Reeps v Freedom Mtge. Corp.
2025 NY Slip Op 30571(U)
February 5, 2025
Supreme Court, New York County
Docket Number: Index No. 653778/2022
Judge: Emily Morales-Minerva
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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ERIC REEPS,

Plaintiff,

- v -

FREEDOM MORTGAGE CORPORATION, ROUNDPOINT MORTGAGE SERVICING CORPORATION, and JOHN DOES,

Defendants.

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INDEX NO.	653778/2022
MOTION DATE	07/09/2024
MOTION SEQ. NO.	005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for DISMISS.

APPEARANCES:

Kilpatrick Townsend & Stockton LLP, New York, New York (Frederick L. Whitmer, Esq. and Andrew T. Williamson, Esq., of counsel) for plaintiff.

Proskauer Rose LLP, New York, New York (Patrick Kramer Rice, Esq., Scott S. Tan, Esq., Steven J. Pearlman, Esq. [admitted pro hac vice], and Guy Brenner, Esq. [admitted pro hac vice] of counsel) for defendants.

HON. EMILY MORALES-MINERVA:

In this action for, among other things, a declaratory judgment that a restrictive covenant is unenforceable, plaintiff ERIC REEPS moves, by notice of motion, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the first, second and third counterclaims of defendants FREEDOM MORTGAGE CORPORATION and ROUNDPOINT MORTGAGE SERVICING CORPORATION (see generally

CPLR). These counterclaims are that (1) plaintiff breached the restrictive covenant in his employment contract, that (2) plaintiff violated the parties' mutual release agreement, (3) plaintiff must indemnify defendants for losses due to delinquent mortgage loans, and (4) unjust enrichment.

Defendants appear and submit written opposition to the motion.

For the reasons set forth below, the motion to dismiss (seq. no. 005) is granted, in part, and otherwise denied entirely.

BACKGROUND

Plaintiff Eric Reeps was an employee and one of four shareholders in non-party Continental Home Loans, Inc. ("Continental Corp."), "a multistate licensed business entity that originates mortgage loans directly to consumers" (see New York State Courts Electronic Filing System [NYSCEF] Doc. No. 003, Exhibit 2 of the Complaint, Asset Purchase Agreement dated May 20, 2014, p 1). Defendant Freedom Mortgage Corporation ("Freedom Corp.") "is a licensed mortgage company and loan originator and servicer with operations in New York" (NYSCEF Doc. No. 74, Answer, Affirmative Defenses, and First Counterclaims, dated May 28, 2024, p 3, at ¶ 9).

On or around May 20, 2014, Eric Reeps and the other shareholders of Continental Corp. entered into an Asset Purchase Agreement (APA) with Freedom Corp. whereby Freedom Corp. purchased Continental Corp.'s assets (see NYSCEF Doc. No. 001, Complaint). Pursuant to APA, Freedom Corp. agreed to offer employment to "Key Employees" of Continental Corp., which included Eric Reeps and the other shareholders (see NYSCEF Doc. No. 003, Exhibit 2 of the Complaint, Asset Purchase Agreement, dated May 20, 2014, p 54, at ¶ 6.11 [a]).

Eric Reeps and Freedom Corp. then entered an employment contract through which Reeps became Freedom Corp.'s Executive Vice President (see NYSCEF Doc. No. 001, Complaint at ¶¶ 22-24). The employment contract, among other things, explicitly permitted "[Freedom Corp. to] terminate [Eric Reep's] employment at any time without Cause" (see NYSCEF Doc. No. 002, Exhibit 1 of the Complaint, Employment Agreement, at p 6, § 4.2 [b]).

In the event for termination without cause, the employment contract provides that Eric Reeps would receive severance as specified therein if he "executes and delivers to the Company the Release" attached to therein (id. at p 7, § 4.2 [d] [ii]; see also id., exhibit A - Form Release). The employment contract also contained a restrictive covenant effective during

Reeps's employment with Freedom Corp. and two-years immediately thereafter (id. at p 9, § 6.1).[1]

About four years after joining Freedom Corp., Eric Reeps became the shareholder representative for Continental Corp. Thereafter, he entered a mutual release agreement with Freedom Corp. relating to the APA (see NYSCEF Doc. No. 52, Mutual Release Agreement, at p 2). The mutual release agreement identified Freedom Corp. as "buyer" and identified Eric Reeps as (1) "shareholder representative" of Continental Corp. shareholders, as (2) an individual "shareholder" of Continental Corp., and as (3) part of Continental Corp.'s "shareholders" collectively (id. at p 2).

It explicitly states that Freedom Corp. notified Eric Reeps of "indemnity claims resulting from **Delinquent Mortgage Loans**, and [of Freedom Corp.'s] expect[ation] that additional indemnity

[1] The covenant states, in pertinent part: "[t]he provisions set forth in this section shall be in force during the Term and for the two-year period (such period, the 'Restricted Period') immediately following the termination of [[plaintiff's] employment with Company, regardless of the reason for such termination . . . (i) the [plaintiff] shall, and shall not permit any of their respective 'Affiliates' to directly or indirectly engage in or assist others in engaging in the 'Restricted Business' (as such term is defined in the APA); or have any interest in any 'Person' that engages directly or indirectly in the Restricted Business in any capacity . . . during the Restricted Period . . .; (ii) during the Restricted Period, the [plaintiff] shall not, and shall not permit any of their respective Affiliates to, directly, or indirectly, hire or solicit any employee of Company or encourage any such employee to leave such employment or hire any such employee who has left such employment . . .; (iii) during the Restricted Period, the [plaintiff] shall not, and shall not permit any of their respective Affiliates to, directly or indirectly, solicit or entice, or attempt to solicit or entire, any clients, business partners, or customers of Company . . . for purposes of diverting their business or services from Company."

claims [will] arise in the future" (id. at p 1 [emphasis in original]). The mutual release also states that the shareholders of Continental Corp. desire to be released from such indemnity claims (see id. at p 2).

The mutual release then declares that "Buyer [Freedom Corp.] is willing to forever waive and forgot such indemnity claims [including delinquent mortgage loans] against the Shareholders, in exchange" for certain promises from each Continental Corp. shareholder (id. at p 2). These promises were set forth plainly as follows:

> "Shareholder's (1) continued compliance with the Surviving Obligations (as hereinafter defined), including, the Purchase Agreement Restrictive Covenants and the Employment Agreement Restrictive Covenants, without the Shareholder(s) asserting or contending that such covenants do not apply due to the Provisos or for any other reason, and
>
> (2) agreement to waive and forego any and all indemnity claims each or all may have against Buyer under the Purchase Agreement"

(id. at p 2).[2]

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[2] The MRA defines "provisos" collectively as that part of the non-competition covenant in the asset purchase agreement and that part of the non-competition covenant in the employment contract which declares that the noncompete covenants remain in effect only if Freedom Corp. is in material compliance with the asset purchase agreement and employment agreement (see NYSCEF Doc. No. 52, MRA, at p 2 ["WHEREAS, the non-competition covenant in the Purchase Agreement (the '**Purchase Agreement Non-Competition Covenant**') states that is remains in effect provided that (Freedom Corp.) is in material compliance with the Purchase Agreement; and the non-competition covenant in each employment Agreement (the '**Employment Agreement Non-Competition Covenant**') states that it remains in effect provided that (Freedom Corp.) is in material compliance with the Purchase Agreement and employment agreement (each a '**Proviso**' and collectively, the "**Provisos**")] [emphasis in original]).

The "surviving obligations" of the shareholders were the:

> " . . . obligations pursuant to Section 6.7 (b) (Confidentiality; Publicity), Section 6.9 (Non-Competition; Non-Solicitation), Section 6.10 (Further Assurance; Post-Closing) of the Purchase Agreement) (collectively, the **Surviving Obligations**"), or Losses from fraud or intentional or willful breach of a representation, warrant or covenant as described in Sections 9.3 (b) (i) and (ii) of the Purchase Agreement, all of which shall survive this Release Agreement, and remain in full force and effect in accordance with the Purchase Agreement"

(id. at p 2-3, ¶ 3 [a]-[b] [bold emphasis in original and underscored emphasis added]).

Finally, the subject mutual release agreement provides that Freedom Corp.'s release "is null and void ab initio" -- if "any" shareholder "(1) breach[ed] any of the Surviving Obligations, or (ii) challenge[d] the enforceability of any of the Surviving Obligations or the Employment Agreement Restrictive Covenants, or (iii) assert[ed] that one or both of the Provisos apply to render inapplicable or unenforceable the Purchase Agreement Non-Competition Covenant and/or the Employment Agreement Non-Competition Covenant" (NYSCEF Doc. No. 52, Mutual Release Agreement, at p 3).

According to the mutual release, upon any of these actions, the breaching or challenging shareholder will "be subject to any and all claims for Losses that [Freedom Corp.]

has now or that may arise in the future under the Purchase Agreement" (id.).

Around three years thereafter, Freedom Corp. and Eric Reeps executed an amendment to their employment agreement (see NYSCEF Doc. No. 004, Amendment to Employment Agreement). Said amendment, among other things not at issue, provides that, as amended, any reference to Freedom Corp. or "the 'Company' [in the employment contract] shall be deemed to refer to and include Freedom Mortgage Corporation, Roundpoint Mortgage Servicing Corporation, and their respective affiliates, subsidiaries, and parent companies" (see id. at p 1 [emphasis added]).

Thereafter, by letter, dated July 29, 2022, defendant Roundpoint Mortgage Servicing Corporation (Roundpoint Corp.) -- identifying itself as "the Company" -- terminated Eric Reeps "without 'Cause,' as defined in Section 4.1 (a) of the Employment Agreement" (see NYSCEF Doc. No. 005, Termination Letter). The termination letter further provided that, [p]ursuant to Section 4.2 (d) of the Employment Agreement," Roundpoint Corp. "enclose[d] the Waiver and General Release (the 'Release')" for plaintiff's execution in connection with his termination (id.).[3]

[3] Section 4.2 (d) (ii) of the Employment Agreement provides, in part, apparently referenced: "[Where] the employment of the Executive [plaintiff] is terminated (x) by the Company for any reason other than for Cause during the Term . . . (ii) if it the Executive [plaintiff] executes and delivers to the Company the Release, the Executive [plaintiff] shall receive severance

Eric Reeps refused to execute that waiver and release, as it was substantially different than the release attached to his employment contract because the one attached to the termination letter contains a reference to "restrictive covenants" (see NYSCEF Doc. No. 001, Complaint, p 7, ¶ 35). Consequently, "the Company" did not provide Eric Reeps with a severance.

Reeps then commenced this action against defendants Freedom Corp. and RoundPoint (defendants), for a declaratory judgment, pursuant to CPLR § 3001,[4] and for breach of contract, unjust enrichment, breach of implied covenant of good faith, promissory estoppel, and failure to pay earned commissions (see id.).

Defendants answer and counterclaim, asserting (1) plaintiff breached his duty of loyalty by facilitating employee departures to a competitor, (2) plaintiff violated the mutual release agreement, nullifying defendants' indemnification waiver, (3) plaintiff must indemnify defendants for losses due to delinquent mortgage loans, and (4) unjust enrichment (see NYSCEF Doc. No. 74, Answer with Amended Counterclaims).

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equal to the Annual Salary and Override Fee for the period commencing on the date of termination of employment and ending on the last day of the Term, . . ." (emphasis added).

[4] CPLR § 3001 provides, in pertinent part, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

Now, Eric Reeps moves, by notice of motion (seq. no. 005), pursuant to CPLR 3211 (a)(1)[5] and (7),[6] for an order, dismissing defendants' counterclaims with prejudice. Reeps argues that the Freedom Corp.'s breach of loyalty claim fails because the alleged acts of disloyalty allegedly occurred when Roundpoint Corp. employed Eric Reeps, not Freedom Corp. As to the enforceability of the restrictive covenants, Reeps contends they must be dismissed because defendants terminated him without cause (see NYSCEF Doc. No. 005, Termination Letter; NYSCEF Doc. No. 90, Plaintiff's Mem. of Law in Support of Mot. to Dismiss).

ANALYSIS

CPLR 3211 (a) (1)

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]; see also M & E 73-75, LLC v. 57 Fusion LLC, 189 AD3d 1, 6 [1st Dept 2020]). As with a motion to dismiss a complaint, when considering a motion to dismiss a counterclaim,

[5] CPLR § 3211 (a)(1) states, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded on documentary evidence."
[6] CPLR § 3211 (a)(7) states, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action."

the court must accept the facts as alleged in the counterclaim as true, providing the defendant the benefit of every possible favorable inference (see Twitchell Technical Products, LLC v Mechoshade Systems, LLC, 277 AD3d 45, 47 [2nd Dept 2024], citing Leon, supra, 84 NY2d at 87).

CPLR § 3211 (a)(1) permits "[a] party [to] move for judgment dismissing one or more causes of action asserted against [the party] on the ground that a defense is founded on documentary evidence." To prevail on such a motion, the moving party must show that the documentary evidence "conclusively refutes" the allegations against it (see Consolidated Rest. Operations, Inc. v. Westport Ins. Corp., 41 NY3d 415, 425 [2024], citing J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 334 [2013]; see also Kolchins v. Evolution Markets, Inc., 31 NY3d 100, 106 [2018]; AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582, 590-591 [2005]).

Further, "[t]o constitute documentary evidence, the papers must be 'essentially undeniable' and support the motion on its own (see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 A.D.3d 431, 432 [1st Dept 2014]; see also Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava, 144 AD3d 431, 431 [1st Dept 2016] [holding a written contract constitutes documentary evidence for dismissal of a breach of

contract]; Marcal Fin. SA v. Middlegate Sec. Ltd., 203 AD3d 467, 468 [1st Dept 2022] [holding an affidavit does not constitute documentary evidence for purposes of CPLR 3211 (a) (1)]).

CPLR 3211 (a) (7)

Pursuant to CPLR 3211 (a) (7), "[a] party may move for judgment dismissing one or more causes of action asserted against [the party] on the ground that the pleading fails to state a cause of action." "On a motion to dismiss a complaint or counterclaims pursuant to CPLR 3211 (a) (7), the court must accept all facts as alleged in the pleading to be true, accord the pleader the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Wynkoop v 622A President St. Owners Corp., 169 AD3d 1100, 1102 [2d Dept 2019], citing Leon v Martinez, 84 NY2d 83, 87-88 [1994] and Sokol v Leader, 74 AD3d 1180, 1181-1182 [2d Dept 2010]).

MOTION TO DISMISS COUNTERCLAIM FOR BREACH OF LOYALTY

Plaintiff Eric Reeps moves for an order dismissing defendant's counterclaim, in part, to dispose of only defendant Freedom Mortgage's claim that Reeps breached his duty of loyalty

to it. In support of this proposed relief, Eric Reeps contends that documentary proof exists in the record to show that he worked only for Roundpoint at the time of the alleged action of disloyalty (see NYSCEF Doc. No. 90, Plaintiff's Mem. of Law in Support of Partial Mot. to Dismiss the First Amended Counterclaims, p. 22, n 8 [discussing the letter of termination, dated July 29, 2022]; see also NYSCEF Doc. No. 05, Termination Letter).

However, Eric Reeps's termination letter refers to both Freedom Corp. and Roundpoint as the "company" terminating Eric Reeps (see NYSCEF Doc. No. 05, Termination Letter). Further, the plain language of the amended employment agreement between Freedom Corp. and Eric Reeps explicitly provides that "any reference in the[ir] Employment Agreement [dated October 31, 2014] to 'Freedom Mortgage Corporation' or the 'Company' shall be deemed to refer to and include Freedom Mortgage Corporation, RoundPoint Mortgage Servicing Corporation, and their respective affiliates, subsidiaries, and parent companies" (id. [emphasis added]).

These documents do not "conclusively" refute the allegations that Freedom Corp and Roundpoint were Reeps's employer at the time of the alleged disloyalty (see Consolidated Rest. Operations, Inc. v. Westport Ins. Corp., 41 NY3d 415, 425 [2024]). Further, Eric Reeps does not point to any other proof

in the record as constituting such documentary proof for purposes of CPLR 3211 (a) (1).

Also unavailing is Eric Reeps's argument that Freedom Corp. has failed to state a cause of action for breach of loyalty because it did not employ Reeps at the time of the alleged breach. The court must accept all facts as alleged in the pleading as true, accord Freedom Corp. the benefit of every favorable inference, and "determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87 [1994]).

A breach of the duty of loyalty claim is "available only where the employee has acted directly against the employer's interests - as in embezzlement, improperly competing with the current employer, or usurping business opportunities" (Veritas Cap. Mgmt., LLC v Campbell, 82 AD3d 529 [1st Dept 2011]; Bluebanana Grp. v Sargent, 176 AD3d 408 [1st Dept 2019]). Freedom Corp. has sufficiently alleged this cause of action. "Whatever an ultimate trial may disclose as to the truth of the allegations," the liberal standard of CPLR 3211 (a) (7) is satisfied here (Sander v Winship, 57 NY2d 391, 394 [1982]).

MOTON TO DISMISS INDEMNITY COUNTERCLAIM

Eric Reeps next asks the court to dismiss Freedom Corp.'s counterclaim against him for contractual indemnification of losses arising from delinquent mortgage loans, pursuant to the Asset Purchase Agreement, dated May 20, 2014 (see NYSCEF Doc. No. 003, Exhibit 2 of the Complaint, Asset Purchase Agreement). Reeps argues that, pursuant to the Asset Purchase Agreement, Freedom Corp. waived indemnification, as it failed to timely notify Eric Reeps of losses resulting in a material prejudice. This argument is unavailing.

It is undisputed that the Asset Purchase Agreement provides:

> "In any case in which an Indemnified Party [Freedom Corp.] seeks indemnification. . ., the Indemnified Party [Freedom Corp.] shall notify the Indemnifying Party [Eric Reeps] in writing as promptly as reasonably practicable of any Losses which such Indemnified Party claims are subject to indemnification under the terms hereof. Subject to the limitations otherwise set forth in this Article IX, the failure of the Indemnified Party to exercise promptness in such notification shall not amount to a waiver of such claim unless and to the extent the resulting delay materially prejudices the position of the Indemnifying Party with respect to such claim"

(article 9.8 [emphasis added]).

Here, issues of fact exist as to what was "reasonably" (see id.; see also NYSCEF Doc. No. 52, Mutual Release Agreement, at p 2). While not stating when or setting forth what delinquent mortgage loans Freedom Corp. disclosed, the mutual release agreement plainly states that Freedom Corp. notified Eric Reeps of "indemnity claims resulting from **Delinquent Mortgage Loans**, and [of Freedom Corp.'s] expect[ation] that additional indemnity claims [will] arise in the future" (id., at p 1 [emphasis in original]). Further, prior to Eric Reeps's challenging the validity of the mutual release agreement, Freedom Corp.'s understanding was that no notice was necessary as it was waiving such disclosed and undisclosed losses.

In any event, as set forth in the asset purchase agreement, untimely notification of losses "shall not amount to a waiver of such claim unless and to the extent the resulting delay materially prejudices the position of the Indemnifying Party with respect to such claim" (see NYSCEF Doc. No. 003, Exhibit 2 of the Complaint, Asset Purchase Agreement, article 9.8 [emphasis added]). Here, Eric Reeps provides neither dispositive documentary evidence of material prejudice nor other proof to establish this prong as a matter of law.

To the extent Eric Reeps relies on the following list of cases for a contrary result, the facts and procedural posture presented therein are completely dissimilar to the facts and

procedural posture presented here for purposes of an analogous result (see Wainco Funding v First AM. Tit. Ins. Co. of NY, 219 AD2d 598 [2d Dept 1995] [holding that on defendant's motion for summary judgment in an action to recover under an insurance policy, plaintiff's failure to give defendant notice for 20 months actually prejudiced defendant, and complaint was properly dismissed]; see also Steinberg v Hermitage Ins. Co., 26 AD3d 426 [2d Dept 2006] [finding that where an insurance policy required an insured to provide notice of an accident as soon as practicable, such notice must be provided within a reasonable time, and defendant established, prima facie, its entitlement to judgment as a matter of law by demonstrating that plaintiff did not provide it with notice of the occurrence for 57 days after it had become aware of the incident that gave rise to the claim]; Conergics Corp. v Dearborn Mid-West Conveyor Co., 144 AD3d 516 [1st Dept 2016] [providing that on a motion for summary judgment, plaintiff must demonstrate that untimely notice caused them actual prejudice)].

Eric Reeps next argues that Freedom Corp.'s indemnification claim must be dismissed because the "no challenge" provision in their mutual release agreement is unenforceable as a matter of law. This argument appears to be a red hearing. The mutual release agreement and the asset purchase agreement are separate documents. In the event this court finds that the "no

challenge" provision is unenforceable and that the mutual release is void, it does not follow that the indemnification provisions of the asset purchase agreement are void. Indeed, Eric Reeps does not challenge the validity of the asset purchase agreement, which governs indemnification.

To the extent that Eric Reeps argues that he has "demonstrated that the restrictive covenants in his Employment Agreement and the 'no-challenge' provision in the MRA [mutual release agreement] are unenforceable as a matter of law" (NYSCEF Doc. No. 103, section II (B), at 6 [citing to pages 8-14 of plaintiff's memorandum of law]), this argument is also unavailing.[7]

In making this argument, Reeps relies on Post v Merril Lynch, Pierce, Fenner & Smith, Inc. (48 NY2d 84 [1979]). There, the Court of Appeals "h[e]ld where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is

[7] The court, however, agrees that the documentary evidence establishes that Reeps was terminated without cause (see NYSCEF Doc. No. 005, Termination Letter; NYSCEF Doc. No. 74, Answer with Amended Counterclaims, ¶ 1, 96). As such, pursuant to CPLR § 3211 (a)(1), the court dismisses defendants' allegations in the counterclaim that purport to establish that plaintiff was terminated with cause (NYSCEF Doc. No. 74, Answer with Amended Counterclaims, ¶ 47).

unreasonable as a matter of law and cannot stand" (id. at 86; see also Davis v. Marshall & Sterling, Inc., 217 AD3d 1073, 1075 [3d Dept 2023] ["Post involved the forfeiture of pension plan benefits and we find that its holding is limited thereto"]). In evaluating the "forfeiture-for-competition provision in the employee' pension plan," the Court considered as key "the declaration of a strong public policy manifested by the Employee Retirement Income Security Act of 1974 (ERISA) (US Code, tit 29, § 1001 *et seq.*) (id. at 88 [emphasis added]).[8]

This case, however, does not plainly involve forfeiture of either a pension plan or a vested employee benefit. The subject employment contract's section governing compensation, sets forth Eric Reeps "general benefits" as the right to participate in, among insurance plans and other benefits, "retirement plans" (p 2-3, § 3.3).[9] His compensation description does not list "severance" as a benefit (id.).

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[8] see also US Code, tit 29, § 1001: defining "the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program — (i) provided retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan"(emphasis added).

[9] 3.3 provides in full: "The Executive shall be permitted during the Term to participate in any group life, hospitalization or disability insurance plans, health programs, retirement plans, fringe benefit programs and similar benefits that may be available to other senior executives of the Company generally, on the same terms as such other executives, in each case, to the extent that the Executive is eligible under the terms of such plans or

Instead, "severance" appears in the employment contract's provision addressing termination without cause (see NYSCEF Doc. No. 98, Employment Agreement, at p 7, § 4.2 [d] [ii]; see also id., exhibit A - Form Release). There, the employment agreement states -- "if the Executive [Eric Reeps] . . . executes and delivers to the Company the Release, the Executive . . . shall receive [a] severance" for at or around a year (NYSCEF Doc. No. 98, Employment Agreement, at p 7, § 4.2 [d] [ii]; see also id., exhibit A - Form Release). Thus, given the liberal standard on a motion to dismiss and the requisite benefit of every favorable inference to Freedom Corp., an issue of fact exists as to whether this case involves forfeiture of a vested benefit.

A vested post-employment benefit is also not plainly at issue in the mutual release agreement. There the purported exchange was of Freedom Corp.'s waiver of indemnification rights for Eric Reeps's agreement not to challenge the restrictive covenants in their employment agreement. Reeps does not establish, as a matter of law, that liability for losses as agreed to under the asset purchase agreement are the same as a loss of post-employment benefits to which he was entitled.

programs; provided however that the Executive shall be entitled to full family medical benefits. The Executive shall be entitled to vacation and sick leave in accordance with the Company's standard practices as are in effect from time to time."

In any event, contrary to Reeps's argument, non-compete covenants may be enforceable even where a person is terminated without cause. The Court of Appeals explicitly provided: "although a restrictive covenant will be enforceable without regard to reasonableness if an employee left his employer voluntarily, a court must determine whether forfeiture is "reasonable" if the employee was terminated involuntarily and without cause (see Morris v. Schroder Capital Mgmt. Int'l, 7 NY3d 616, 621 [2006] [emphasis added], citing Post v Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 NY2d 84, [1979]). "The law in New York is in fact that contractual forfeitures of postemployment benefits are per se enforceable for a violation of a restrictive covenant, unless the employee was terminated without cause, in which case the standard reasonableness analysis applies to any restrictive covenant" (Kelly-Hilton v Sterling Infosystems, 426 FSupp3d 49, 59 [SDNY 2019] [emphasis in original] [citations omitted]).

MOTION TO DISMISS UNJUST ENRICHMENT COUNTERCLAIM

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff" (Corsello v Verizon New York, Inc., 18 NY3d 777 [2012]). "A claim for unjust

enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter" (Goldstein v CIBC World Markets Corp., 6 AD3d 295, 296 [1st Dept 2004]; Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382 [1987] [holding that "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]).

Here, there are express contracts between the parties -- namely, the asset purchase agreement, the mutual release agreement, and the amended employment agreement. However, dismissal of defendants' unjust enrichment counterclaim is not warranted as it is pleaded as an alternative theory of relief (see Shilpa Saketh Realty, Inc. v Vidiyala, 191 AD3d 512 [1st Dept 2021][finding that the "unjust enrichment claim was not barred by the existence of an express contract where, as here, the validity of that contract was in dispute]; see also First Class Concrete Corp. v Rosenblaum, 167 AD3d 989 [2d Dept 2018][finding that since defendants disputed the enforceability of a contract covering the dispute at issue, plaintiff was entitled to allege cause of action for unjust enrichment as alternative theory of relief]).

Accordingly, it is

ORDERED that the motion (seq. no. 005) of plaintiff, ERIC REEPS, is granted to the extent that paragraph 47 of defendants' FREEDOM MORTGAGE CORPORATION and ROUNDPOINT MORTGAGE SERVICING CORPORATION, answer with amended counterclaims is dismissed; and the motion is denied, in all remaining parts; it is further

ORDERED that this matter is scheduled for a virtual Status Conference on June 9, 2025 at 11:00 A.M.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/05/2025
DATE

EMILY MORALES-MINERVA, 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