SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 4
NASSAU COUNTY

ROBERT CURRAN,

Plaintiff,

- against -

BROOKSTONE COMPANY, INC., and BROOKSTONE STORES, INC.,

Defendants.

MOTION DATE: 6/21/11

MOTION SEQ. NO.: 001

INDEX NO.: 13594/10

The following papers read on this motion (numbered 1-4):

Notice of Motion.....1
Affidavit in Opposition.....2
Memorandum of Law In Opposition.....2a
Reply Affirmation.....3
Supplemental Submissions.....4

Motion by defendants BROOKSTONE COMPANY, INC. and BROOKSTONE STORES, INC. ("BROOKSTONE") to dismiss the action pursuant to **CPLR §3211(a)(1)** and **§3211(a)(7)** is determined as follows.

This is an action by plaintiff ROBERT CURRAN against his former employer, BROOKSTONE for breach of contract and breach of an obligation of good faith and fair dealing. Plaintiff commenced his employment with BROOKSTONE in 2009 as Regional Vice President of BROOKSTONE's Western Region ("Western RVP") and was promoted to Operational Vice President, Retail Operations/Administration ("OVP") pursuant to a letter agreement, dated January 21, 2010 (the "Agreement") [Motion Exh. A]. The Agreement provided that plaintiff is an "employee-at-will and that neither [plaintiff] nor BROOKSTONE is obligated to continue our employment relationship if either of us does not wish to do so." Most significant to the relief sought by plaintiff herein, is the following clause in the Agreement: "In the unlikely event your employment is terminated by the Company other than for cause, you will receive a severance package consisting of your base salary for a maximum period of up to twelve (12) months." The

Court refers to its Order, dated March 30, 2011 (the "Prior Order"), for a complete recitation of the facts.

Plaintiff alleges that BROOKSTONE wrongfully withheld severance pay from him upon his termination of employment thereby violating the clause in the Agreement providing for severance upon termination unless termination of plaintiff's employment is for cause. Plaintiff's cause of action sounding in breach of contract alleges that plaintiff "was not terminated 'for cause' within the meaning and/or reasonable interpretation of policies cited by defendants as the reason for plaintiff's termination from employment." Plaintiff's second cause of action alleges that BROOKSTONE's actions breached its obligation to act in good faith and with fair dealing.

BROOKSTONE moves to dismiss plaintiff's first cause of action pursuant to **CPLR §3211(a)(1)** based on documentary evidence, and moves to dismiss plaintiff's second cause of action pursuant to **CPLR §3211(a)(7)** on grounds plaintiff failed to state a cause of action. In the Prior Order, the Court granted BROOKSTONE's motion to dismiss plaintiff's second cause of action which alleged that BROOKSTONE violated its duty to terminate an at will employee in good faith and with fair dealing on grounds that such action fails to state a cognizable cause of action under New York law. *See* **DiLacio v. New York City Dist. Council of United Brotherhood of Carpenters & Joiners of America**, 80 AD3d 553; **Riccardi v. Cunningham**, 291 AD2d 547.

In connection with BROOKSTONE's motion to dismiss plaintiff's first cause of action for breach of contract pursuant to **CPLR §3211(a)(1)**, BROOKSTONE argues that based on "clear and irrefutable" documentary evidence, plaintiff has no right to severance because he was properly terminated for cause. The documentary evidence includes a termination memorandum addressed to plaintiff, dated April 19, 2010 (the "Termination Memorandum"), which provides that on February 10, 2010, plaintiff was notified by Rhoda McVeigh of BROOKSTONE, that BROOKSTONE was investigating an allegation that he had a romantic relationship with a subordinate, a District Manager (identified in the motion papers as 'AD') when plaintiff was Western RVP and continuing thereafter. The Termination Memorandum references BROOKSTONE's Communication Policy governing Manager/Associate Romantic Relationships (the "Communication Policy") [Motion Exh. C] which provides: "Because of concerns regarding possible favoritism or the appearance of favoritism or unfairness, relationships of a romantic nature between Associates and Managers to whom they directly report are prohibited."

The Termination Memorandum provides that (1) plaintiff "continued to have personal communication with AD after being specifically told not to contact her unless for business purposes"; (2) plaintiff was "not truthful during this investigation"; and (3)

an email previously sent by plaintiff denying a personal relationship with AD was false. Consequently, the Termination Memorandum concludes that plaintiff's "actions will result in the immediate termination of employment for cause for dishonesty, failure to cooperate with an investigation, and violating the express instruction to refrain from personal, non-business contact during the investigation." The Termination Memorandum cites a violation of Asset Protection Policy #18 which provides that failing to cooperate, be truthful, or to withhold information during an investigation is a Class A violation resulting in immediate termination, which the Court found in its Prior Order, to be inapplicable to the facts of this case.

In opposition, plaintiff as an 'at will' employee does not deny that BROOKSTONE was within its rights to terminate him nor does he deny the existence of the Communication Policy but argues that it is inapplicable for the reason that he "was not AD's direct supervisor from the time [he] was promoted in January 2010 until the time [he] was terminated in April 2010." Consequently, the Prior Order, required the parties to submit proof as to whether or not AD reported to plaintiff from the date of the Agreement until the date of his termination. It is undisputed that AD reported to plaintiff prior to his promotion effective February 1, 2010.

BROOKSTONE has now submitted an affirmation of counsel, and an affidavit of Anne McDonough, sworn to on June 17, 2011 (the "McDonough Affidavit"). The McDonough Affidavit, states that after plaintiff was promoted to the position of OVP, plaintiff's former position of Western RVP was not filled and, as a result, plaintiff continued to maintain his Western RVP responsibilities, including supervision of Western Region District Managers, such as AD, who reported to him prior to the promotion. BROOKSTONE also submits affidavits of four district managers in the Western Region who attest that they reported directly to plaintiff both prior to and subsequent to his promotion to OVP.

BROOKSTONE's motion to dismiss plaintiff's breach of contract claim pursuant to **CPLR §3211(a)(1)** founded on documentary evidence is based on (i) plaintiff's involvement in a romantic relationship with AD, a direct report, in violation of the Communication Policy; (ii) plaintiff's insubordination; and (iii) plaintiff's making of false statements during BROOKSTONE's investigation. In addition to the supplemental submission, BROOKSTONE's documentary support consists of (1) the Agreement; (2) Communication Policy; (3) Termination Memorandum; (4) record of cell phone calls covering certain calls between plaintiff and AD; (5) email from plaintiff to a representative in BROOKSTONE's human resources department, dated February 17, 2010 stating that he has had nothing but a professional relationship with AD; and (6)

emails between plaintiff and AD, and between plaintiff, and various hotels, travel agencies and airlines for the period November 2009 through March 2010.

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." **Fontanetta v. John Doe 1**, 73 AD3d 78, 83-84 *quoting* **Fortis Fin Servs. v. Fimat Futures USA**, 290 AD2d 383. "[I]f the court does not find [their] submissions 'documentary', it will have to deny the motion." **Fontanetta** *Id.* at 84 *quoting* **Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10**, at 22. As outlined in **Fontanetta**, *supra*, for purposes of motions to dismiss under **CPLR §3211(a)(1)**, judicial records, and documents reflecting out of court transactions, such as mortgages, deeds, leases, and contracts "the contents of which are 'essentially undeniable' can qualify as documentary evidence. **Fontanetta** *Id.* at 84-85. However, affidavits, emails, deposition and trial testimony, letters, medical records, and certain records containing information in summary form do not qualify as 'documents' within the meaning of **CPLR §3211(a)(1)**.

Consequently, the Court finds that the written materials provided by BROOKSTONE in support of its motion to dismiss are not documentary evidence "within the intendment" of a motion to dismiss under **CPLR §3211(a)(1)**. **Fontanetta**, *Id.* BROOKSTONE's printed materials can best be characterized as affidavits, emails, letters, memoranda, summaries, and opinions/and or conclusions of BROOKSTONE employees and as such fail to qualify as documentary evidence for purposes of **CPLR §3211(a)(1)**.

In its supplementary submissions, BROOKSTONE appears to be arguing for the first time that its motion to dismiss plaintiff's cause of action for breach of contract is alternatively based on **CPLR §3211(a)(7)**. Even if the Court finds that BROOKSTONE has properly asserted alternative grounds for dismissal, BROOKSTONE's motion to dismiss for failure to state a cause of action pursuant to **CPLR §3211(a)(7)** is equally unavailing.

The Court notes that plaintiff does not have to prove his claim in order to survive a motion to dismiss. On a motion to dismiss for failure to state a cause of action pursuant to **CPLR §3211(a)(7)**, a court must construe pleadings literally, accepting as true the factual allegations in the complaint and accord a plaintiff the benefit of every favorable inference. At this stage of the proceeding, the Court must accept as true the Complaint's allegations and finds that such allegations fall within a cognizable legal theory sounding in breach of contract. "The mere fact that, judged on the complaint and affidavits alone, plaintiff could not withstand a motion for summary judgment under CPLR 3212, which

requires disclosure of all the evidence on the disputed issues, cannot be controlling." **Rovello v. Orofino Realty Co.**, 40 NY2d 633, 635.

BROOKSTONE's alternative argument made in reply, that even if the Court determines that plaintiff was not terminated for cause, the clause in the Agreement providing for severance of 'up to' 12 months is discretionary thereby precluding a breach of contract action. The Court finds that, taken together with the provision in the Agreement deducting self-employment or other income from severance pay earned, the Agreement does not clearly indicate on its face that severance payment was discretionary.

Based on the foregoing, it is

ORDERED, that BROOKSTONE's motion to dismiss plaintiff's complaint is **denied**.

This constitutes the Order of the Court.

Dated: 9/29, 2011

J.S.C.

ENTERED
OCT 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE