delaware LLC and wholly owned subsidiary of defendant Thesys Tech, also a Delaware LLC. Defendant Beller is the Chief Executive Officer of Thesys Tech.

In 2012, the United States Security Exchange Commission adopted rules requiring that the Financial Industry Regulatory Authority (FINRA) and the self-regulating organizations (SROs) to prepare and submit for the SEC's approval a plan to create, implement, and maintain a consolidated audit trail for exchange-traded securities (the CAT Plan). Thereafter, the SROs published a request for bids to be the "Plan Processor" responsible for building and operating the CAT in accordance with the CAT Plan. In November 2016, the SEC approved the CAT Plan, and in January 2017, after a four-year bidding process, Thesys Tech was selected as the Plan Processor.

On April 6, 2017, Thesys, through its newly formed and wholly owned subsidiary, Thesys CAT, entered into a Plan Processor Agreement (the PPA) with CAT NMS, LLC (CATLLC), an entity jointly owned by the SROs. The PPA detailed the duties and

responsibilities of Thesys CAT in building, implementing, and maintaining the CAT in accordance with the CAT Plan. The PPA had a seven-year term and upon the expiration of the initial term or any subsequent renewal term, the PPA would automatically renew for successive three-year terms unless either Thesys CAT or CATLLC provided the requisite advance notice of its intent not to renew.

Under the PPA, Thesys CAT was required to hire a CISO to ensure the security and confidentiality of all information reported to the CAT. Thesys CAT hired plaintiff to fill this position at the end of February 2018. On February 28, 2018, plaintiff and Thesys CAT entered into an 8-page employment contract (employment agreement). The employment agreement is governed by Delaware law. Plaintiff was to be paid a base salary of \$450,000 under the employment agreement and was eligible to receive an annual performance bonus that was targeted to be \$250,000 for 2018. The employment agreement provided for an annual bonus as follows:

“(b) Annual Bonus. With respect to each of the Company's fiscal years that end during the Term, the Executive shall be eligible to receive an annual performance-based cash bonus, with an initial target annual amount of \$250,000, based upon the achievement of Company and/or individual performance goals established by the Manager for such fiscal year, as determined by the Manager in its discretion (the ‘Annual Bonus’), subject to merit review on an annual basis.”

(NYSCEF doc. no. 26 at § 2.b).

Section 3(c), entitled severance payments, states in relevant part that “[t]he parties hereto acknowledge and agree that (i) except as set forth in Section 3(c)(i), the Executive is not entitled to any severance payments or benefits upon termination of employment due to the expiration of the Term.” The term of plaintiff’s employment was set to end “upon termination of the Plan Processor Agreement in accordance with its terms,” unless earlier terminated as provided in Section 3 of the Employment Agreement (*id.* at 1[b]). The employment provided that Thesys CAT terminated plaintiff prior to the expiration of its term without “Cause,” or if plaintiff left for “Good Reason,” Thesys CAT would be required to pay plaintiff his base salary for a period of one year following the date of his termination.

The employment agreement also contained a provision governing amendments, which states that the agreement “may not be modified, amended, or terminated except by an instrument in writing, signed by the Executive and a duly authorized officer of the Company” (*id.* at § 10). Moreover, the employment agreement includes an additional provision that it is intended “by the parties to be the final expression of their agreement with respect to the employment of the services of [plaintiff] by the Company and may not be contradicted by evidence of, and supersedes, any prior or contemporaneous agreement (including, without limitation, any verbal employment, consulting or other similar agreement)” (*id.* at § 9).

Pursuant to the terms of an escrow agreement between CATLLC, Thesys CAT and Citibank NA as escrow agent, the escrow agent was instructed to automatically disburse to

Thesys CAT on a monthly basis an amount equal to the CISO's pro rata salary for the month. The escrow agreement also provided for the disbursement of an additional \$250,000 to Thesys CAT on January 10, 2019, allegedly representing the amount of the annual performance bonus due to plaintiff under the employment agreement.

The PPA had an initial seven-year term. However, on January 2019, after only approximately two years, the SROs announced that the PPA with Thesys CAT was being terminated and that Thesys CAT would no longer serve as Plan Processor under the CAT Plan. As part of the transition from Thesys CAT to the new Plan Processor, Thesys CAT and CAT LLC entered into a Transition Services Agreement (TSA) on February 7, 2019. The TSA states that "the PPA will terminate" on "April 15, 2019." According to the TSA, the SROs expressly required the retention of specified employees for the transition, including plaintiff as the CISO, and required Thesys CAT to comply with its legal and contractual obligations to the personnel and vendors providing the transition services. Plaintiff alleges that to prevent plaintiff from resigning, Beller, personally assured plaintiff that he would be "taken care of" after the transition (compl. at ¶ 4).

Plaintiff's employment was terminated on April 15, 2019, after Thesys CAT transitioned its duties to the new plan processor. Plaintiff alleges that he was not paid his 2018 performance bonus and the full year of base salary required to be paid if he was terminated without cause, totaling \$700,000. Instead, plaintiff was offered \$50,000, an amount Thesys CAT claimed was consistent with the severance paid to other terminated employees

Defendants now move to dismiss plaintiff's claims against Thesys CAT for breach of contract (counts one and three), violations of the Labor Law (counts two and four), constructive trust (count five), equitable estoppel (count six), and alter ego liability against Thesys Tech as Thesys CAT (count seven).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration" (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

CPLR § 3211(a)(1) states that: "A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is founded upon documentary evidence." Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the

plaintiffs claim” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

Choice of law

The parties do not dispute, and the Court agrees, that Delaware law should be applied to plaintiff’s breach of contract and that New York statutory law should be applied to the statutory and equitable, and constructive trust claims.

Breach of Contract

In support of the branch of its motion to dismiss plaintiff’s breach of contract claims, defendants argue that plaintiff is not entitled pursuant a bonus to the plain language of the employment agreement. Specifically, defendants argues that whether plaintiff receives a bonus is at Thesys CAT’s discretion. Defendants further argue that the employment agreement did not require Thesys CAT to establish a company performance goal or that plaintiff would be entitled to a bonus if it failed to do so. Defendants further argue that plaintiff was not entitled even though money was earmarked for a bonus. Defendants also argue that plaintiff is not entitled to a severance, since plaintiff’s employment concluded upon the expiration of the employment agreement.

In opposition, plaintiff argues that the employment agreement provides that he was entitled to receive a bonus for 2018 pursuant to the employment agreement because he achieved his own individual performance goals. Plaintiff argues that the discretionary language in the bonus provision applies to the criteria in which plaintiff’s performance is weighed to determine plaintiff’s bonus—and not whether plaintiff was entitled to a bonus. Plaintiff next argues that he is entitled to a severance payment pursuant to the employment agreement, since the agreement requires the payment of severance if plaintiff’s employment is terminated without cause or if plaintiff resigns for good reason. Plaintiff contends that he did not resign, but rather that he was terminated.

Under Delaware law, the elements of a breach of contract claim are (1) a contractual obligation, (2) a breach of that obligation by defendant, and (3) resulting damage to plaintiff (*H-M Wexford LLC v Encorp, Inc.*, 832 A2d 129, 140 [Chancery Ct, Del 2003]).

Here, the bonus provision contained in the employment agreement states that the bonus is left to defendant’s discretion. As the employment agreement states, plaintiff is eligible, and not guaranteed, a bonus. Thus, it follows that the discretionary language contained in the bonus provision was intended to apply to the bonus provision as a whole, and not limited to the criteria to determine plaintiff’s bonus. Otherwise, where the discretionary language is applied to the criteria language only, the term “eligible” is rendered superfluous (*see Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 [1984] [“In construing a contract, one of a court’s goals is to avoid an interpretation that would leave contractual clauses meaningless”]). Further, it is the employment agreement, and not the escrow agreement, that governs the conditions in which plaintiff is to receive a bonus.

Plaintiff is also not entitled to severance. The employment agreement states that plaintiff is not entitled to severance where the term of employment ended, and that the term of employment ends upon the termination of the PPA. The parties agree that the PPA was terminated no later than April 15, 2019, the same day that plaintiff's employment ended, and that plaintiff was employed through that date. Thus, plaintiff's allegations demonstrate that plaintiff's employment ended in accordance with the term of the employment agreement, i.e. the expiration of the term.

Further, the complaint does not allege that the employment agreement was modified to provide for a bonus or severance. As defendants argue, there is no dispute that the employment agreement required that any amendment in writing by both parties, which did not take place. Instead, plaintiff argues that Beller told plaintiff that he would be "taken care of." Beller's alleged statement to plaintiff leaves more questions than it provides answers. Indeed, this statement alone is insufficient to demonstrate that the employment agreement was modified, since it lacks the "specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by document" (*Cont'l Ins. Co. v Rutledge & Co.*, No. CIV. A. 15539, 2000 WL 268297, at *3 [Del. Ch. Feb. 15, 2000]; see *Singh v. Batta Env't Assocs., Inc.*, No. CIV.A. 19627, 2003 WL 21309115, at *7 [Del. Ch. May 21, 2003]; *Reeder v. Sanford Sch., Inc.*, 397 A2d 139, 141 [Del. Super. Ct. 1979]). Accordingly, plaintiff's claims for breach of contract are dismissed.

In light of the above determination that plaintiff does not have a contractual right to a bonus or severance, plaintiff may not assert a claim for wages under the Labor Law (see *Tierney v Capricorn Invs., L.P.*, 189 AD2d 629 [1st Dept 1993]) [affirming dismissal of a claim for severance pay and ruling that the "plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages"]).

Plaintiff's claim for a constructive trust is also dismissed, as the subject matter of the constructive trust—the bonus—is governed by the employment agreement (see *Hamrick v Guralnick*, 146 AD3d 606, 607 [1st Dept 2017] ["the unjust enrichment and constructive trust claims fail to state a cause of action since the subject matter thereof is governed by express written contracts"]).

Plaintiff's claim that Thesys Tech is responsible for the liabilities of its alleged alter ego Thesys CAT is also dismissed. "To state a veil-piercing claim under Delaware law a plaintiff must plead facts supporting an inference that a corporation, through its alter ego, has created a sham entity designed to defraud investors and creditors" (*Walnut Hous. Assocs. 2003 L.P. v MCAP Walnut Hous. LLC*, 136 AD3d 403, 404 [1st Dept 2016], citing *Crosse v BCBSD, Inc.*, 836 A2d 492 [Sup. Ct. Del. 2003]). Pursuant to Delaware law,

"[t]he Delaware courts apply the alter ego theory rather strictly and, in determining the sufficiency of the claim, will often consider a combination of factors including whether a company was adequately capitalized or solvent, whether corporate formalities were observed, whether the dominant shareholder siphoned company funds and whether, in general the company simply functioned as a facade for the dominant shareholder"

Walnut Hous. Assocs. 2003 L.P., 136 AD3d at 404 [1st Dept 2016]).

Here, the complaint alleges that Thesys CAT was inadequately capitalized, and that it distributed funds received pursuant to the escrow agreement to Thesys Tech. However, the complaint fails to “plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors” (*Crosse*, 836 A2d at 497). Indeed, as defendants argue, plaintiff fails to allege that the employment agreement was inherently fraudulent, that Beller’s statements constituted fraud, or that Thesys CAT was a “vehicle for fraud” intended solely to deny plaintiff his discretionary bonus or severance.

In support of defendants’ motion to dismiss plaintiff’s claim for equitable estoppel, defendants argue that equitable estoppel is an affirmative defense, not an affirmative cause of action and that plaintiff seeks monetary damages, which is unavailable under a defense of equitable estoppel. The elements required to state a claim for equitable estoppel are:

“(1) conduct amounting to false representation or concealment of material facts, (2) intention or expectation that the other party will act upon such conduct, and (3) actual or constructive knowledge of the true facts (*see e.g. BWA Corp. v. Alltrans Express U.S.A.*, 112 A.D.2d 850, 853 [1st Dept 1985]. “The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position’ ” (*id.*, quoting *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81–82 [4th Dept 1980])”

(*Forman v Guardian Life Ins. Co. of Am.*, 25 Misc. 3d 1224[A] [Sup. Ct., New York County 2009], *affd.*, 76 AD3d 886 [1st Dept 2010]; *see Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 182 [1st Dept 2000]).

Plaintiff alleges that Thesys CAT, through Beller, assured that plaintiff “would be taken care of,” which he relied upon when deciding to not resign for good reason in accordance with the employment agreement. Plaintiff alleges that he would have been entitled to receive severance payment the employment agreement required to be paid upon resignation had he exercised the right. Plaintiff further alleges that Thesys CAT and Beller knew Beller’s representation was false, and that plaintiff relied upon it to his detriment. Thus, the Court finds that the complaint states a claim for equitable estoppel against Thesys CAT.

For the first time in reply, defendants argue that plaintiff’s claim for equitable estoppel fails because plaintiff fails to allege a legal duty owed to him independent of the employment agreement, and plaintiff fails to allege a prejudicial change in the plaintiff’s position. Even if the Court were to consider defendants’ late arguments, which it does not (*see Glencore Ltd. v Freepoint Commodities LLC*, 198 AD3d 413, 414 [1st Dept 2021]), they are without merit. First, the facts alleged in plaintiff’s breach of contract claim, which focus on the employment agreement, are distinct from the facts that make up plaintiff’s equitable estoppel claim, namely, Beller’s statements (*see MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 842 [1st Dept 2011]). And second, plaintiff’s claim that he forwent resigning as a result of

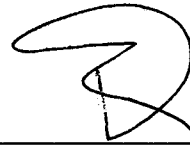
Beller's statements, and thus also his entitlement to severance, adequately alleges a prejudicial change in his position.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(7) is granted to the extent that counts one, two, three, four, five, and seven are dismissed, and the complaint is dismissed against Thesys Tech; and it is further

ORDERED that defendants shall serve a copy of this order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



2/10/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: