Bitonti v TYCO Healthcare Group, LP
2012 NY Slip Op 32769(U)
November 7, 2012
Supreme Court, Suffolk County
Docket Number: 40838-10
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX NO.: 40838-10

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:
Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 7-3-12
ADJ. DATE: 9-7-12
Mot Seq. 005-MotD
006-XMD
Conf: 12/7/12

JOSEPH BITONTI,

Plaintiff,

-against-

TYCO HEALTHCARE GROUP, LP,

Defendant.

SKLOVER, DONATH & FELBER, LLC
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New York, New York 10020

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Upon the following papers numbered 1 to 84 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40 ; Notice of Cross Motion and supporting papers 63 - 79 ; Answering Affidavits and supporting papers 41 - 60; 80 - 82 ; Replying Affidavits and supporting papers 61 - 62; 83 - 84 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (005) by the defendant for summary judgment is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed; and it is further

ORDERED that the cross motion (006) by the plaintiff for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that the parties are directed to appear at a conference in the chambers of the undersigned on **December 7, 2012**, at 9:30 a.m. in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York; and it is further

ORDERED that the defendant's counsel shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiff pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

In this breach of contract action, the plaintiff, Joseph Bitonti, seeks compensatory damages and punitive damages against his former employer, U.S. Surgical Corporation (hereinafter referred to as "U.S. Surgical" or the defendant), a division of defendant TYCO Healthcare Group, L.P., now known as Covidien PLC. The record reveals that the plaintiff was employed with the defendant from August 2007 through June 2009 as a medical device salesperson. The plaintiff sold, among other things, a product called Permacol.[1]

At the start of his employment, the plaintiff executed an Employment Agreement Regarding Confidential Information, Inventions and Conflicting Employment (hereafter "the Agreement"). According to the Agreement, the plaintiff agreed not to divulge any trade secrets or inventions to any person or company (Paragraphs 1 - 4). In addition, pursuant to Paragraph 5, the plaintiff agreed as follows:

> During my employment and for a period of two years after it is terminated, I will not, within any geographic area with which my job responsibilities for U.S. Surgical were concerned, render services similar to those performed by me at any time during my employment directly or indirectly to any person or company engaged in or about to become engaged in researching, developing, producing, marketing or selling any type of product relating to technology developed or acquired by U.S. Surgical with which I have become familiar during my term of employment with U.S. Steel.
>
> In the event that I am assigned sales responsibilities or similar responsibilities during my employment, the "geographic area" covered by this paragraph shall mean the sales territory or, as the case may be, territories, or similar geographic territory or territories, for which I had responsibility during the last twelve months of my employment with U.S. Surgical.
>
> Subject to the provision of paragraph 7 below, if, despite diligent and aggressive effort, I am unable to obtain employment consistent with my education or training solely because of the provision of this paragraph, such prohibition shall bind me only if and as long as U.S. Surgical pays to me, after demand and U.S. Surgical's receipt of such accounting and evidence of the foregoing diligent

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[1] According to the plaintiff, Permacol is a biological surgical implant made of pig skin dermis. Its uses include hernia and abdominal repair, dura repair in the skull, and plastic and reconstructive surgical repairs of the face and head.

> and aggressive effort as U.S. Surgical may request, a sum equal to my monthly base pay at termination or each such month of such unemployment during the period mentioned in this paragraph.

Paragraph 7 of the Agreement provides as follows:

> For the purposes of paragraph 5 above, "base pay" in all cases excludes bonus or other extra compensation or benefits and is subject to regular deductions for taxes and social security payments and other lawful deductions and withholdings.[2] For each month of unemployment in which I demand payment under paragraph 5 above, I will diligently and "aggressively seek employment and will accept any reasonable offer of employment and will account to U.S. Surgical in detail for my efforts to obtain employment. If U.S. Surgical elects to make payment in accordance with paragraph 5 and thereby bind me to this prohibition, the amount payable by U.S. Surgical shall be reduced by the amount of compensation that I receive during such period from other employment, and U.S. Surgical may at its option be relieved of the aforementioned monthly payment for any month in which I have failed to aggressively seek employment or accept reasonable employment or account to U.S. Surgical my efforts to obtain employment as herein provided.

The Agreement further provided that the plaintiff's employment was terminable by either party at will, at any time, upon notice, and with or without cause.

The record reveals that on June 12, 2009, the plaintiff terminated his employment with the defendant and on June 27, 2009, began to work for TEI Biosciences, Inc. (hereafter "TEI"), which marketed one product named Surgimend.[3] In a letter dated September 30, 2009, the defendant's in-house counsel informed the plaintiff that he violated Paragraph 5 of the Agreement by contacting a surgeon at Peconic Bay Hospital in Suffolk County who had ordered Permacol in the past. The letter directed the plaintiff to cease an desist all activities with his new employer, and stated, in part:

> The purpose of this letter is to advise you that we recently learned

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[2] The plaintiff testified that his base pay was $90,000 per year.

[3] According to the plaintiff, Surgimend is a biological surgical implant made of bovine (cow) fetal dermis. Its uses include hernia, abdominal, and open wound repair.

> that you have been engaging in activity in violation of your Employee Agreement Regarding Confidential Information, Inventions and Conflicting Employment with U.S. Surgical and to demand that you cease such activity immediately.
>
> * * * Paragraph 5 of this Agreement prohibits you, during the two-year period following your June 12, 2009 separation from U.S. Surgical, from performing work for a competitor within the geographic sales area that you covered during your last 12 months with U.S. Surgical, which was Nassau County, Suffolk County, Queens and Brooklyn in New York. We understand that you are currently performing sales responsibilities for TEI Biosciences, which is a competitor of U.S. Surgical, within the Geographic Territory. As such, you are in direct violation of the Agreement.
>
> U.S. Surgical demands that you immediately cease and desist from engaging in sales activity for TEI Biosciences or any other competitor of U.S. Surgical within the Geographic Territory and that you comply in all other ways with your obligations under the Agreement. * * *

The defendant's counsel also sent a copy of the letter to TEI. There is no dispute that TEI terminated the plaintiff's employment on December 10, 2009. After unsuccessfully obtaining alternative employment, in a letter dated April 23, 2010, the plaintiff demanded the payment of his base pay from the defendant in the amount of $45,000, for the period from October 1, 2009 through March 31, 2009. In an attached affidavit, the plaintiff detailed his efforts to obtain employment. In May, 2010, the plaintiff commenced a lawsuit in Federal District Court in the Eastern District of New York, titled *Bitonti v Covidien PLC*, Index No. 10-CV-2848.[4] In a letter dated July 1, 2010, the defendant informed the plaintiff that it would not enforce paragraph 5 in the Agreement, however the nondisclosure clause remained in effect. On July 23, 1010, TEI reinstated the plaintiff's employment, however, the plaintiff was terminated due to low sales production on January 31, 2011. The plaintiff demanded the payment of his base pay for the period of unemployment. The plaintiff commenced the instant action upon receiving notice in a letter, dated July 1, 2010, that the defendant would not enforce Paragraph 5 of the Agreement, thereby declining to pay the plaintiff his base pay.

The complaint consists of five causes of action: breach of contract, intentional misrepresentation, negligent misrepresentation, tortious interference with existing and prospective business relationships, and violation of New York State Labor Law § 198 (1-a). The

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[4] The Court notes that there are no supporting documents regarding this matter.

gravamen of the complaint is that the defendant's letter dated September 30, 2009 misrepresented two facts: that the plaintiff was engaging in activity in violation of the Agreement and that the plaintiff was working for a competitor in his former geographic territory. In addition, the plaintiff seeks the payment of his base pay pursuant to Paragraph 7 in the Agreement. The defendant asserted a general denial in its answer, and stated the following six affirmative defenses: failure to state a cause of action, waiver, unclean hands, estoppel, and failure to mitigate damages. The Court's computer reveals that a note of issue was filed on April 24, 2012.

The defendant now moves for summary judgment dismissing the complaint. The plaintiff cross-moves for partial summary judgment on the issue of liability. In support of its motion, the defendant submits, among other things, the pleadings, copies of the Agreement, aforementioned letters, portions of the deposition testimonies of the plaintiff, Frank Zych, Marcellus Willis, and Rebecca Goldstein, the plaintiff's personal affidavit, dated April 23, 2010, and several e-mails. The defendant contends that the plaintiff first breached the Agreement by selling Surgimend to a client of the plaintiff's in Peconic Bay Hospital in Suffolk County, where he previously sold products. In addition, inasmuch as it released the plaintiff from the Agreement after the plaintiff breached it, that the defendant has no duty to comply with the plaintiff's demand for payment of his base pay, and, in any event, the defendant released the plaintiff from complying with the noncompete portion of the Agreement.

The plaintiff testified at his deposition that he began selling Permacol for the defendant in October 2008 among the other products he sold such as synthetic mesh, fixation tools, laparoscopic tools and trocars. His territory originally consisted of Nassau and Suffolk Counties, and then his territory changed solely to western Long Island, and he did not work in Suffolk County. He testified that he began selling Permacol after his territory changed. When he applied for a job at TEI, he told the interviewer that there was no problem with a non-competition agreement with his former employer because the plaintiff understood the Agreement to consist of his promise not to share technology or privileged information from U.S. Steel with TEI. He learned about TEI's new product Surgimend and stated that it had some overlapping indications to Permacol. When he received the letter from the defendant to cease working for TEI, he was unaware of the technology behind the two products and did not think the products were similar enough to cause a problem related to the noncompete clause in the Agreement. He states that he was suspended from TEI on September 30, 2009 and terminated in December 2009. He called former colleagues and recruiters and searched online for a new job. He stated that he was rejected from several jobs unrelated to his former job due to lack of experience and when he did have the experience he was rejected because the Agreement was still in effect. The plaintiff stated that by the time TEI rehired him in July 2010, he had lost all of his sales contacts and was unable to generate sufficient sales. He stated that as a result, he was terminated in January 2011.

Frank J. Zych, Jr. testified at his deposition that he hired the plaintiff at TEI on the basis of his direct experience in selling biologics. He received a copy of the letter from U.S. Steel

which stated that the plaintiff was in violation with the Agreement between US Steel and the plaintiff. Zych stated that he contacted the corporate attorney for advice. Zych informed the plaintiff that he would be suspended and that the plaintiff would need to get the Agreement rescinded. At that time, the plaintiff had registered his first sale of $12,000. Zych recalls terminating the plaintiff's employment on December 11, 2009. Although Zych rehired the plaintiff approximately six months later, he subsequently terminated the plaintiff after having posted no sales for six months.

Marcellus Willis testified at his deposition that he was the plaintiff's supervisor at US Steel. Willis stated that from October 2008 through the end of the plaintiff's employment with the defendant, the plaintiff's sales territory was diminished to include only Nassau County, Queens and a few accounts in Brooklyn, which decreased the number of the plaintiff's accounts. He states that the plaintiff no longer sold products for the defendant in Suffolk County from October 2008 through the end of his employment with the defendant in June 2009. Willis states that after the plaintiff terminated his employment with the defendant, Willis received an email from a coworker who observed the plaintiff speaking to a customer of the defendant about purchasing Surgimend in one of the old hospitals he covered in Suffolk County. Willis then reported this activity to Rebecca Walsh Goldstein. Rebecca Walsh Goldstein testified at her deposition that she is employed as a senior employment counsel for the defendant. She states that the defendant develops, manufactures and sells medical supplies, medical devices and pharmaceuticals. She stated that she learned of the plaintiff's activity from conversations with Marcellus Willis. Goldstein states that she wrote the letters dated September 30, 2009 to the plaintiff and TEI.

The plaintiff avers in his affidavit that since he was terminated by TEI, he has diligently and aggressively sought employment consistent with his education and training. He states that he remains unemployed. He spoke with six head hunters who specialize in medical device sales positions and told the plaintiff that they would not consider sending the plaintiff's resume to several companies who they knew were seeking a medical device salesperson of the plaintiff's caliber, because the companies would not consider his application once they were aware of the terms of his Agreement with the defendant. The plaintiff listed all the interviews he attended and people he spoke with.

In opposition and in support of his cross motion, the plaintiff submits, among other things, a copy of his personal affidavit which was previously submitted by the defendant, and a copy of the defendant's response to the plaintiff's Notice to Admit wherein the defendant admitted that during the plaintiff's last twelve months of employment, he worked in Nassau County, Queens County and Kings County. The plaintiff also relies upon the defendant's submissions in its motion in chief. The plaintiff contends that he did not breach the Agreement inasmuch as the technologies behind the creation of Permacol and surgimend are different. In addition, TEI was not engaged in or about to become engaged in researching, developing, producing, marketing or selling the same product as the defendant, and the two products at issue

have different uses and are made of different substances. Th plaintiff claims that he was not working in Suffolk County from October, 2008 until he terminated his employment in June, 2009, and he did not sell Permacol for the defendant in Suffolk County in any event. He argues that he began selling Permacol for the defendant in 2008 in Nassau County and the boroughs. The plaintiff also claims that the defendant's letter was written with the intent to damage his career. In addition, the plaintiff contends that he is entitled to payment of his base pay for the period of time that he was unemployed and that his demand triggered the defendant's duty to pay. Moreover, the plaintiff contends that he provided sufficient evidence of his aggressive efforts to obtain employment after losing his job at TEI.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.,*** 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Before determining whether the parties have met their burdens of demonstrating their prima facie entitlement to judgment as a matter of law, the Court must first determine whether the Agreement was reasonable. The legitimate interests of an employer that may be protected by a non-competition agreement are limited to "the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary" (*see* ***BDO Seidman v Hirshberg***, 93 NY2d 382, 389, 690 NYS2d 854 [1999]). However, a non-compete clause in an employment contract is not looked upon with favor by the Courts and will only be enforced to the extent reasonable and necessary to protect valid business interests (*see* ***BDO Seidman v Hirshberg***, *supra*; ***Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 48 NY2d 84, 421 NYS2d 847 [1979]). A restrictive covenant limited for a period of two years has been found to be reasonable but that period of time does not, prima facie, require a finding that the covenant is enforceable (*see* ***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.***, 42 NY2d 496, 398 NYS2d 1004 [1977]; ***Gazzola-Kraenzlin v Westchester Med. Group, P.C.***, 10 AD3d 700, 782 NYS2d 115 [2d Dept 2004]). Instead, the Court is required to look at all of the facts of the case to determine if the covenant not to compete may be valid (*see* ***IVI Envtl., Inc. v McGovern***, 269 AD2d 497, 707 NYS2d 107 [2d Dept 2000]).

A familiar and eminently sensible proposition of law is that when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms (***W.W.W. Assocs. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). Evidence

outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing or to create an ambiguity in a document which is otherwise clear and unambiguous (id.). Whether or not a writing is ambiguous is a question of law to be resolved by the courts (id.). Ambiguity is present if the language was written so imperfectly that it is susceptible to more than one reasonable interpretation (***Brad H. v City of New York***, 17 NY3d 180, 185 - 186, 928 NYS2d 221[2011]; ***Critelli v Commonwealth Land Tit. Ins. Co.***, 98 AD3d 556, 949 NYS2d 487 [2d Dept 2012]). In seeking summary judgment, each party bears the burden of establishing that its construction of the employment agreement is the only construction which can fairly be placed thereon.

The Court finds that the Agreement is reasonably limited in time, however the language regarding the scope, specifically "the geographic area and similar geographic territories," is susceptible to more than one reasonable interpretation. In addition, the Court finds that the terms provided in Paragraph 5 relating to what triggers the payment of the plaintiff's base pay are also susceptible to more than one reasonable interpretation. In addition, the language regarding how the payment of the plaintiff's base pay is triggered in Paragraph 7 is susceptible to more than one reasonable interpretation. The defendant argues that on June 1, 2010, it released the plaintiff from the noncompetition portion of the Agreement and was not required to pay the plaintiff his base pay at all. In addition, the defendant argues, in any event, that the plaintiff did not accept any reasonable offer of employment. The plaintiff argues that his demand triggered the requirement that the defendant pay his base pay during the time he was unemployed. The offers that he declined were not consistent with his education and training. Where an agreement contains an ambiguity, the court may look at extrinsic evidence to determine the intent of the parties (***Tierney v Drago***, 38 AD3d 755, 833 NYS2d 127 [2d Dept 2007]). Such an ambiguity creates an issue of fact regarding whether either party breached the Agreement, which precludes granting summary judgment to the defendant and partial summary judgment to the plaintiff on the first cause of action as a matter of law.

The Court finds, however, that the defendant has demonstrated its prima facie entitlement to judgment as a matter of law to dismiss the second, third, and fourth causes of action. With regard to the second cause of action alleging intentional misrepresentation, or fraud, to state a legally cognizable claim of fraudulent misrepresentation, "the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentations" (***P. T. Bank Cent. Asia v ABN AMRO Bank N.V.***, 301 AD2d 373, 376, 754 NYS2d 245 [1st Dept 2003]; *see also* ***Berger v Roosevelt Inv. Group Inc.***, 28 AD3d 345, 346, 813 NYS2d 419 [1st Dept 2006]). It is well settled that "a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation" (***767 Third Ave. LLC v Greble & Finger, LLP***, 8 AD3d 75, 76, 778 NYS2d 157 [1st Dept 2004]). Here, the defendant made misrepresentations to TEI, and not to the plaintiff himself. Contrary to the plaintiff's contentions in opposition, there are no specific

allegations of fraud, as otherwise required by CPLR 3013, and there is no claim that there was a representation made as an inducement to entering into a contract (***Ventur Group, LLC v Finnerty***, 68 AD3d 638, 892 NYS2d 69 ([1st Dept 2009]). Therefore, the second cause of action is dismissed.

Turning to the third cause of action, the defendant demonstrated its prima facie entitlement to judgment as a matter of law. Negligent misrepresentation is not available to the plaintiff because it requires, at the outset, that the parties have a fiduciary relationship (***FAB Indus. v BNY Fin. Corp.***, 252 AD2d 367, 675 NYS2d 77 [1st Dept 1998]). Although the plaintiff, in opposition, contends that there is a special relationship between himself and the defendant, his relationship with the defendant, as between a former employee and employer, does not rise to the level of a fiduciary relationship as a matter of law (*Id.*). It also requires that a misrepresentation was made and that the plaintiff detrimentally relied upon it (***Ravenna v Christie's Inc.***, 289 AD2d 15, 734 NYS2d 21 (1st Dept 2001), which the plaintiff has failed to demonstrate. Therefore, the third cause of action is dismissed.

The defendant also demonstrated its prima facie entitlement to judgment as a matter of law dismissing the fourth cause of action. To establish a defendant's liability for damages for tortious interference with prospective contractual relations, the plaintiff must show that the defendant engaged in wrongful conduct which interfered with a prospective contractual relationship between the plaintiff and a third party. As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of physical violence, fraud or misrepresentation, civil suits and criminal prosecutions" (***Smith v Meridian Tech., Inc.***, 86 A.D.3d 557, 560, 927 NYS2d 141 [2d Dept 2011], *quoting* ***Guard-Life Corp. v S. Parker Hardware Mfg. Corp.***, 50 NY2d 183, 191, 428 NYS2d 628 [1980]). Such wrongful conduct may include "some degrees of economic pressure; however, persuasion alone is not sufficient" (id. at 191; *see* ***Lyons v Menoudakos & Menoudakos, P.C.***, 63 AD3d 801, 802, 880 NYS2d 509 [2d Dept 2009]). Such conduct, which involves persuasion rather than undue economic pressure, does not employ wrongful means (*see* ***Carvel Corp. v Noonan***, 3 NY3d 182, 189-191, 785 NYS2d 359 [2004]).

In support, the defendant contends that inasmuch as it executed the Agreement with the plaintiff, the defendant was justified in sending the letter to TEI to protect its economic interest in its customer base (***Barrett v Toroyan***, 39 AD3d 366, 833 NYS2d 497 [1st Dept 2007]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant acted with the purpose of harming him or engaged in any wrongful conduct (*see* ***Baron Assoc., P.C. v RSKCO***, 16 AD3d 362, 362-363, 790 NYS2d 407 [2d Dept 2005]; ***Waste Servs. v Jamaica Ash & Rubbish Removal Co.***, 262 AD2d 401, 402, 691 NYS2d 150 [2d Dept 1999]). Therefore, the fourth cause of action is dismissed.

The defendant demonstrated its prima facie entitlement to summary judgment on the fifth cause of action alleging a violation of NY Labor Law § 198 (1-a). Labor Law § 198 (1-a)

provides in part that "[i]n any action instituted upon a wage claim by an employee ... in which the employee prevails, the court shall allow such employee reasonable attorney's fees." It is well settled that the plain language, legislative history and purpose of § 198 (1-a) all indicate that the intent of the statute is that the attorney's fees remedy provided therein is limited to hourly wage claims based upon violations of one or more of the substantive provisions of Labor Law article 6 (***Gottlieb v Kenneth D. Laub & Co.***, 82 NY2d 457, 463, 605 NYS2d 213 [1993]). Here, the Court notes that the plaintiff is a salaried professional employee, and, therefore, has no cognizable claim under the statute (*see* NY Labor Law § 190 [7]). In any case, the plaintiff has failed to allege a violation of Labor Law article 6 (*Id.*, ***Capobianco v Incorporated Village of Massapequa Park***, 278 AD2d 268, 717 NYS2d 328, [2d Dept 2000]; ***Scheer v Kahn***, 221 AD2d 515, 634 NYS2d 148 [2d Dept 1995]). In opposition, the plaintiff failed to raise a triable issue of fact as to the applicability of Labor Law article 6 (***Fraiberg v 4Kids Entertainment, Inc.***, 75 AD3d 580, 906 NYS2d 64 [2d Dept 2010]). Therefore, the fifth cause of action is dismissed.

Finally, punitive damages are generally not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights (*see* ***Reads Co. LLC v Katz***, 72 AD3d 1054, 900 NYS2d 131 [2d Dept 2010]; ***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]). "Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally" (***Reads Co., LLC v Katz***, *supra* at 1056-1057 quoting ***Tartaro v Allstate Indem. Co.***, *supra* at 758; *see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Rocanova v Equitable Life Assur. Socy. of US***, 83 NY2d 603, 612 NYS2d 339 [1994]). Here, inasmuch as the Court determined that no independent fraud occurred outside the alleged breach of contract, the application for punitive damages is dismissed.

Accordingly, the defendant's motion for summary judgment is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed, as is the application for punitive damages. The plaintiff's cross motion for partial summary judgment is denied.

Dated: 1/17/12

THOMAS F. WHELAN, J.S.C.