Goldman v Frederick Goldman, Inc.
2012 NY Slip Op 31266(U)
May 8, 2012
Sup Ct, New York County
Docket Number: 602827/03
Judge: Marcy S. Friedman
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[* 1].

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**   PART _57_
_____
                    Justice

Index Number : 602827/2003   INDEX NO. _____

GOLDMAN, MICHAEL   MOTION DATE _____

vs

FREDERICK GOLDMAN, INC.   MOTION SEQ. NO. _____

Sequence Number : 012

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ , were read on this motion to/for _summary judgment_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _1, 1a_

Answering Affidavits — Exhibits _____ | No(s). _2_

Replying Affidavits _____ | No(s). _____

memoranda of law in support & in oppos'n

Upon the foregoing papers, it is ordered that this motion is _denied_

as per accompanying decision/order dated 5/8/12.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): _____

FILED

MAY 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _5/8/12_   _____, J.S.C.
                                   MARCY S. FRIEDMAN

1. CHECK ONE: .... ☐ CASE DISPOSED   ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED   ☐ DENIED   ☐ GRANTED IN PART   ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER   ☐ SUBMIT ORDER
                                                         ☐ DO NOT POST   ☐ FIDUCIARY APPOINTMENT   ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

————————————————————x

MICHAEL GOLDMAN,

                    Plaintiff,

   - against -

FREDERICK GOLDMAN, INC., JONATHAN
GOLDMAN, individually and RICHARD
GOLDMAN, individually,

                    Defendants.

————————————————————x

Index No.: 602827/03

DECISION/ORDER

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    In this action, plaintiff Michael Goldman alleges that he was unlawfully demoted and then

terminated from his employment with defendant Frederick Goldman, Inc. (FGI) by FGI and its

principals Jonathan Goldman and Richard Goldman individually. Plaintiff, who was 62 at the

time of his termination, claims age discrimination. He also alleges that defendants breached his

employment agreement by failing to pay him contracted for bonuses and vacation pay. Plaintiff

further alleges a claim in quantum meruit for the value of services for which he was allegedly not

compensated. Defendants assert counterclaims for fraud, misrepresentation, breach of fiduciary

duty, and conversion, alleging that during his tenure as Vice President of Finance and Chief

Financial Officer, plaintiff, who had control of the company's financial books and records,

improperly appropriated $875,000 in unauthorized advances. Plaintiff moves for summary

judgment on all of his claims and striking defendants' answer, affirmative defenses, and

counterclaims.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

In order to establish a claim of discrimination under both the City and State Human Rights Laws (NYC Admin. Code § 8-107[1][a] and NY Exec. Law §296, respectively), the plaintiff must show a connection between his membership in a protected class and the adverse employment action taken against him. (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 35 [1st Dept 2011], lv denied 2012 NY Slip Op 71298.) The determination of whether the plaintiff has met his burden requires a three step analysis in which the plaintiff must initially establish a prima facie case of discrimination. The burden then shifts to the defendant to rebut the plaintiff's prima facie case with a legitimate reason for the firing. The burden then returns to the plaintiff to · demonstrate that the proffered reason is pretextual. (Stephenson v Hotel Empl. and Rest. Empl. Union Local 100 of the AFL-CIO, 6 NY3d 265, 270-71 [2006] [applying three step burden shifting approach articulated under Title VII in McDonnell Douglas v Green, 411 US 792, 793, to State Human Rights law claim of discrimination]; Bennett, 92 AD3d at 36 [holding that burden shifting approach of McDonnell Douglas is "sound," but cautioning that it must be applied in a way so as to effectuate the broad remedial purpose of the City Human Rights Law].) "Moreover, the burden of persuasion of the ultimate issue of discrimination always remains with the plaintiff[]." (Stephenson, 6 NY3d at 271.)

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In support of his motion for ultimate relief, plaintiff provides a brief affidavit of merit accompanied by hundreds of pages of transcripts of the depositions of the individual parties and a memorandum of law. Plaintiff fails, however, to cite evidence in the record that supports his claim of discrimination. Plaintiff's affidavit merely asserts that defendant Jonathan Goldman questioned him about when his was going to retire, stated that he wanted "fresh blood" at the firm, and made other "age centric remarks" to plaintiff. (P.'s Aff. In Support, ¶ 6.)

Even assuming arguendo that this conclusory affidavit is sufficient to shift the burden to defendants to show a legitimate reason for plaintiff's termination, defendants' opposition papers raise a triable issue of fact in this regard. Defendants cite their deposition testimony that they did not ask plaintiff if he was going to retire (Jonathan Goldman Dep. at 70-71); that age was not a factor in their termination decision (Richard Goldman Dep. at 119); and that they had numerous reasons for that decision, including plaintiff's untimely financial reporting, insubordination, and inability to get along with defendants. (Id. at 19-22; Jonathan Goldman Dep. at 63-64, 69-70.) Plaintiff does not make any showing in reply that these reasons were pretextual.
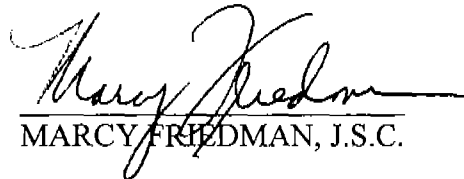
With respect to plaintiff's claims for breach of contract, his sweeping and conclusory statement that he was entitled to supplemental compensation of $973,880 (P.'s Memo. at 11), is unconvincingly bolstered with allegations concerning "loans" allegedly taken by the individual defendants over the years (id. at 12), and the additional statement that defendants were aware of and received statements reflecting plaintiff's appropriation of additional compensation. (Id. at 12-13.) Defendants assert, on the contrary, that plaintiff committed fraud, stealing $875,000 from FGI over a two year period. They emphasize that at numerous points in his deposition, plaintiff admitted that he had caused funds to be advanced to him without any prior authorization from the principals of FGI. (R. Goldman Aff. in Opp., ¶24.)

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Plaintiff's final contention, that defendants' counterclaim for fraud should be dismissed, is premised upon the erroneous assertion that the pleading lacks specificity. In fact, the counterclaims alleging fraud, misrepresentation, and breach of fiduciary duty allege that plaintiff took unauthorized advances of $100,000 six times in 2002, directed his subordinates to make accounting entries to evade detection of the alleged overpayments, took additional sums that brought the payments to $875,000, and created false and misleading documents to hide the theft. The allegations as pleaded are sufficiently detailed and specific to "permit a reasonable inference of the alleged conduct." (MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 295 [1st Dept 2011], quoting Pludeman v Northern Leasing Systems, Inc., 10 NY3d 486, 492 [2008].)

For the foregoing reasons, plaintiff's motion for summary judgment as to liability and for an order striking defendants' answer, affirmative defenses, and counterclaims, is denied.

This constitutes the decision and order of this court.

Dated: New York, New York
        May 8, 2012

MARCY FRIEDMAN, J.S.C.

FILED

MAY 15 2012

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