JMM Consulting, LLC v Triumph Constr. Corp.
2017 NY Slip Op 30726(U)
April 12, 2017
Supreme Court, New York County
Docket Number: 650261/2016
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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JMM CONSULTING, LLC and WILLIAM LICATA,

Plaintiffs, Index No. 650261/2016

- against -

TRIUMPH CONSTRUCTION CORP.,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, plaintiffs JMM Consulting, LLC ("JMM") and William Licata move pursuant to CPLR 6301 for a preliminary injunction restraining defendant Triumph Construction Corp. ("Triumph") from enforcing the non-compete/non-solicitation clause of the consulting agreement (the "Agreement") executed by Licata and Carlo Cuzzi, Triumph's president, on November 30, 2012. In motion sequence 003, Triumph moves pursuant to CPLR 3211(a) to dismiss the first cause of action of the amended complaint for failure to state a claim[1]. The motions are consolidated for disposition.

For the reasons set forth below, the motions are denied in their entirety.

Background

As alleged in the complaint, Licata is the manager and sole member of JMM (Verified Complaint, ¶ 2). Triumph entered into the

[1] Triumph also sought to withdraw its prior motion (NYSCEF Doc. No. 53). This portion of motion is moot.

Agreement with JMM to retain Licata's consulting and advisory services, including advising Cuzzi and other directors and officers of Triumph (*id.* at Ex. 1).

Section 13(b)(ii) of the Agreement provides that it terminates in the event that Licata's employment is terminated for "Cause" or "Extreme Cause" (Verified Complaint, Ex. 1). Extreme Cause is defined as

> "(i) misconduct by JMM or Licata in connection with the performance of this Agreement involving fraud, dishonesty or illegality, or (ii) JMM or Licata being convicted of or pleading *nolo contendere* to a felony or a misdemeanor involving moral turpitude" (*id.*).

The non-compete/non-solicitation clause, section 12(b)(i)(c) of the Agreement provides that, during the Agreement and eighteen months thereafter, JMM and Licata agreed they would not

> "solicit or attempt to solicit any employees of [Triumph] or its Affiliates to leave the employ of their employer or offer or cause to be offered employment to or hire any person who was employed by [Triumph] or its Affiliates at anytime during the one year prior to the termination of this Agreement" (*id.*).

JMM and Licata alleged that they duly performed their obligations under the Agreement (Verified Complaint, ¶ 24). On December 7, 2015, Triumph's attorney notified JMM and Licata that Triumph terminated the Agreement and Licata's employment for unspecified Extreme Cause (*id.* at Ex. 2, ¶ 28). Thereafter, Triumph failed to pay JMM and Licata any compensation or a share of the profits as provided by the Agreement (*id.* at ¶¶ 30, 31).

In January 2016, JMM and Licata commenced this action

against Triumph. In the first cause of action, they seek a declaration that Triumph has committed a material breach of the Agreement, and therefore the non-compete/non-solicitation clause is unenforceable, while the third cause of action seeks monetary damages resulting from the wrongful termination of the Agreement.

Discussion

I. Failure to State a Claim

In deciding a motion to dismiss under CPLR 3211(a)(7), the court must consider whether there can be a legally cognizable cause of action based on the allegations in the complaint (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). The facts alleged in the pleadings are assumed to be true, and the court must accord a plaintiff the benefit of every possible favorable inference (*id.*). Allegations that establish a justiciable controversy concerning parties' legal rights are sufficient for seeking a declaratory judgment (*Harmit Realties LLC v 835 Ave. of the Ams., L.P.*, 128 AD3d 460, 461 [1st Dept 2015]). However, seeking a declaratory judgment is "unnecessary and inappropriate when the plaintiff has adequate, alternative remedy in another form of action" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]).

Triumph argues that JMM and Licata failed to state a claim in their first cause of action for declaratory judgment because it improperly seeks equitable relief for a legal claim, and it is

duplicative of the third cause of action for wrongful termination. First, JMM and Licata allege a justiciable controversy concerning the enforceability of the non-compete/non-solicitation clause of the Agreement, and whether Triumph committed a material breach thereunder impacts the legal rights of parties *(see generally Thome v Alexander and Louisa Calder Found.*, 70 AD3d 88,99 [1st Dept 2009]).

Second, the relief sought in JMM and Licata's third cause of action seeks a different remedy. The third cause of action seeks monetary damages resulting from the alleged wrongful termination of the Agreement. The first cause of action seeks a declaration that the non-compete/non-solicitation clause of the Agreement is unenforceable. Thus, the Court finds that the first cause of action is not duplicative of the third cause of action, and a cause of action for a declaratory judgment is sufficiently stated.

II. Preliminary Injunction

To obtain a preliminary injunction pursuant to CPLR 6301, the movant shall demonstrate that:

> "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

JMM and Licata only seek a preliminary injunction restraining enforcement of the non-solicitation of the employees

clause, not the non-compete clause (Transcript, 2/2/2017, 9:14-25). Licata argues that prohibiting him from solicitation of Triumph's employees would render him unemployed, which constitutes irreparable injury.

A restrictive covenant in a contract is unenforceable when the party benefitting from the covenant breaches the contract (*DeCapua v Dine-A-Mate, Inc.*, 292 AD2d 489, 491 [2nd Dept 2002], citing *Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 75 [1966]). Here, JMM and Licata are likely to succeed on the merits that the non-solicitation clause is unenforceable because Triumph has failed to provide any evidence that Licata was terminated for Extreme Cause. Triumph has refused and continues to refuse to provide any explanation on details of the purported Extreme Cause. The current record supports Licata's argument.

However, JMM and Licata fail to demonstrate the existence of irreparable injury if the injunction is withheld, and the balance of equities tips in favor of Triumph. JMM and Licata could hire employees from the job market, instead of soliciting Triumph's employees. Even if JMM and Licata have difficulties in the hiring process, which may render Licata unemployed, Licata's loss of employment by itself does not constitute irreparable harm (*Stewart v Parker*, 41 AD2d 785, 786 [3rd Dept 1973]). Furthermore, lost of income is clearly compensable with money damages.

On the other hand, Triumph's operation would be severely disturbed if its current employees leave Triumph unexpectedly within the restricted time period. In addition, the non-solicitation clause will expire within two months. Therefore, the balance of equity supports denial of a preliminary injunction enjoining the enforcement of the non-solicitation clause. Accordingly, it is

ORDERED that defendant's motion to dismiss the first cause of action is denied in part, and otherwise moot; and it is further

ORDERED that plaintiffs' motion for preliminary injunction is denied in its entirety.

Dated: April 12, 2017

ENTER:

CHARLES E. RAMOS
U.S.C.