

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JAMES R. NELSON,)

Plaintiff,)

v.)

) C.A. No. N12C-06-068 CLS

THE JAED CORPORATION, INC.)
d/b/a STUDIOJAED, STUDIOJAED,)
LLC, JAMES A. HUTCHISON, III, ED)
LUPINEK, BEATRICE A. COOK,)
DAVID SPANGLER, PHILLIP)
CONTE, BRIAN ZIGMOND, and)
PAMELA BABUCA,)

Defendants.)

Date Submitted: October 4, 2012

Date Decided: January 23, 2013

On Defendants' Motion to Dismiss. **GRANTED in part and DENIED in part.**

ORDER

James F. Harker, Esq., Nemours Bldg., Suite 1130, 1007 North Orange Street, Wilmington, DE, 19801. Jonathan Landesman, Esq. (*Pro hac vice*), United Plaza, 19th Floor, 30 South 17th Street, Philadelphia, PA, 19103. Attorneys for Plaintiff.

Charles A. McCauley, III, Esq., 1000 N. West Street, Suite 1200, Wilmington, DE 19801. Eric J. Phillips, Esq. (*Pro hac vice*) (Of Counsel), One Penn Center, 19th Floor, 1617 JFK Boulevard, Philadelphia, PA 19103. Attorneys for Defendants.

Scott, J.

Introduction

Before the Court is Defendants' Motion to Dismiss. The Court has reviewed the parties' submissions. For the reasons that follow, Defendants' motion is **GRANTED in part and DENIED in part.**

James R. Nelson ("Plaintiff") has been a registered architect in several Eastern states for almost fifty years. From 1966 through 2005, Plaintiff owned and operated his own practice, "The Architects Studio, LLC."

The JAED Corporation, Inc. and STUDIOJAED, LLC (Collectively, "JAED") are Delaware entities. Defendants Ed Lupinek ("Lupinek"), Beatrice Cook ("Cook"), David Spangler, Phillip Conte, Brian Zigmond, and Pamela Babuca held positions on the Board of Directors and are shareholders. Lupinek also held the position of Vice-President of JAED and Cook was both Secretary and Treasurer at JAED. James A. Hutchison ("Hutchison") was Chief Executive Officer, the principal shareholder, and a director on the Board of Directors at JAED.¹

In the summer of 2005, Plaintiff met with Hutchison several times and the parties negotiated the terms of a new business relationship and merger of their respective practices and businesses. The parties memorialized their agreement in

¹Hutchison, Lupinek, Cook, Spangler, Conte, Zigmond, and Babuca are collectively referred to as "Individual Defendants."

three related documents: 1) Asset and Purchase Agreement and Stock Sale and Purchase Agreement between The Architects Studio, Inc. and JAED (“Asset Purchase Agreement”); 2) Employment Agreement of James R. Nelson by The JAED Corporation (“Employment Agreement”); and 3) Amendment No. 3 to and Restatement of Stockholders’ Agreement (“Amended Stockholders’ Agreement”).

In the Asset Purchase Agreement, Plaintiff sold to JAED certain assets of The Architects Studio, LLC, accounts receivable, contracts and/or contractual rights valued in excess of one-half million dollars. In consideration for the Asset Purchase Agreement, JAED paid Plaintiff the equivalent of \$122,700 through the issuance of 100 shares in JAED with each share valued at \$1,227.

While negotiating the Employment Agreement, Hutchison represented to Plaintiff that Plaintiff could expect to receive an additional \$20,000 to \$30,000 in annual bonuses during his employment. The Employment Agreement was a five-year term of employment running from September 18, 2005 through September 18, 2010. After September 18, 2010, Plaintiff’s employment would continue under the same terms and conditions set forth in the Employment Agreement; however, the employment would convert into an employment at-will relationship and would be “terminable at any time and for any reason by either Party”.² The Employment Agreement also provided that Plaintiff would be employed full-time, as an

² Employment Agreement, at § 4.

architect, Director of Design, and part of the management team, in addition to his status as stockholder and principal in JAED. Also, Plaintiff would receive \$100,000 per year as his base annual compensation and other benefits. Plaintiff was also allotted ninety days annual vacation time.

The Amended Stockholders' Agreement contained specific provisions governing a stockholder's obligation to sell, or to offer to sell, their shares back to JAED upon that stockholder's death, disability, retirement, or termination of employment. The Amended Stockholders' Agreement also provided the procedure governing the obligation to sell or offer to sell. Section 7 of the Amended Stockholders' Agreement contained a non-compete clause for employee-stockholders.

Plaintiff worked for JAED for the full five-year term and continued to be employed beyond the expiration of the term. During the term, JAED increased Plaintiff's annual rate of compensation for 2007 and for 2009. Plaintiff usually traveled to Florida to use a block of his vacation time during the months of January, February, March and April. Each year, during the term of the employment agreement, JAED required Plaintiff to perform work and engage in work-related travel when Plaintiff was away on vacation. In 2006, 2007, and 2008, Plaintiff worked approximately forty-five of the ninety day annual allotment of vacation

days. JAED required Plaintiff to work during twenty-two of his vacation days in 2009 and thirty-five in 2010.

In 2009, Hutchison informed Plaintiff that JAED was experiencing financial difficulties and, as result, Hutchinson was requesting that Plaintiff and the other stockholders agree to defer a portion of their compensation until JAED's financial situation improved. Relying on Hutchison's representation that the other stockholders agreed to defer compensation, Plaintiff agreed to withhold a portion of his compensation. At no time did Plaintiff agree to a temporary or permanent reduction of his annual compensation. During certain periods in 2009 and 2010, JAED withheld a portion of Plaintiff's compensation. At various points during 2009, JAED repaid some of the outstanding compensation due to Plaintiff and the other JAED stockholders.

After the expiration of the five-year term, Plaintiff continued to work in the same position and capacity at JAED under the same terms contained in the Employment Agreement. While Plaintiff was using his vacation time, JAED continued to require Nelson to perform work and engage in work-related travel. During 2011, Plaintiff was required to work during thirty-one of his annual allotment of vacation days. In or about February 2011, Cook contacted Plaintiff, on behalf of JAED, to request that he agree to defer his 2011 compensation for an indefinite period of time. Cook represented that all of the other stockholders in

JAED had agreed to withhold a portion of their annual compensation. Plaintiff did not receive any compensation for more than twelve weeks during periods of the first and second quarter of 2011, which amounted to more than \$25,000 in compensation.

When Plaintiff returned from vacation in April 2011, Plaintiff spoke with the controller about the status of his compensation. Cook informed Plaintiff that the other stockholders only deferred two weeks of their normal compensation and that it was only Plaintiff from whom JAED had withheld twelve weeks of compensation. Plaintiff expressed his opposition to such treatment to Cook and the controller. In response, Cook informed Plaintiff that JAED did not intend to pay him for his vacation time in 2011 because his employment agreement had expired. When Plaintiff informed Cook that he was entitled to the same terms under the Employment Agreement, Cook stated that JAED would pay him for the vacation time, but that he would have to “work it off” during 2011.³

In or about April 2011, Hutchison asked Plaintiff if he would be interested in working in a part-time capacity. Plaintiff replied by providing Hutchison a proposal on or about May 2, 2011. On May 26, 2011, Nelson met with Hutchison, Cook, and Lupinek to discuss issues relating to his continued employment, including, but not limited to, part-time employment. Plaintiff proposed certain

³ Compl., at ¶51.

terms of his part-time employment and Hutchison, Cook, and Lupinek agreed to the proposal. The three also represented to Plaintiff that JAED would slightly increase his hourly rate, Plaintiff would have a forty hour work week, and Plaintiff would continue to receive the same benefits. Plaintiff informed the Hutchison, Cook, and Lupinek that he expected and demanded that JAED immediately pay him withheld compensation owed from 2009, 2010, and 2011. Hutchison acknowledged that JAED owed Plaintiff and agreed to pay all of the withheld compensation. Also at the meeting, Hutchison stated that he wanted Plaintiff to sell his stock back to JAED based upon a business valuation report from September 30, 2010.

On June 7, 2011, Hutchison issued a memorandum to Plaintiff confirming the agreement for Plaintiff's part-time employment beginning on July 7, 2011. The memorandum also confirmed that Plaintiff was owed the withheld compensation and stated that "[w]e wanted to inform you that we will catch up on all salary owed to you under our previous agreement through July 7."⁴ On June 10, 2011, Nelson provided a memorandum to Hutchison, Cook, and Lupinek confirming the agreement and seeking clarification of various terms and conditions that would apply. On June 17, 2011, Hutchison issued another memorandum to set forth more particular terms and conditions. In the same memorandum, Hutchison

⁴ *Id.* at ¶ 64. JAED only partially paid the withheld compensation from 2011 and failed to repay any compensation owed from 2009 and 2010.

informed Plaintiff that the Amended Stockholders' Agreement required him "at this time to sell all of [his] stock"⁵ without stating the provision requiring him to do so. Hutchison further stated that "[w]e believe the September 30, 2010 valuation of \$206/share is a fair and equitable value"⁶ and "per [the Amended Stock Agreement] [Plaintiff] will be paid for the value of our stock monthly over a 5-year period at the current prime interest rate (3.25%) plus one percent. This equates to a monthly payment of \$381.71..."⁷ Hutchison attached a signed copy of the Corporation's Note and requested that Plaintiff surrender his stock certificate prior the first payment on July 1, 2011. Nelson did not agree to offer to sell or to sell his shares.

On July 7, 2011, Plaintiff began working in a part-time capacity. On July 12, 2011, Plaintiff emailed Hutchison and addressed ten specific items of concern. Plaintiff discussed working during his vacation days from 2006 through 2011 and his failure to receive compensation. Plaintiff objected to the demand that he sell, and the attempted forced sale of, all of his stock at a grossly deflated value. Plaintiff also objected to JAED's failure to pay him the full amount of the outstanding withheld compensation, despite having specifically promised to do so.

⁵ *Id.* at ¶ 70.

⁶ *Id.* at ¶ 72.

⁷ *Id.* at ¶ 73.

After two months, Hutchison responded to Plaintiff's e-mail and acknowledged that Plaintiff had been required to work on his vacation time, but it would be unfair to the other principals of JAED to fully compensate him. Hutchison also stated that he was requiring Plaintiff to sell his stock in accordance with Paragraph 1.5 of the Amended Stockholders' Agreement, which applied to retirement. Hutchison claimed that Plaintiff and the other members of JAED's management team agreed to forfeit their withheld compensation from 2009 and 2010; however, he stated that withheld compensation from 2009 and 2010 "may be reimbursed commensurate with the management team's election to provide partial and/or full reimbursement for lost wages to all employees."⁸

On September 29, 2011, Plaintiff, by and through his attorneys, sent a letter to JAED, to the attention of Hutchison, in which he asserted his right to, and demanded payment of, the approximately \$100,000 owed to him in unpaid compensation and benefits he earned but had not received. In direct response, JAED, through a letter from its attorneys, terminated Plaintiff's employment. In the letter, JAED asserted that Plaintiff was required to sell his stock in accordance with Paragraphs 1.6 and 1.63, which applied to termination of employment. JAED also reiterated the terms of the valuation and sale as set forth in the June 17, 2011 memorandum.

⁸ *Id.* at ¶ 96.

Plaintiff filed an eight-count complaint against the defendants. Count I alleges that the Individual Defendants, as corporate Officers and Directors in JAED, owed fiduciary duties to Plaintiff as a minority shareholder in JAED and the obligation to discharge those fiduciary duties in good faith. In particular, Count I alleges that Hutchison breached the fiduciary duties owed to Plaintiff by 1) refusing to pay Plaintiff all compensation earned, due and owing to him as an employee, 2) paying out bonuses to other employees while refusing to pay Plaintiff compensation due, 3) improperly attempting to force Plaintiff to sell his JAED stock without basis in the Amended Stockholders' Agreement, 4) improperly attempting to force Plaintiff to sell his JAED stock at a grossly deflated and devalued price, 5) terminating Plaintiff's employment, and 6) taking action which would freeze-out Plaintiff and deprive him of the full value of this stock and the other obligations owed to him by JAED. In addition, Plaintiff argues that Hutchison acted intentionally, willfully, maliciously, and with reckless indifference to the Plaintiff. Plaintiff also asserts that Hutchison's actions were taken with full knowledge and consent of the other Individual Defendants. In Count II, Plaintiff claims that the Individual Defendants, other than Hutchison, actively conspired with and aided and abetted Hutchison in breaching fiduciary duties.

In Count III, Plaintiff asserts a breach of contract claim against JAED and the Individual Defendants based on JAED's failure to pay him the full amount of

compensation due and owing to him, as of December 31, 2009, in consideration of his work during calendar year 2009 and, as of December 31, 2010, in consideration of his work during calendar year 2010. Plaintiff states that, upon completion of the term of the Employment Agreement and as of September 18, 2010, JAED had failed to pay him the full amount of compensation based on the deprivation of his annual vacation days.

In Count IV, Plaintiff alleges breach of contract against JAED and the Individual Defendants. Plaintiff states that JAED, through the oral representation of Hutchison on May 26, 2011 and the written representation of Hutchison on June 7, 2011, promised to pay Nelson all of the withheld compensation due and owing to Nelson from calendar years 2009, 2010, and 2011.

In Count V, Plaintiff contends that JAED's failure to pay Plaintiff the full amount of compensation and benefits constituted a violation of Delaware's Wage and Payment Act ("the Act"). Plaintiff states that JAED is liable to him for the full amount of earned, but unpaid compensation and benefits, together with statutory damages and reasonable attorneys' fees.

In Count VI, Plaintiff alleges a breach of contract claim against JAED and the Individual Defendants based on the Amended Stock Agreement. Plaintiff claimed that JAED and the Individual Defendants breached the terms of the

agreement in attempting to force a sale of Plaintiff's shares in violation of the provisions of that agreement without a legitimate basis for requiring the sale of the stock. Additionally, Plaintiff states that JAED and the Individual Defendants breached the agreement by attempting to set a deflated and highly undervalued purchase price according to a method that was contrary to the explicit provisions of the agreement. Plaintiff seeks damages equal to the full value of his shares based on the defendants' deprivation of the value of his shares.

In Count VII, Plaintiff alleges that JAED wrongfully terminated his employment in response and retaliation for his September 29, 2011 complaint to JAED and demand for payment of all outstanding compensation due and owing to him. Plaintiff further stated that the termination was undertaken intentionally, willfully, maliciously and with reckless indifference.

In Count VIII, Plaintiff specifically sought declaratory judgment by the Court that the non-compete clause contained in the Amended Stockholder Agreement is unenforceable.

Defendants have moved to dismiss many of the allegations contained in the complaint. Defendants suggest that the only remaining claims in the Complaint are the breach of contract claim against JAED, the Wage Payment and Collection Act

claim against JAED, and the claims against JAED in Count VIII. Plaintiff has withdrawn his claims against the Individual Defendants in Counts III and IV.

Standard of Review

A complaint need only put the opposing party on notice of the claim being brought against it.⁹ When considering Rule 12(b)(6) motions to dismiss brought for failure to state a claim upon which relief may be granted, the Court must accept all well-pled allegations as true¹⁰ and draw any reasonable inferences in favor of the plaintiff.¹¹ Dismissal is appropriate when a claim is void of any factual or legal merit,¹² but not if it appears that plaintiff could recover under any reasonably conceivable set of circumstances susceptible of proof.¹³

Discussion

A. Count I: Breach of Fiduciary Duties and Freeze-out of Minority Shareholder

Plaintiff has not sufficiently alleged a claim for breach of fiduciary duty. Plaintiff argues that the actions of Hutchison and the other Individual Defendants amounted to a freeze-out and resulted in breach of fiduciary duties owed to him.

⁹ *Sult v. American Sleep Medicine, Inc.*, 2011 WL 4688730, *1 (Del. Super.) (quoting *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del.1995)).

¹⁰ *Dickens v. Brewington-Carr*, 1999 WL 1240910, *1 (Del. Super.).

¹¹ *Master Mechanical, Inc. v. Shoal Const., Inc.*, 2009 WL 1515591, *1 (Del. Super.).

¹² *Id.*

¹³ *Precision Air, Inc.*, 654 A.2d at 406 (quotations omitted).

After review of the relevant case law, the Court has determined that the fundamental issue is not whether a fiduciary duty is owed to Plaintiff as a minority shareholder, but whether Plaintiff's claims arising out of the Amended Stockholders' Agreement and the Employment Agreement may be pursued with his claims for breach of fiduciary duty. The Court of Chancery has stated that, "... unless the fiduciary duty claims are based on duties and rights *not* provided for by contract, a plaintiff cannot maintain both contractual and fiduciary claims arising out of the same alleged wrong doing."¹⁴ In such case, a plaintiff's claims will be treated as a breach of contract claim.¹⁵ For example, employment contractual rights, such as rights regarding termination,¹⁶ are considered independent from stockholder rights.¹⁷ Where a plaintiff is both a minority shareholder and an employee, "[fiduciary] duties are not implicated when the issue involves the rights of the minority stockholder *qua* employee under an employment contract."¹⁸

The duties at issue in Count I are derived from "the parties' contractual, as opposed to their fiduciary, relationship."¹⁹ Therefore, Plaintiff's claims for breach of fiduciary duties are dismissed. The allegations in Count I are as follows: refusal

¹⁴ *Fletcher Intern. Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838, *8 (Del. Ch.).

¹⁵ *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010).

¹⁶ *See Ueltzhoffer v. Fox Fire Development Co.*, 1991 WL 271584 (Del. Ch.).

¹⁷ *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 40 (Del. 1996); *Dweck v. Nasser*, 2005 WL 5756499,*5 (Del. Ch.).

¹⁸ *Riblet Prods.*, 683 A.2d at 37; *Juran v. Bron*, 2000 WL 1521478, *9 (Del. Ch.).

¹⁹ *Gale v. Bershad*, 1998 WL 118022, *5 (Del. Ch.).

to pay Plaintiff compensation “due and owing to him as an employee,”²⁰ improper attempt to force Plaintiff to sell his stock without basis in the Amended Stockholders’ Agreement and at a grossly deflated and devalued price, and termination of employment. Plaintiff’s claims for withheld compensation and termination on are founded on the Employment Agreement. The forced sale and the procedure governing the sale are based on the Amended Shareholder Agreement. Plaintiff specifically states that Hutchison attempted “to force [Plaintiff] to sell his stock without legitimate basis in JAED’s Amended Stockholders’ Agreement.”²¹ Furthermore, in Count VI, Plaintiff states that the attempted force sale of his shares was “in violation of the explicit provisions of [the Amended Stockholders’ Agreement]...”²²

B. Count II: Conspiracy and Aiding and Abetting the Breach of Fiduciary Duties

Plaintiff has failed to state claims of civil conspiracy and aiding and abetting. When two or more persons engage in an unlawful act in furtherance of a conspiracy and actual damage resulted, co-conspirators may be jointly and severally liable.²³ No relief for a claim for civil conspiracy exists without an

²⁰ Compl., at ¶109.

²¹ *Id.* at ¶111.

²² *Id.* at ¶ 145.

²³ *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del. 1987).

underlying actionable tort.²⁴ The Supreme Court has stated that “[a] claim for aiding and abetting requires the following three elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) a knowing participation in that breach by [the defendant].”²⁵ Plaintiff has failed to state a claim for breach of fiduciary duty; as a result, Plaintiff is unable to sustain claims for civil conspiracy and aiding and abetting since these claims were alleged in conjunction with the claim for breach of fiduciary duty.

C. Count V: Claim against JAED and Individual Defendants for Violation of Delaware’s Wage Payment and Collection Act²⁶

Defendants argue that the Individual Defendants were not the Plaintiff’s “employer;” consequently, they cannot be held individually liable for alleged violations of the Act. The Act defines an “employer” as

any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual or the receiver, trustee or successor of any of the same employing any person. This chapter does not apply to employees of the United States government, the State of Delaware or any political subdivision thereof.²⁷

²⁴ *Brooks-McCollum v. Shareef*, 2006 WL 3587246 (Del. Super.); *Anderson v. Airco, Inc.*, 2004 WL 2827887, *3 (Del. Super.).

²⁵ *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995)(citing *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 131 (Del. Ch. 1986)).

²⁶ 19 *Del. C.* § 1101, et seq.

²⁷ §1101(a)(4).

“Employers” also include “officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate [the Act].”²⁸ Defendants state that Plaintiff has not alleged that any managing officers or agents of JAED “knowingly permitted” JAED to violate the Act. To the contrary, Plaintiff has stated that Hutchison’s actions were taken with full knowledge and consent of the other Individual Defendants. The Court finds that Plaintiff has sufficiently pled facts to support Plaintiff’s claim based on the Act against the Individual Defendants.

Wages are defined as “compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation.”²⁹ Plaintiff argues that he is owed compensation for the time that he worked during his allotted vacation days. Defendants contend that Plaintiff is not entitled to vacation pay because vacation pay does not qualify as “wages” under the Act. However, the Act also provides for civil remedy for the payment of benefits or provision of wage supplements.³⁰

Section 1109(b) states that

‘benefits or wage supplements’ means compensation for employment other than wages, including, but not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation,

²⁸ §1101(b).

²⁹ §1101(a)(5).

³⁰ § 1109(a); *Nye v. Univ. of Delaware*, 2003 WL 22176412, *6 (Del. Super.).

separation or holiday pay, but not including disputed amounts of such compensation subject to handling under dispute procedures established by collective bargaining agreements.”³¹

Compensation for Plaintiff’s vacation time need not fall under the definition of “wages” to qualify under the Act.³² Based on the text of the statute, vacation pay would qualify as a wage supplement. Therefore, the Wage Payment and Collect Act claim is not dismissed.

D. Count VI: Breach of Contract based on Attempted Forced Sale of Stock by JAED and Individual Defendants

Defendants argue that Plaintiff has failed to state a valid claim for breach of contract against the Individual Defendants based on the Amended Stockholders’ Agreement because they cannot be held liable as stockholders for any corporate debt or obligations. Defendants have not moved to dismiss the claims against JAED in Count VI.

Corporations and shareholders are bound by the agreements to which they become parties to.³³ The “forced sale” at issue is based on certain contingencies in the Amended Shareholders’ Agreement, which are governed by 8 *Del. C.* §§

³¹ § 1109(b).

³² *Cf. Manley v. Associates in Obstetrics and Gynecology, P.A.*, 2001 WL 946489, *7 (Del. Super.) (discussing *Dept. of Labor v. Green Giant, Co.*, 394 A.3d 753 (Del. Super. 1978)).

³³ *Mitchell Associates, Inc. v. Mitchell*, 1980 WL 268106 (Del. Ch. 1980) (“As party to the Agreement, the Corporation---like the shareholders---is bound by it”).

202(b) and 202(c)(4).³⁴ Section 202(b) permits the imposition of a restriction sale of securities “by the certificate of incorporation or the bylaws or by an agreement among any number of security holders or among such holders and the corporation.” The agreement stated that it was “by and among” the stockholders and the JAED Corporation.³⁵ Therefore, Plaintiff has sufficiently pled that the Individual Defendants, along with JAED, were bound by the Amended Stockholders’ Agreement.

E. Count VII: Retaliatory Discharge/Wrongful Termination

Plaintiff alleges that JAED terminated his employment in retaliation for his complaint and demand for outstanding compensation and benefits owed to him. Before Plaintiff was terminated, his employment contract had converted to an at-will employment contract. At will employment contracts are for an indefinite duration and allow for either the employer or the employee to terminate the employment relationship “without demonstrating to anyone else’s satisfaction that the reasons for doing so are valid, reasonable or appropriate.”³⁶ Despite the broad scope of the employment at-will doctrine, the Supreme Court has held that the

³⁴ Section 202(c)(4) permits a restriction on the transfer of securities that “[o]bligates the holder of the restricted securities to sell or transfer an amount of restricted securities to the corporation or to any other person or to any combination of the foregoing, or causes or results in the automatic sale or transfer [...] to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing”.

³⁵ Amended Stockholders’ Agreement, at p.1.

³⁶ *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578,585 (Del. Ch. 1994).

covenant of good faith and fair dealing is implicit in every employment contract.³⁷

A breach of the covenant of good faith and fair dealing is accompanied by “an aspect of fraud, deceit or misrepresentation by the employer”³⁸ and occurs only in four limited circumstances:

(1) termination of employment when the termination violates public policy, (2) where the employer misrepresents important facts inducing an employee to either stay or accept a new position, (3) when an employer uses its superior bargaining power to deprive the employee of clearly identifiable compensation related to the employee’s past services, (4) or the employer falsifies or manipulates employment records to create fictitious grounds for termination.³⁹

Based on the facts pled, that JAED terminated Plaintiff in retaliation for Plaintiff’s complaint and demand for compensation, Plaintiff’s only plausible claim for breach of the covenant is for termination of employment in violation of public policy. To show an alleged violation of public policy, an employee must assert a public interest recognized by some legislative, administrative or judicial authority and must occupy a position with responsibility for advancing or sustaining that particular interest.⁴⁰

³⁷ *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.3d 436, 437 (Del. 1996); *Merrill v. Crothall-American, Inc.*, 606 A.2d 96,101 (Del. 1992).

³⁸ *Nye*, 2003 WL 22176412 at *3; *Merrill*, 606 A.2d at 101.

³⁹ *Nye*, 2003 WL 22176412 at *4 (citing *Lord v. Souter*, 748 A.2d 393, 400 (Del. Super. 2000)).

⁴⁰ *Lord v. Souder*, 748 A.3d 393, 401 (Del. 2000).

Plaintiff argues that his termination was in violation of the public policy behind the Delaware Wage and Collection Payment Act.⁴¹ However, there is no basis in the statute to support this claim. Where a statutory framework is already in place to address wrongful conduct, this Court has been reluctant to expand the public policy exception to the employment at will doctrine.⁴² There are three provisions of the Act which provide guidance on the issue of whether an employee may sustain a private right of action for a claim of retaliation for an employee's complaints regarding compensation. Section 1113 allows an employee to bring civil action to recover unpaid wages and liquidated damages.⁴³ Section 1111 states that the "Department may institute actions in the Superior Court for penalties for any violation of [the Act]."⁴⁴ Lastly, § 1112 provides that an employer who discharges an employee for making a complaint will be subjected to civil penalty.⁴⁵ This Court has stated that "[t]here is no provision in the Wage Act authorizing a private right of action for statutory penalties. Nor are there any Delaware cases awarding civil penalties to an employee or suggesting that such an award is

⁴¹ Pl. Opposition to Mot., at 14. Plaintiff did not argue public policy in the Complaint; in opposition to the Motion, Plaintiff argued that the public policy argument stems from the WPCA, 19 *Del. C.* §§ 1112(b) and 1113.

⁴² See *Ayers v. Jacobs & Crumplar, P.A.*, 1996 WL 769331, *12 (Del. Super.) ("In particular, it would be counter-productive to recognize a broader common law exception to the at-will doctrine when there exists elaborate statutory schemes at both the federal and state levels that address this same public policy concern").

⁴³ 19 *Del. C.* §1113(a).

⁴⁴ 19 *Del. C.* §1111(c).

⁴⁵ 19 *Del. C.* §1112(b).

feasible under the Wage Act.”⁴⁶ Based on the language of the Act, it appears that Plaintiff cannot bring a private action for retaliatory discharge or wrongful termination.

F. The Ad damnum Clauses

Plaintiff’s requests for declaratory judgment regarding the non-compete clause and claims against JAED based on the Employment Agreement,⁴⁷ against all defendants for breach of the Amended Stockholders’ Agreement, and against all defendants for violations of the Wage Payment and Collection Act remain.

Defendants argue that the *ad damnum* clauses of the complaint are “boilerplate” and must be dismissed to the extent that they request remedies that are not available under the action pled.⁴⁸ Defendants set forth specific arguments regarding the claims for attorneys’ fees and punitive damages.

The clauses at issue requests

[t]hat this Court enter an Order, as well as Judgment, in its favor and against the Defendants: [...] (c) finding that JAED and the Individual Defendants breached their Employment Agreement with Nelson, and violated Delaware’s Wage Payment and Collection Act;(d) awarding Nelson monetary damages for the amount of all compensation, vacation time, and benefits which JAED failed to pay and wrongfully

⁴⁶ *Rodas v. Service General Corp.*, 2010 WL 2355314, *1 (Del. Super.).

⁴⁷ Plaintiff withdrew claims in Counts III and IV against the Individual Defendants.

⁴⁸ This order addresses only those arguments expressly set forth in Defendants’ Motion concerning the Plaintiff’s available remedies.

withheld from Nelson, together with award of statutory damages, reasonable attorneys fees and costs; (e) [...] (f) awarding Nelson monetary damages for the full value of Nelson's JAED shares; (g) granting declaratory relief in favor of Nelson and entering a Declaratory Judgment that the non-compete clause, Section 7, Paragraph 7.1 of JAED's Amended Stockholders' Agreement is void and unenforceable; (h) awarding compensatory and punitive damages to punish JAED and the Individual Defendants for their wrongful conduct; (i) awarding pre-and post-judgment interest to Nelson; and (j) such other and further relief as the Court deems appropriate.⁴⁹

Generally, Delaware follows the "American Rule" that each party in a lawsuit must bear its own attorneys' fees.⁵⁰ According to the rule, in "an action at law and absent a statutory or contractual provision, a court may not ordinarily order the payment of attorneys' fees as costs to be paid by the losing party."⁵¹ Plaintiff's claims for attorneys' fees are dismissed to the extent that they are brought under the Employment Agreement and the Amended Stockholders' Agreement. Neither agreement contains a provision indicating that the parties opted out of the application of the American Rule. The Employment Agreement addresses attorneys' fees and it states:

In the event an arbitration, suit or action is brought by any party under this Agreement to enforce any of its terms, or in any appeal therefrom,

⁴⁹ Parts (a), (b), and (e) of the *ad damnum* clauses, which relate to the claim for breach of fiduciary duties, have been omitted since the fiduciary claims are dismissed.

⁵⁰ *Relax Ltd. v. ANIP Acquisition Co.*, 2011 WL 4954174, *3 (Del. Super.).

⁵¹ *Dover Historical Soc., Inc. v. City of Dover Planning Com'n*, 902 A.2d 1084, 1090 (Del. 2006).

it is agreed that each party shall bear and be responsible for its own costs and expenses including without limitation attorneys' fees.⁵² Nevertheless, Plaintiff may prove a set of facts entitling him to recover attorneys' fees under the Wage Payment and Collection Act, which expressly provides for attorneys fees.⁵³

Plaintiff is not entitled to punitive damages for any claims based on the Employment Agreement or the Amended Stockholders' Agreement. Traditionally, punitive damages are not awarded for breach of contract unless supported by an independent tort.⁵⁴ In rare situations, courts may award punitive damages for breach of contract when there is malicious intent.⁵⁵ Although Plaintiff has alleged that the stock valuation was not the product of good faith, Plaintiff has failed to show that a tort exists, independent from the breach of the Amended Stockholders' Agreement or the Employment Agreement, in order to justify an award of punitive damages.

⁵² Employment Agreement, at § 16.

⁵³ 19 *Del C.* § 1113(c) states “[a]ny judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorney's fees, all to be paid by the defendant...”

⁵⁴ *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996); *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, *5 (Del. Super.).

⁵⁵ *Littleton v. Young*, 608 A.2d 728 (Del. 1992); *Standard Distrib. Co. v. NKS Distributors, Inc.*, 1996 WL 944898, *13 (Del. Super.).

Conclusion

Based on the forgoing, Defendants' Motion to Dismiss is **GRANTED, in part, and DENIED, in part.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.