Horwitz v Loop Capital Mkts. LLC
2016 NY Slip Op 32402(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 650944/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SETH HORWITZ,

Plaintiff,

-against-

LOOP CAPITAL MARKETS LLC,

Defendant.

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Index No. 650944/16

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendant moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing the complaint, and for an order sanctioning plaintiff for perpetrating a fraud on the court. Plaintiff opposes.

I. BACKGROUND

A. The complaint

On February 24, 2016, plaintiff commenced this action, alleging as follows: In or around August 2014, plaintiff, a New York-based financial analyst, approached defendant's senior vice president, nonparty Bill James, about a potential engagement whereby plaintiff would provide his expertise in the area of tender option bonds (TOBs) so that defendant could expand in that area. Plaintiff was to "educate [defendant] on recent market developments and opportunities" in the

area of TOBs, and "oversee the implementation and maintenance of a product which would enable [defendant] to compete directly with other firms." (NYSCEF 1).

James arranged a telephone meeting with Jim Reynolds, defendant's CEO, who was unfamiliar with TOBs and the TOB market. Following their meeting, on October 1, 2014, plaintiff texted James: "Do you have any read over whether [Reynolds] is looking for a brain dump, and then send me on my way, or if this could lead to an actual job (At some point.)," to which James responded, "Contract at a minimum." (*Id.*).

Following a second in-person meeting with Reynolds in New York, at which plaintiff further described the TOB market, James notified plaintiff that defendant was "[r]eady to talk turkey." Plaintiff responded, outlining his terms as follow: "Right now I'm thinking to keep it pretty straightforward and good terms for us both. $20G/month with a 6 month guarantee as a consultant, but you can flip over at any time during those 6 months to a salaried employee and a 12 month contract, for $180K + eligibility for a performance bonus." (*Id.*).

On October 9, 2014, James contacted plaintiff, explaining that he had relayed his terms to Reynolds and that they were "good to go." Plaintiff persuaded defendant to take the one-year, $180,000 option. James told plaintiff that defendant "needed" him in Chicago, where defendant was based, on October 14, and might treat him as a consultant at first "until they could get the paper work completed, and meet any regulatory requirements, to make [plaintiff] an employee." Plaintiff agreed, provided that the parties proceed with the option of $180,000 for one year's employment plus bonus eligibility, and "James assured him that was the deal." (*Id.*).

From October 9 until October 14, plaintiff alleges that he immediately began working on developing a plan to implement the TOB business for defendant and researching pertinent regulations. (*Id.*).

On October 14, 2014, upon arriving in Chicago, plaintiff met with James and Reynolds to discuss improving the company's marketing material in preparation for a meeting with a potential customer on October 16, at which plaintiff was asked to make a presentation. Plaintiff alleges that the prepared materials were to be reused at future meetings with other potential customers whom he had identified for defendant. He also alleges that during this time, his disability, a pronounced stutter, became "readily apparent," difficult to control, and it took him "substantially longer than usual to communicate his ideas." (*Id.*).

On the morning of October 16, 2014, plaintiff was informed that the meeting had been canceled. On his way to the airport to return to New York, James texted him: "do not quit the other job yet." Plaintiff alleges that he had already quit his former job, and that, based upon his information and belief, the October 16 meeting proceeded without him. Later, James assured plaintiff that defendant only wished to "slow things down" and renegotiate their agreement. Plaintiff reminded James of their one-year contract. (*Id.*).

By email dated October 22, 2014, defendant, without explanation, terminated plaintiff's employment. Upon his information and belief, his position was replaced and defendant continued to "pursue the lucrative TOB business which [plaintiff] identified and presented to [defendant], educated [defendant] on, and for which [plaintiff] developed the marketing and presentation materials," without any compensation. (*Id.*).

Plaintiff advances causes of action for: (1) breach of contract, based on defendant's failure to pay his salary and other consideration for which he had a contractual right; (2) a violation of Labor Law § 190 *et seq.*, based on defendant's failure to pay him wages in the amount of $180,000 to which he was entitled; (3) fraud, based on defendant's representation that it would employ him, that it knew its representation was false, that it intended that plaintiff would rely on it, and that he did reasonable rely on it; (4) disability discrimination pursuant to the New York City Human Rights Law (Administrative Code of the City of New York § 8-107); and (5) quantum meruit, as he rendered services to defendant, which it accepted, and from which it benefitted without compensating him. Plaintiff alleges damages not less than $180,000. (*Id.*).

B. Other pertinent facts

On October 16, 2014, while plaintiff was en route to the airport in Chicago, James texted him "Do not quit the other job yet," to which he responded, "I won't. I've been picking up on that vibe." (NYSCEF 11).

Before commencing this action and following the alleged breakdown in the parties' engagement, by letter dated October 28, 2014, plaintiff's counsel wrote to defendant:

> On October 9, Mr. James called [plaintiff] and said that he had "spoken to [defendant's CEO]" and that "we are good to go" . . . Mr. James also said that they needed [plaintiff] to start on October 14, an unusually short timeframe, and that he might have to start as a consultant until they could get the paperwork completed, and meet any regulatory requirements, to make him an employee. [Plaintiff] agreed as long as there was an agreement that he would be paid $180,000 + eligibility for bonus over the course of one year. Mr. James assured him that was the deal.
> . . . .
>
> On October 14, [plaintiff] flew to Chicago and began work for [defendant].

(NYSCEF 5).

As of April 23, 2015, plaintiff's public LinkedIn profile reflects his employment as a senior consultant for Quoizel from 2012 until the present. (NYSCEF 9).

II. DISCUSSION

Pursuant to CPLR 3211(a)(5), a party may move to dismiss a cause of action for breach of contract on the ground that it is barred by the statute of frauds. The moving party bears the burden of establishing that the statute renders the alleged contract void and unenforceable. (*Stevens v Perrigo*, 122 AD3d 1430, 1431 [4th Dept 2014]).

A party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]).

However, when the court considers evidentiary material submitted by the parties, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and the motion should be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 145-146 [1st Dept 2014]).

A. Breach of contract (first cause of action)

1. Contentions

Defendant contends that plaintiff fails to set forth the material terms and/or conditions of his alleged agreement with defendant, and that consequently, the agreement lacks definiteness. At best, defendant claims, plaintiff alleges that their agreement constituted a promise of future employment, with unspecified terms as to his duties, job location, and to whom he would report, and is also indefinite as it was contemplated that plaintiff would begin work, for some unspecified period, as a "consultant." Alternatively, defendant argues that the agreement violates the statute of frauds, claiming that although the parties entered the agreement on October 9, 2014, plaintiff's performance was not to commence until October 14, five days later. Thus, the one-year agreement could not be performed within a year as it would, by its terms, terminate beyond October 8, 2015. To the extent that plaintiff alleges that he commenced work on his own initiative on October 9, defendant maintains that he asserts no factual basis for suggesting that the parties agreed to his doing so, and that his allegation is belied by their agreement that plaintiff would come to Chicago on October 14. (NYSCEF 3).

In support of imposing sanctions on plaintiff, defendant argues that he should be estopped from denying that the parties did not intend for his job to commence until October 14, as his attorney admitted otherwise in the October 28 letter to defense counsel. In a transparent effort to circumvent the statute of frauds, it contends, counsel then altered his position, alleging that plaintiff began work on October 9. (*Id.*).

In opposition, plaintiff contends that the agreement in issue is sufficiently definite, as the parties agreed to all material terms, including its duration and plaintiff's salary, and that

plaintiff's temporary designation as a consultant does not render the agreement indefinite. Plaintiff also argues that because his employment could be terminated at any time for cause, it was capable of being performed in a year or less. In any event, he alleges that he began work on October 9, and to the extent that there are factual issues as to when his employment began, they cannot be resolved on this motion. He also claims that the October 28 letter may not be considered on this motion, and that in any event, plaintiff will testify that he started work on October 9. (NYSCEF 21).

In reply, defendant denies any mutuality between the parties as to the alleged October 9 start date, nor does plaintiff allege it, and to the extent that their alleged agreement was terminable at will or for cause, that fact is immaterial for agreements of a finite duration. Defendant alternatively maintains that the contract is indefinite absent the parties' agreement on a start date, which was an essential term. (NYSCEF 22).

2. Analysis

a. Statute of frauds

The elements of a cause of action for breach of contract are: the existence of a contract between the plaintiff and the defendant, the plaintiff's performance under it, the defendant's breach of the contract, and damages resulting therefrom. (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 2016 NY Slip Op 07267, *1 [1st Dept 2016]). However, a contract that cannot, by its terms, be performed within one year of its making is void and unenforceable unless in writing and signed by the party to be charged. (General Obligations Law [GOL] § 5-701[a][1]).

To come within the statute, there must be "absolutely no possibility in fact and law of full performance within one year." (*D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 454 [1984], citing 2 Corbin, Contracts § 444 [1950]; *JNG Constr., Ltd. v Roussopoulos*, 135 AD3d 709, 710 [2d Dept 2016]). Consequently, an oral employment agreement for a term of one year to commence at a time subsequent to its making is unenforceable. (*Geller v Reuben Gittelman Hebrew Day Sch.*, 34 AD3d 730, 731 [2d Dept 2006]; *Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318, 319 [1st Dept 1981]). Conversely, an oral employment agreement without a fixed duration and is terminable at-will by either party is necessarily capable of being performed within one year and is not void. (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 367 [1998]; *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1040 [2d Dept 2009]). The possibility of termination of the contract occasioned by a party's breach does not render an agreement enforceable, as it remains governed by the statute. (*D & N Boening, Inc.*, *supra*, at 456-457; *see also Sabharwal v Eminax, LLC*, 305 AD2d 336, 337 [1st Dept 2003]).

Here, even accepting plaintiff's allegations as true, nothing in his pleadings or opposition suggests that the parties agreed that he was to commence work on October 9, 2014, notwithstanding his allegation that he prepared for the meeting in advance. (*See Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1st Dept 1993] [notwithstanding deponent's subjective understanding of legal effect of agreement, language and terms governed]; *see also Murray Walter, Inc. v Sarkisian Bros., Inc.*, 183 AD2d 140, 146 [3d Dept 1992] [court rejected letter to aid in interpretation of contract as it was a unilateral expression of one party's postcontractual subjective understanding of terms]). Instead, the sole reasonable inference from the pleadings is that the parties agreed that plaintiff's employment would commence on October 14.

Even assuming that the agreement could be terminated for cause, plaintiff cites no authority for the proposition that such a circumstance renders the agreement enforceable (*cf. Air Masters, Inc. v Bob Mims Heating & Air Conditioning Serv., Inc.*, 300 AD2d 513, 515 [2d Dept 2002] [absent allegation that parties agreed to employment for fixed term, agreement terminable at will and thus outside statute of frauds]), nor does defendant's alleged breach remove it from the statute (*see eg, Zimmer-Masiello, Inc. v Zimmer, Inc.*, 159 AD2d 363, 368 [1st Dept 1990], *lv dismissed* 76 NY2d 772 [oral agreement providing for termination only in event of breach was not permissible basis for concluding that agreement could be performed within one year]). Defendant thus demonstrates that its alleged oral agreement with plaintiff could not, by its terms, be performed within a year of its making on October 9, 2014, as the engagement would conclude on October 13, 2015. Accordingly, plaintiff's cause of action for breach of contract is barred by the statute of frauds.

b. Definiteness

Alternatively, to the extent that the parties did not reach an agreement on a commencement date, an essential, material element of any contract for employment, it is also void for lack of definiteness. (*Elite Tech. N.Y. Inc. v Thomas*, 70 AD3d 506, 506 [1st Dept 2010] [essential elements of effective employment contract consist of identity of parties, terms of employment, including commencement date, duration of contract and salary]; *Pail v Precise Imports Corp.*, 256 AD2d 73, 73-74 [1st Dept 1998]).

B. Fraud (third cause of action)

1. Contentions

Defendant contends that plaintiff's fraud claim is duplicative of his breach of contract claim, as it is based on the allegation that defendant never intended to keep its promise of employment. It also disputes plaintiff's allegation that he quit his job before his trip to Chicago, offering his LinkedIn profile reflecting employment with the same firm since 2012, as well as a text message exchange wherein plaintiff confirmed that he had not yet quit his job, and contends that plaintiff's allegation constitutes a veiled attempt to plead reliance to support his claim of fraud, and that his equivocation constitutes a fraud on the court. (NYSCEF 3).

In response, plaintiff disputes defendant's characterization of his fraud claim, maintaining instead that his claim is based on defendants' misrepresented offer to hire him, fraudulently intending to obtain his expertise on TOBs , and that the fraud is evidenced by defendant's denial of the existence of that contract. He alleges that he relied on defendant's promised employment contract by preparing the TOB presentation materials and divulging to defendant his "knowledge of the current market and regulatory environment, [and] . . . the advantages of pursuing this new business opportunity." Notwithstanding defendant's production of the text message in which he indicated that he had not quit his previous job, counsel asserts that plaintiff will testify that he resigned from his job, while acknowledging the possibility that discovery may reveal that he rescinded his resignation. (NYSCEF 21).

In reply, defendant reiterates that plaintiff's fraud claim is based on the same operative facts as his breach of contract claim, plus an allegation about defendant's state of mind. (NYSCEF 22).

2. Analysis

The elements of a cause of action in fraud are a "representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016]). Pursuant to CPLR 3016(b), a claim based on a misrepresentation must set forth detailed circumstances constituting the wrong. The requirement of particularity is meant to "clearly inform a defendant as to the complained-of incidents." (*CIFG Assur. N.A., Inc. v J.P. Morgan Sec. LLC*, 2016 WL 6954098, *2 [1st Dept 2016]). Thus, to sustain a cause of action in fraud, the plaintiff must plead nonconclusory facts. (*MP Cool Investments Ltd., supra*, at 291).

The facts on which a claim of fraud is based must be sufficiently distinct from those pleaded in support of a breach of contract claim. (*Edem v Grandbelle Intl., Inc.*, 118 AD3d 848, 849 [2d Dept 2014]; *Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 118-119 [1st Dept 1998]). The claim may not be premised on an "insincere promise of future performance," but must constitute a "misrepresentation of then present facts that [is] collateral to the contract." (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81-82 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

Here, construing the pleadings in a light most favorable to plaintiff, he alleges that defendant misrepresented its intention to comply with their alleged agreement to hire him. In other words, defendant breached their agreement. The allegations underlying the two causes of action are identical. (*Cf. Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 492 [1st Dept 2015] [plaintiff's claim of fraud not duplicative of breach of contract claim, as it was based on

"separate and distinct" representations made by defendant's principal]; *GoSmile, Inc.*, *supra*, at 81-82 [plaintiff's claim of fraud distinct from breach of settlement and consulting agreement claims, as it was premised on defendant's misrepresentation that it did not breach confidentiality and non-compete provisions of earlier agreement, which were warranties incorporated into subsequent agreements and induced plaintiff to enter them]). Thus, plaintiff fails to allege any distinct, collateral misrepresentations on which he relied to support a claim of fraud.

C. Quantum meruit (fifth cause of action)

Defendant argues that plaintiff's quantum meruit claim fails absent any allegation of the reasonable value of the services he rendered. (NYSCEF 3). In opposition, plaintiff observes that defendant does not deny that plaintiff rendered services which it accepted, and contends that the value of the contract, $180,000, constitutes a sufficient estimate at the pleading stage of the value of those services. (NYSCEF 21). In reply, defendant argues that plaintiff cannot rely on an unenforceable oral agreement to project the value of his services, notwithstanding what he may prove at trial. (NYSCEF 22).

Where the plaintiff performs services and the defendant accepts them, the court may infer an implied contract to compensate the plaintiff for the reasonable value of the services. (*Killian v Captain Spicer's Gallery, LLC*, 140 AD3d 1764, 1766 [4th Dept 2016]; *Farina v Bastianich*, 116 AD3d 546, 547-548 [1st Dept 2014]). To state a claim to recover for services rendered, the plaintiff must demonstrate: "(1) the performance of services in good faith, (2) the acceptance of services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016]; *see also* 22A NY Jur 2d Contracts § 610 [2016]).

Here, defendant does not dispute that plaintiff sufficiently pleads that he performed services which it accepted and for which plaintiff expected compensation. To the extent that plaintiff does not plead a specific value for the services he provided, construing his pleadings liberally and in consideration of his submissions here, a value may be inferred based on plaintiff's description of the services, namely, that he prepared for the TOB presentation scheduled for October 16, 2016 and gave defendant TOB materials when he met with James and Reynolds in Chicago. (*Cf. Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 [1st Dept 2009] [quantum meruit claim dismissed where plaintiff failed to allege acceptance of services by defendants, expectation of compensation, or reasonable value of services, nor did he allege "any facts from which any of these elements reasonably (could) be inferred"]; *Steinberg v DiGeronimo*, 255 AD2d 204, 204-205 [1st Dept 1998] [quantum meruit claim dismissed where, in addition to failing to plead reasonable value of services rendered, plaintiff had agreed to commence work without salary, failed to allege any equity interest or other compensation was owed to her, nor did she allege any compensation promised to her for work beyond what would become her salary]).

Moreover, defendant cites no authority for the proposition that an oral contract not capable of being performed within a year cannot constitute an implied contract. (*See Dorfman v Reffkin*, 144 AD3d 10, 19-20 [1st Dept 2016] [GOL § 5-701(a)(10) may bar recovery for services rendered to extent services fall within scope of that subsection]). Thus, plaintiff sufficiently states a cause of action for quantum meruit.

D. Labor Law § 190 *et seq.* violation (second cause of action)

Absent any allegation that plaintiff worked or that the parties intended that he work in New York under their agreement, defendant contends, his claim for unpaid wages fails. In any event, defendant maintains, the claim fails absent any allegation of a substantive violation of article six of the Labor Law, and as there is no enforceable agreement, plaintiff cannot claim that he was an employee of defendant entitled to wages. (NYSCEF 3).

In response, plaintiff contends that he sufficiently alleges an employee-employer relationship to sustain a claim for unpaid wages, and to the extent that the parties' relationship turns on factual issues, they need not be resolved here. Nevertheless, he asserts that the Labor Law applies to the work he performed in the state between October 9 and 13, 2014. (NYSCEF 21).

In reply, defendant argues that any factual issues as to plaintiff's status are irrelevant, as his claim fails absent an allegation of an enforceable agreement from which plaintiff would be deemed an employee of defendant. (NYSCEF 22).

As plaintiff's breach of contract claim is barred by the statute of frauds (*supra* II.A.2.), he has no enforceable contractual right to wages. Thus, plaintiff's Labor Law claim fails. (*See generally Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 185 [1st Dept 2010] [to sustain causes of action pursuant to Labor Law §§ 191 and 198, plaintiff must demonstrate enforceable contractual right to wages claimed]; *Tierney v Capricorn Invs., L.P.*, 189 AD2d 629, 632 [1st Dept 1993], *lv denied* 81 NY2d 710 [same]).

E. Disability discrimination (fourth cause of action)

Defendant contends that plaintiff fails to allege that it engaged in an adverse employment action giving rise to an inference of discrimination; defendant's mere awareness of plaintiff's stutter does not, absent other affirmative factual allegations, suggest that he was the victim of discrimination. Morever, that James and Reynolds were responsible for plaintiff's hiring and firing militates against a finding of discrimination, particularly as they would have been aware of plaintiff's purported disability before hiring him. (NYSCEF 3).

Plaintiff pleads that his stutter first became apparent and uncontrollable when he met with James and Reynolds in person in Chicago, and that as a result, defendant falsely claimed that it canceled the scheduled meeting where he was to make a presentation, and sent him home without explanation. These facts, plaintiff contends, raise an inference that defendant discharged him because of his disability in order to avoid embarrassment at the meeting. (NYSCEF 21).

In reply, defendant reasserts that plaintiff's allegations are too conclusory and syllogistic to avoid dismissal. (NYSCEF 22).

A discrimination claim advanced pursuant to the New York City Human Rights Law (NYC HRL) is subject to federal pleading requirements, pursuant to which a plaintiff need not allege specific facts, "but need only give fair notice of the nature of the claim and its grounds." (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]; *Phillips v City of New York*, 66 AD3d 170, 189 n 6 [1st Dept 2009], *overruled on other grounds by Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]). The plaintiff states a *prima facie* cause of action for disability discrimination if the "employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee was terminated."

(*Jacobsen*, 22 NY3d at 834; *Vig*, 67 AD3d at 147). Compared to its federal and state counterparts, provisions of NYC HRL "should be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013]).

Accepting plaintiff's allegations as true, and absent any dispute that plaintiff's alleged stutter is a protected disability, it may be inferred from the pleadings that, given plaintiff's TOB expertise, defendant hoped that his October 16 presentation would be persuasive. Thus, defendant's unexpected cancellation of the meeting and termination of plaintiff support an inference that plaintiff's disability was the actual reason, given a fear that it would jeopardize defendant's success at the meeting. (*See Vig*, 67 AD3d at 147 [in light of liberal pleading standard for State and City HRL claims, plaintiff sufficiently pleaded that he was disabled within meaning of NYC HRL and that defendant terminated him because of it]).

Moreover, while there is a presumption against discrimination where the same actor hires and fires the plaintiff, it is not dispositive. (*See generally King v U.S. Sec. Assoc., Inc.*, 2012 WL 4122025, *7 [SD NY 2012] ["same actor inference" typically inappropriate at pleading stage and in any event, is permissive, not mandatory]). In any event, plaintiff alleges that his stutter did not fully manifest until his in-person meeting with defendant's principals in Chicago, and defendant provides no basis for believing or inferring that James or Reynolds were aware of his stutter before October 14, 2014.

F. Sanctions

Plaintiff's alleged inconsistent or contradictory positions do constitute a fraud on the court sufficient to warrant sanctions. (*Cf. CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 322-323

[2014] [sanctions warranted for fraud on court where record abounded with "numerous instances of (defendants') perjury, subornation of perjury, witness tampering and falsification of documents"]; *see also Holcombe v U.S. Airways Group, Inc.*, 976 F Supp 2d 326, 342 [ED NY 2013] [party's inconsistent positions in different proceedings did not amount to fraud on court]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the complaint is granted to the extent that the first (breach of contract), second (Labor Law violation), and third (fraud) causes of action are dismissed; it is further

ORDERED, that the remaining causes of action are severed and shall continue; and it is further

ORDERED, that defendant's request for sanctions against plaintiff is denied.

ENTER:

Barbara Jaffe, JSC

DATED: December 5, 2016
New York, New York