Tabackman v Airtyme Communications, LLC
2017 NY Slip Op 30391(U)
February 8, 2017
Supreme Court, Suffolk County
Docket Number: 004807/2014
Judge: James Hudson
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Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

KEVIN TABACKMAN,

Plaintiff,

-against-

AIRTYME COMMUNICATIONS, LLC, RELIANCE COMMUNICATIONS, LLC, PARVEEN NARULA, ASHMINA NARULA, ANDREA TIBKE and MARK FELDMAN,

Defendants.

x----------x

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MOT. SEQ. NO.:002-Mot D
003-MD

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Upon the following papers numbered 1 to 26 read on this Motion and Cross Motion for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-26; Answering Affidavits and supporting papers 27; ~~Replying Affidavits and supporting papers 0; Other 0~~; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by Defendants (002) for summary judgment is granted to the extent that the second and third causes of action are dismissed; and it is further

ORDERED that the cross motion by Plaintiff (003) for summary judgment in its favor is denied.

In this breach of contract action, the Plaintiff seeks, *inter alia*, the remainder of his salary which was allegedly promised in an Offer Letter, the amount of shortfall from his stock options obtained from his former employer non-party Personal Communications Devices Holdings, LLC "PCD"), and severance pay. The record reveals that the Plaintiff was offered employment with Defendant Airtyme Communications, LLC ("Airtyme") as Vice President of Creative Services on September 21, 2012 pursuant to an Offer Letter.

The Offer Letter, dated September 21, 2012, provided for a base salary for the next two years at $165,000.00 and provide health benefits on the condition that Plaintiff worked full time exclusively for Airtyme. In addition, Airtyme agreed to pay Plaintiff for any shortfall in the value of his stock options that he accrued while working for PCD when the one-year anniversary of Plaintiff's termination from PCD occurred, and a signing bonus of $40,000.00.

The record reveals that on October 1, 2012, Plaintiff arrived at Airtyme's corporate offices and executed an employee application ("Application") and a employment confidentiality, non-disclosure, non-solicit and non-compete agreement ("Confidentiality Agreement"). The Application provided that Plaintiff would become an at-will employee. The Confidentiality Agreement, in addition to the provision of at-will employment, provided that Plaintiff agreed not to compete, solicit Airtyme's customers, or compete with Airtyme for two years after termination. The Confidentiality Agreement further provided a merger clause and no oral modification clause.

Plaintiff testified in his deposition that throughout his employment with Airtyme, he also worked on projects for Reliance. On January 31, 2013, the Plaintiff executed a Notice and Acknowledgment of Pay Rate and Payday ("Notice"). The Notice contained Plaintiff's name, Reliance was listed as the employer, a statement that notice was given on or before February 1, 2013 and that the pay was based on a bi-weekly salary. Plaintiff was subsequently paid by Reliance, however, he retained his Airtyme employee number and health benefits through Airtyme. By letter dated April 5, 2013, PCD informed Plaintiff that his stock was worth zero dollars. Reliance terminated Plaintiff's employment in or about late April, 2013. Upon receipt of Plaintiff's demand letter, dated September 9, 2013, Defendants declined to pay Plaintiff the remainder of his salary for the two year period, and also refused to pay for any shortfall of the PCD stock. This action was commenced on March 6, 2014.

The complaint contains five causes of action: breach of contract, breach of the covenant of good faith and fair dealing, misrepresentation, breach of contract for failure to pay severance and violation of New York Labor Law § 193, and violation of the New York Wage Theft Protection Act. The answer contains general denials and five affirmative defenses: 1) Plaintiff was an employee at will of both Defendants; 2) Reliance is neither Airtyme nor its successor; 3) Plaintiff's relationship with Reliance is an accord and satisfaction; 4) Plaintiff failed to mitigate his damages; and 5) Plaintiff failed to complete or satisfy all of his part to be performed with respect to PCD shares.

Defendants now move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff cross-moves for summary judgment in his favor.

In support of their motion, the Defendants Submit the Pleadings, the Personal Affidavit of Mark H. Feldman, a copy of the Offer Letter, a copy of the Equity Redemption Letter from PCD, the Plaintiff's deposition transcript, a copy of the application, a copy of the Confidentiality Agreement, a copy of Plaintiff's business card with Reliance, copies of Plaintiff's payroll information, and a copy of the Notice and Acknowledgment of Pay Rate and Payday. Initially, the Court finds that neither the payroll information nor the acknowledgment of pay rate are certified and are not admissible (***Giuffrida v. Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]).

Defendants contend that Plaintiff's breach of contract cause of action should be dismissed. Inasmuch as Plaintiff's receipt of salary, compensation for his shares of PCD stock, and health insurance and other benefits was contingent on several factors including his continued full-time and exclusive employment with Airtyme and PCD's obligation to pay Plaintiff for his PCD stock. Defendants further argue that once Plaintiff stopped working for Airtyme, Airtyme's salary and benefit obligations stopped. In any event, Plaintiff signed two subsequent documents, the Application and Confidentiality Agreement, which specifically stated that Plaintiff's employment was at-will.

Mark Feldman ("Feldman") avers in his affidavit that he is the Chief Financial Officer of Defendant Reliance Communications, LLC. He states that in or about July 2010, Defendant Airtyme formed a company and recruited certain individuals, including Plaintiff from PCD. At that time, Feldman was the Chief Financial Officer of Airtyme. All employees brought over to Airtyme from PCD by way of an Offer Letter were hired by Airtyme on an at-will employment basis. Consistent with the position that Plaintiff's employment was at-will are the additional employment documents signed by Plaintiff when he started with Airtyme. Unfortunately, Airtyme was a start-up company that failed, and as a result, its employees were either let go outright, or hired by Reliance in order to keep as many employed as possible. Feldman states that Reliance was under no obligation to hire these employees and did not assume the liabilities of any agreements or contracts signed by Airtyme. Plaintiff was hired by Reliance, however, Reliance was unable to compensate Plaintiff at the same salary as Airtyme, but still offered Plaintiff the amount of $130,000.00. Plaintiff agreed to the lowering of his salary in order to be hired by Reliance and Reliance paid Plaintiff's agreed upon salary in full. Eventually, Plaintiff's employment with Reliance was terminated because Reliance's payroll could no longer financially support the highly salaried former employees of PCD.

The PCD letter, dated April 5, 2013, which acknowledged receipt of Plaintiff's letter dated April 3, 2013, providing notice to PCD of his exercise of the Put Right with respect to shares held by Plaintiff, informed the Plaintiff that the fair market value of his shares was zero. In his deposition, Plaintiff stated that he was aware that he was hired as an at-will

employee when he signed the Confidentiality Agreement. He testified that no one offered him a two-year term of employment and he signed the Offer Letter in the Reliance offices. Sometime in December 2012, he received a Reliance employee email address in addition to the Airtyme employee email address he already possessed.

In opposition and in support of his cross motion for summary judgment, Plaintiff submits a copy of the complaint and his personal affidavit. Plaintiff relies upon ***African Diaspora Maritime Corp. v. Golden Gate Yacht Club***, 109 AD3d 204 (1st Dept 2013) and ***Dorman v. Cohen***, 66 AD2d 411, 415 [1st Dept 1979], for the proposition that courts will not adopt an interpretation that renders a contract illusory and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound.

Plaintiff avers that during negotiations related to employment with Airtyme, he asked for a guarantee of salary and benefits for at least two years and to cover any shortfall on his PCD stock benefits. At some point during the discussions, the Airtyme representative told him that he would give Plaintiff the security that Plaintiff was looking for in terms of salary and two-year employment term and was willing to put an offer of employment in writing. He received an Offer Letter and was invited to the office of Airtyme to meet with the Human Resources Director. Plaintiff states that part of the meeting included filling out all sorts of forms and documents. He states, "...apparently, because I do not recall filling out the documents, I was asked to fill out and sign and Employment Application and a Confidentiality Agreement." Plaintiff further states that during the orientation on October 1, 2012, there was no discussion with anyone at Airtyme that his offer letter was no longer in effect or that anything he was doing or signing on that day would alter the terms or, or have any impact on, the offer letter. He states that he is not an attorney and did not share any of the documents he signed on October 1, 2012 with an attorney to review. He concedes that he signed Reliance's Notice and Acknowledgment of Pay Rate and Payday on January 31, 2013, however, he was still working on projects for Airtyme, receiving health benefits from Airtyme, and was identified by his Airtyme employee number on his paychecks. Plaintiff further states that there was no specific point in time that he was told that he was no longer working for Airtyme and was instead working for Reliance. Plaintiff further states that there seemed to be no distinction between Airtyme and Reliance, and he learned that in March, 2013, the offices of Airtyme and Reliance were combined in one location at 555 Wireless Boulevard, Hauppauge.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v. Citibank Corp.***, ***supra***). A

defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law, with evidence demonstrating the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (***Mondello v. DiStefano***, 16 AD3d 637, 792 NYS2d 177 [2nd Dept. 2005]; ***Peskin v. N.Y. City Transit Authority***, 304 AD2d 634, 757 NYS2d 594 [2nd Dept. 2003]).

It is elementary that before a court can enforce a contract, a Plaintiff must establish, first, that the parties intended to be mutually bound by an agreement and, second, what the agreement requires of them, both factors implicating the doctrine of definiteness (***Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.***, 74 NY2d 475, 482, 548 NYS2d 920 [1989], cert denied 498 US 816, 111 S Ct 58, 112 L Ed 2d 33 [1990]; *see also* ***Charles Hyman, Inc. v. Olsen Indus.***, 227 AD2d 270, 275-276, 642 NYS2d 306 [1st Dept 1996]).

Defendants have failed to demonstrate their prima facie entitlement to judgment as a matter of law in the first cause of action. Initially, the Court finds that the Offer Letter and the Confidentiality Agreement must be read contemporaneously, inasmuch as only the Offer Letter provided any consideration for Plaintiff's performance. Upon review of both agreements, the Court finds that they conflict with each other and an issue of fact exists with regard to the parties' intent (*see*, ***Perlick v. Tahari, Ltd.***, 293 AD2d 275, 740 NYS2d 311 [1st Dept 2002]). In addition, while Defendants argue that Plaintiff never fulfilled the terms of the Offer Letter, and therefore is not entitled to recovery of damages, a question of fact exists as to whether Airtyme breached the no-oral modification clause in Paragraph 15 of the Confidentiality Agreement by failing to notify Plaintiff in writing that it was terminating Plaintiff's employment in order for Reliance to hire him (***Gootee v. Global Credit Servs, LLC***, 139 AD3d 551, 32 NYS3d 105 [1st Dept 2016]). When a no-oral-modification clause purportedly conflicts with another clause in a contract, every attempt should be made to harmonize the two provisions using common-law tools of contract interpretation (Id., at 554). In addition, after Reliance executed the Notice with Plaintiff on January 31, 2013, a question of fact exists as to whether Airtyme assigned its contract with Plaintiff to Reliance, causing Reliance to assume responsibility for continuing the terms of the Offer Letter.

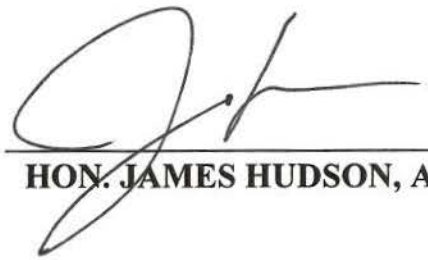
Turning to the second cause of action, Defendants have demonstrated their prima facie entitlement to judgment as a matter of law. The second cause of action, sounding in breach of the covenant of good faith and fair dealing, is also dismissed, as it is duplicative of the breach of contract claim, in that they both arise from the same facts (*see*, ***Logan Advisors, LLC v. Patriarch Partners, LLC***, 63 AD3d 440, 443, 879 NYS2d 463 [1st Dept 2009]). Plaintiff did not submit opposition to this branch of the motion. Therefore, the second cause of action is dismissed.

Turning to the third cause of action, Defendants have also demonstrated their prima facie entitlement to judgment as a matter of law. Defendants cite ***Gorman v. Fowkes*** (97 AD3d 726, 727 [2d Dept 2012]), which holds that "...a cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of contract." Defendants also rely upon Plaintiff's deposition testimony wherein he states that noone made any verbal representations to him that his employment was guaranteed for two years. The Court agrees. "Allegations that a party entered into a contract without intent to perform do not state a cause of action for fraud" (***Orix Credit Alliance, Inc. v. R.E. Hable Co.***, 256 AD2d 114, 115, 682 NYS2d 160 [1st Dept 1998]). In opposition, Plaintiff fails to raise an issue of fact. Accordingly, the third cause of action is dismissed.

The Defendants have failed to sufficiently demonstrate their prima facie entitlement to judgment as a matter of law with regard to the remaining causes of action. With regard to Plaintiff's cross motion, the Court finds that Plaintiff has failed to sufficiently demonstrate his prima facie entitlement to judgment as a matter of law in the first, fourth, and fifth causes of action for the reasons stated above. Accordingly, the cross motion is denied.

In sum, the Defendants' motion for summary judgment is granted to the extent that the second and third causes of action are dismissed. The Plaintiff's cross motion is denied.

DATED: FEBRUARY 8, 2017
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.