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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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JOEL BREN

Plaintiff,

Index No. 104098/05
Mtn Seq. 001

-against-

ESSEX MANUFACTURING, INC.,

Defendant.

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WALTER B. TOLUB, J.:

By this motion, plaintiff seeks the consolidation with the action captioned, *Peter Baum and William Baum v. Joel Bren* (Index No. 115677/2004) (the "Baum Action")[1]. Defendant cross-moves for dismissal of counts one and four of plaintiff's complaint pursuant to CPLR 3211.

In 1994, defendant hired plaintiff as a sales representative. Pursuant to contract, plaintiff was to serve in this capacity from 1994 until 1997, during which he was to earn a salary and commissions (Cross Motion Exhibit C). In 1997, plaintiff's contract was not renewed.[2] However, plaintiff continued to work for defendant as a sales representative until defendant terminated plaintiff from its employ in November, 2003.

In response to his job termination, in early 2004, plaintiff

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[1] This action is presently pending before Justice York.

[2] Although it appears that plaintiff sought to obtain a new contract, no new contract was ever executed as between the parties.

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initiated an arbitration proceeding, alleging breach of contract and age discrimination as well as tortuous interference with prospective advantage, prima facie tort, and defamation. In April, 2004, defendant brought an action to stay the arbitration proceeding (CPLR 7503). By decision and order dated June 17, 2004, Justice Shirley Kornreich granted the motion, and permanently stayed the arbitration, finding that no valid agreement to arbitrate existed (Affirmation in Opposition to Plaintiff's Motion to Consolidate, Exhibit 2).

On October 12, 2004, plaintiff commenced[3] the instant action. Plaintiff's complaint, comprised of seven causes of action, alleges breach of contract, age discrimination under New York State and City laws, fraud, tortious interference with prospective economic advantage, prima facie tort and defamation. Defendant answered plaintiff's complaint on November 4, 2004, asserting counterclaims for injurious falsehood, trespass, violation of Penal Law §156, breach of contract, and breach of fiduciary duty. On November 5, 2004, William and Peter Baum, the CEO and CFO of defendant Essex, commenced the Bren action, alleging defamation. Thereafter, the instant motion and cross-motions ensued.

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[3] The court notes that this action bears a 2005 index number, despite the fact that the documents are dated 2004. This occurred because plaintiff initially incorrectly filed the instant action using the index number purchased for the arbitration.

Discussion

Cross-Motion to Dismiss

At the outset, because defendant's cross-motion has the potential to effect this court's decision with respect to the issue of consolidation, the cross-motion for dismissal of plaintiff's first cause of action for breach of contract, and fourth cause of action alleging fraud, will be addressed.

A motion to dismiss limits the sole inquiry before the court to whether plaintiff's facts, as alleged, "fit within any cognizable legal theory upon which plaintiff may succeed (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Campaign for Fiscal Equity, Inc., v State of New York* (86 NY2d 307 at 318 [1995]. See generally, Barr Altman, Lipshie and Gerstman, *New York Civil Practice Before Trial* [James Publishing 2001, 2004] Section 36.01 et seq.). In the instant action, defendant contends that plaintiff's first cause of action for breach of contract warrants dismissal because the same issue was raised and litigated in the Arbitration action. Therefore, defendant argues, any breach of contract issues are barred by the doctrines of res judicata and collateral estoppel.

Contrary to defendant's position, the commencement of the arbitration action only raised one issue before the court: whether or not a valid arbitration agreement existed between the parties(see, CPLR 7503; *Prinze v Jonas*, 38 NY2d 570 [1976]; *Brown*

v. Bussey, 245 AD2d 255 [2nd Dept. 1997]; *Petition of Levitt*, 109 AD2d 502 [1st Dept 1985). As such, the doctrines of res judicata and collateral estoppel are inapplicable, and the portion of defendant's cross motion seeking to dismiss plaintiff's first cause of action is denied. However, notwithstanding the fact that these doctrines are inapplicable, plaintiff's first cause of action must be dismissed. Plaintiff cannot maintain a cause of action for breach of contract under the circumstances presented. It is the opinion of this court that plaintiff was an at-will employee and as such cannot maintain a cause of action for breach of contract based on wrongful discharge (*McGimpsey v. J. Robert Folchetti & Associates, LLC*, 19 A.D.3d 658 [2nd Dept. 2005]; *Priovolos v. St. Barnabas Hosp.*, 1 A.D.3d 126 [1st Dept 2003]). Accordingly, the portion of defendant's cross-motion seeking to dismiss plaintiff's first cause of action is granted to the extent that it seeks to recover for the wrongful discharge.

Defendant additionally seeks dismissal of plaintiff's fourth cause of action alleging fraud. A prima facie cause of action for fraud requires plaintiff to demonstrate misrepresentation of material facts, falsity, scienter, reliance on the statement, and injury (*Standish-Parkin v. Lorillard Tobacco Co.*, 12 A.D.3d 301 [1st Dept. 2004). In addition, plaintiff must plead the cause of action with particularity (CPLR 3016(b)).

Contrary to defendant's argument, it is this court's opinion

that plaintiff has plead his cause of action asserting fraud with the requisite particularity required by the CPLR. Plaintiff's cause of action is quite specific[4] as to when his salary was reduced, by whom, and under what circumstances his salary was to be increased. Since plaintiff's asserted fraud claim is not predicated upon the breach of contract, but rather the

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[4] In pertinent part, plaintiff's fourth cause of action reads as follows:

55. In or about August of 2003, Essex reduced Bren's annual salary from $175,000.00 to 125,000.00. Bren did not authorize this reduction. Moreover, there was nothing in the Employment Agreement authorizing this reduction.

56. Essex informed Bren that this reduction was necessary because Bren's accounts were allegedly "not profitable". Essex further informed Bren that his salary would be restored to his former level when his sales returned to their former level.

57. Both of these representations were false and known to be false when made. Bren's accounts were extremely profitable at the time his salary was reduced. Moreover, by October of 2003, Bren had surpassed his total sales from the previous year by almost $600,000.00. Even though Bren's sales for 2003 materially exceeded his sales from the previous year, Bren's salary was never restored to its former level.

58. Essex knew at the time that it made these representations that they were false. Essex made these representations with the sole invidious intent of inducing Bren to continue working as a Sales Representative for Essex while working at a reduced salary.

59. Bren reasonably relied on these representations all to his detriment. As a result of Essex's fraudulent representations, Bren remained with Essex, foregoing other opportunities for employment.

60. As a direct and proximate result of the aforesaid fraud, Bren suffered damages including the lost of past and future income and benefits and damage to his business reputation.

misstatements alleged to have been made in order to induce plaintiff to remain in defendant's employ, there is no reason for this court to dismiss plaintiff's claim (see, *Navaretta v. Group Health Inc.*, 191 A.D.2d 953 [3rd Dept. 1993]). Accordingly, the portion of defendant's motion seeking dismissal of plaintiff's fourth cause of action for fraud is denied.

Motion to Consolidate

Turning now to the issue of consolidation, CPLR 602 allows the court, at its discretion, to consolidate actions provided that they involve common questions of law and fact unless the opposing party or parties demonstrate that the consolidation of the actions will prejudice a substantial right (Progressive Insurance Company v Vasquez, 10 AD3d 518 [1st Dept. 2004]). In the instant motion, plaintiff's entire argument in support of consolidation of this action with the Bren action centers around the contention that the actions are inexplicably intertwined because of the defamation allegations, and that neither case will be resolved without a determination of these issues.

It is obvious to this court that both cases do involve common questions of fact with respect to the defamation issues raised, and to that extent, the parties might benefit from synchronized discovery on these issues. However, in light of the fact that consolidation would likely confuse a jury and place both parties in the position of plaintiff and defendant, consolidation of these

actions is inappropriate (*Bass v France*, 70 AD2d 849 [1st Dept. 1979]). In the interest of judicial economy however, what is appropriate under these circumstances, is a joint trial. Accordingly, it is

ORDERED that defendant's cross-motion to dismiss plaintiff's first cause of action is granted, and the within cause of action is dismissed; and it is further

ORDERED that defendant's cross-motion to dismiss plaintiff's fourth cause is denied; and it is further

ORDERED that plaintiff's motion to consolidate this action pursuant to CPLR 602 is denied; and it is further

ORDERED that the above captioned action and the action captioned *Peter Baum and William Baum v. Joel Bren,* Index No. 115677/2004, Supreme Court, New York County shall have joint discovery conferences in this matter so as to expeditiously resolve all remaining discovery matters; and it is further

ORDERED that the above captioned action shall be jointly tried with *Peter Baum and William Baum v. Joel Bren,* Index No. 115677/2004, Supreme Court, New York County; and it is further

ORDERED that upon payment of the appropriate calendar fees, the filing of notes of issue and statements of readiness in each of the above actions, and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid actions upon the trial

calendar for a joint trial before this court.

Counsel for all parties in both actions are directed to appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street on February 17, 2006 at 11:00.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/18/06

HON. WALTER B. TOLUB, J.S.C.