

**Cusack v American Defense Sys., Inc.**

2012 NY Slip Op 30808(U)

March 22, 2012

Supreme Court, Nassau County

Docket Number: 004417-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**THOMAS CUSACK,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 004417-08  
Motion Seq. No. 6  
Submission Date: 2/14/12**

**AMERICAN DEFENSE SYSTEMS, INC.,  
ANTHONY PISCITELLI, FERGAL FOLEY, and  
GARY SIDORSKY,**

**Defendants.**

-----X

**The following papers have been read on the motion:**

- Notice of Motion, Affirmation in Support and Exhibit....x**
- Memorandum in Support.....x**
- Memorandum of Law in Support.....x**
- Memorandum of Law in Opposition.....x**

This matter is before the Court for decision on the motion *in limine* filed by Plaintiff Thomas Cusack ("Cusack" or "Plaintiff") on January 19, 2012 submitted on February 14, 2012 following oral argument before the Court. For the reasons set forth below, the Court 1) denies Plaintiff's application *in limine* to preclude evidence of the following matters at the trial of this matter: a) other lawsuits maintained against Plaintiff, including actions involving an entity known as Coastal Capital by whom Plaintiff was previously employed, b) details regarding the pending investigation against Plaintiff by the New York State Grievance Committee, except to the extent those details are relevant to Defendants' decision to terminate Plaintiff, and c) facts relating to Coastal Capital, whose principals were involved in criminal activity; 2) refers to trial Plaintiff's application *in limine* regarding the valuation of his shares and Plaintiff's duty, if any,

to mitigate.

## BACKGROUND

### A. Relief Sought

Plaintiff moves, *in limine*, for an Order 1) delineating how damages for Plaintiff's conversion claim are to be calculated; and 2) directing that mitigation of the contract claims was not required.

Defendant American Defense Systems, Inc. ("ADSI") opposes Plaintiff's motion.

### B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated August 19, 2010 ("Prior Decision") and the Court incorporates the Prior Decision as if set forth in its entirety herein. As noted in the Prior Decision, the Complaint contains five (5) causes of action: 1) breach of contract against ADSI for its allegedly improper termination of Plaintiff's employment Agreement, 2) conversion of property against all Defendants, 3) breach of contract against ADSI for failure to pay Plaintiff compensation owed under his employment Agreement, 4) conversion against ADSI for failure to remove the restrictions on Plaintiff's Stock, and 5) fraudulent misrepresentation against ADSI for alleged misrepresentations regarding the restrictions on Plaintiff's Stock. Plaintiff seeks compensatory and punitive damages, as well as attorney's fees. Defendants asserted three (3) counterclaims: 1) fraudulent inducement, based on Plaintiff's alleged failure to disclose to Defendants that Plaintiff was the subject of an ongoing investigation by the New York State Appellate Division, Second Department Grievance Committee for the New York 10<sup>th</sup> Judicial District arising from alleged misconduct relating to a shortfall in his attorney trust account, 2) rescission of the First and Second Agreements and issuance of Stock to Plaintiff, and recovery of the proceeds of Plaintiff's sale of Stock, in light of Plaintiff's misrepresentations, and 3) rescission of the issuance of Stock to Plaintiff and recovery of the proceeds of Plaintiff's sale of Stock.

In the Prior Decision, the Court determined that summary judgment was not appropriate on Plaintiff's contract claims, but narrowed the issues for trial to 1) the validity of the two bases for Plaintiff's termination for cause, specifically a) whether the non-disclosure of the Grievance Committee matter was material to Plaintiff's employment; and b) whether Plaintiff failed to

perform his duties as Corporate Counsel, and 2) assuming that liability is established, Plaintiff's damages. The Court concluded that the remaining elements of Plaintiff's breach of contract claims had been established, including Defendants' failure to provide Plaintiff with the required cure period or the opportunity to make a presentation to the Board..

In the Prior Decision, the Court also 1) denied Plaintiff's motion for summary judgment on Plaintiff's claim for conversion of his personal property; 2) concluded that Plaintiff was entitled to summary judgment on his claim for conversion of the remaining 900,000 shares of ADSI Stock that were issued to him on June 24, 2004 and directed a trial on Plaintiff's damages; 3) denied, in its entirety, Defendants' motion for summary judgment dismissing the Complaint; 4) denied Defendants' application for summary judgment on their counterclaims for fraudulent inducement and rescission of certain agreements, and denied Plaintiff's application for summary judgment dismissing those counterclaims; and 5) granted Plaintiff's application for summary judgment dismissing the third counterclaim for rescission of the issuance of Stock in light of the Court's determination that ADSI had improperly converted Plaintiff's 900,000 Shares of ADSI Stock and direction that Plaintiff's resulting damages shall be set down for trial.

In a decision titled *Cusack v. ADSI*, 86 A.D.3d 586 (2d Dept. 2011) ("Appellate Decision"), the Appellate Decision, Second Department modified the Prior Decision by deleting the provision granting the branch of Plaintiff's motion which was for summary judgment on so much of the first cause of action to recover damages for breach of contract as was based on ADSI's failure to afford Plaintiff a 30-day cure period and the opportunity to make a presentation to the Board, and substituting therefor a provision denying that branch of the motion. *Id.* at 587. The Second Department otherwise affirmed the Prior Decision. *Id.*

In support of Plaintiff's instant motion *in limine*, Plaintiff's counsel provides a May 30, 2008 "listing" for ADSI (Ex. A to Valli Aff. in Supp.). The exhibit consists of a one page Ameritrade chart regarding "historical quotes and splits" for ADSI.

Plaintiff seeks to preclude the following at trial of this matter as irrelevant and unduly prejudicial: 1) other lawsuits maintained against Plaintiff, including actions involving an entity known as Coastal Capital by whom Plaintiff was previously employed, 2) details regarding the pending investigation against Plaintiff by the New York State Grievance Committee, discussed in

the Prior Decision, except to the extent those details are relevant to Defendants' decision to terminate Plaintiff, 3) facts relating to Coastal Capital, whose principals were involved in criminal activity, and 4) the valuation of Plaintiff's shares in ADSI by any method other than the conversion theory which values the shares at the time of the conversion.

### C. The Parties' Positions

Plaintiff submits that, in light of the fact that the Court determined that Defendants converted Plaintiff's stock, the proper measure of damages is pursuant to a "conversion theory" (P's Memo. of Law in Supp. at ¶ II) which bases damages on lost profits which are computed by 1) the value of the stock at the time of conversion, or 2) the highest intermediate stock price between the time of its conversion and a reasonable time thereafter during which the stock could have been replaced, whichever is greater. Plaintiff argues that the Court should not calculate damages under a breach of contract theory which fixes damages as of the date of the breach, and would not allow Plaintiff to recover any prospective profit from Defendants. Plaintiff also argues that the provision in his employment contract providing for certain payments and benefits was a liquidated damages provision and, therefore, Plaintiff was not required to mitigate his damages.

ADSI opposes Plaintiff's application regarding the appropriate valuation method submitting that the conversion theory propounded by Plaintiff is against the weight of the law, provides Plaintiff with an unjustified windfall and "does not reflect the economic realities of the situation" (D's Memo. of Law in Opp. at p. 1). Specifically, ADSI argues, Plaintiff seeks to have his damages set based on a single trade that occurred on the morning of ADSI's first day of trading, which was the highest trade ever made for ADSI shares, and then apply the share price from this one trade to all of his shares. ADSI contends that, under this theory, Plaintiff would receive a windfall by receiving a greater amount of damages than he could or would have received had he been able to sell his shares on the first day of trading. ADSI argues that the parties should present expert testimony on the issue of the valuation of Plaintiff's shares.

ADSI also argues that, under the reasoning of *Cornell v. T.V. Development Corp.*, 17 N.Y.2d 69 (1966), Plaintiff was required to mitigate his damages, and his employer was entitled to an offset of income earned during the remaining term, for any obligation to continue payment to the employee after separation of employment. ADSI contends that, given the absence of a

clause in Plaintiff's employment agreement stating that he is not required to mitigate his damages, Plaintiff may not assert that he has no duty to mitigate his damages.

### RULING OF THE COURT

#### A. Calculation of Damages

Damages for a contract claim, whether based on "conversion" or a conventional breach of contract theory, are to compensate a plaintiff for his actual loss. *Schultz v. Commodity Futures Trading Comm'n*, 716 F.2d 136 (2d Cir. 1983). Compensation for damages must not result in the injured party receiving a windfall, *id.* at 139, but rather should "reflect the realities of the situation." *Scully v. US WATS, Inc.*, 238 F.3d 497 (3d Cir. 2001).

#### B. Mitigation

Mitigation of damages is generally not necessary when there is a valid liquidated damages clause. *Delvecchio v. Bayside Chrysler Plymouth*, 271 A.D.2d 636, 639 (2d Dept. 2000). The question whether mitigation is thus necessary depends on whether the damages at issue are, in fact, liquidated damages. Significantly, there are no Second Department cases addressing this question. The First Department has, however, reached the issue in *American Capital Access Service Corp. v. Muessel*, 28 A.D.3d 395 (1st Dept. 2006). There, the First Department affirmed the trial court's Order which, *inter alia*, granted defendant's motion for summary judgment on her first counterclaim for breach and repudiation of her employment agreement and directed a money judgment in her favor. *Id.* at 396. The First Department rejected plaintiffs' argument that any damages that defendant recovered should be reduced by money she actually earned or could have earned in mitigation. In so doing the First Department noted, *inter alia*, that the employment agreement contained a no-mitigation clause and a severance provision "which, in essence, was a liquidated damages clause, exempting defendant from mitigating her damages." *Id.*

#### C. Application of these Principles to the Instant Action

The Court denies Plaintiff's *in limine* application to preclude evidence of the following matters at trial of this matter: 1) other lawsuits maintained against Plaintiff, including actions involving an entity known as Coastal Capital by whom Plaintiff was previously employed, 2) details regarding the pending investigation against Plaintiff by the New York State Grievance

Committee, discussed in the Prior Decision, except to the extent those details are relevant to Defendants' decision to terminate Plaintiff, and 3) facts relating to Coastal Capital, whose principals were involved in criminal activity. The Court cannot determine, at this juncture, whether evidence regarding these matters will be relevant and appropriate and, accordingly, refers those determinations to the trial of this matter.

The Court refers to trial the question regarding the calculation of Plaintiff's damages. In so doing, the Court is mindful of the Defendants' concerns that quantifying Plaintiff's damages solely by valuing the stock at issue as of the date of the conversion could well result in Plaintiff receiving a windfall. The Court also notes, however, that damages must not reward the Defendants for any wrongdoing. In sum, the question of how to determine Plaintiff's damages is best determined at trial.

The Court also refers to trial the question whether Plaintiff was required to mitigate any damages. In light of the lack of controlling precedent from the Second Department, the Court cannot state, as a matter of law, that mitigation of the contract claims was not required.

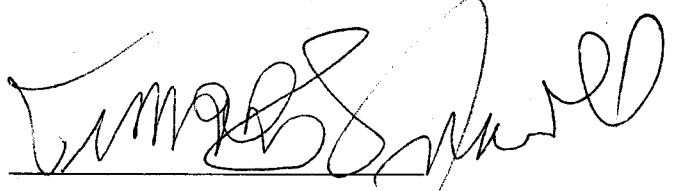
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Pre-trial Conference on April 24, 2012 at 9:30 a.m.

DATED: Mineola, NY  
March 22, 2012

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

**MAR 27 2012**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**