

Global Tech. Fin., LLC v Faisal Syed

2011 NY Slip Op 33901(U)

August 12, 2011

Supreme Court, New York County

Docket Number: 603693/08

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Brantley
Justice

PART 3m

Global Technology

INDEX NO. 603693 bt

MOTION DATE 1/26/11

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

- v -

Faisal Syed

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-12-11

Edmund Brantley
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
GLOBAL TECHNOLOGY FINANCE, LLC,
a Delaware limited liability company, and
NEW YORK TECHNOLOGY FINANCE, LLC,
a Delaware limited liability company,

Plaintiffs,

-against-

Index No.: 603693/08
Mtn. Date: 1/26/11
Mtn. Seq. No.: 007

FAISAL SYED,

Defendant.

-----X
FAISAL SYED

Counterclaim Plaintiff,

-against-

GLOBAL TECHNOLOGY FINANCE, LLC,
a Delaware limited liability company, and
NEW YORK TECHNOLOGY FINANCE, LLC,
a Delaware limited liability company,

Counterclaim Defendants.

-----X

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Plaintiffs/counterclaim defendants Global Technology Finance, LLC and New York
Technology Finance, LLC, (hereinafter "GTF" and "NYTF" or "Plaintiffs") seek dismissal of the
counterclaims against it asserted by defendant/counterclaim plaintiff Faisal Syed ("Syed"). Syed
opposes the motion.

BACKGROUND

In 2005, Syed formed UCA Global, Inc. (“UCA”), a value-added computer hardware and software reseller. Affidavit of Faisal Syed in Opposition to Plaintiffs’ Renewed Motion to Dismiss the Second, Third and Fourth Counts of Counterclaim (“Syed Aff.”) at ¶ 3. UCA’s stock was originally owned by iWonders, Inc., a corporation Syed wholly owned. *Id.* UCA stock was later issued to FJS Holdings Private Limited (“FJS Holdings”), a corporation in which Syed also had a controlling interest. *Id.*

On July 29, 2005, UCA entered into a Management Servicing Agreement (“MSA”) with NYTF. Answer, Counterclaim and Third-Party Complaint (“Answer”) at ¶ 9. iWonders, having an interest in UCA, also became a party to the MSA. Syed Aff. at ¶ 6.

The MSA provided that Plaintiffs were to purchase and take title to all UCA inventory. Syed Aff. at ¶ 7. Under the MSA, UCA was to be Plaintiffs’ managing agent. *Id.* UCA was to forward monies received from inventory sold to a “lock box” bank account maintained by and held for Plaintiffs’ benefit. *Id.*

Syed was to serve in a sales and marketing role for UCA. Syed Aff. at ¶ 8. In turn, Plaintiffs were to provide inventory financing to UCA and financial and accounting support to UCA and Syed. *Id.* Syed personally guaranteed a limited portion of UCA’s potential liability for any inventory repurchase obligations under the MSA. Answer at ¶ 10.

In late 2006, Syed began discussing selling all or a majority of his UCA shares to non-party Darien Dash. Syed Aff. at ¶ 10. Dash controlled Technology Access Partners, LLC (“TAP”). *Id.* Syed was introduced to Dash by Plaintiffs and their principals, including Mr. Paul Stemler. *Id.*

On May 3, 2007, Syed and Dash entered into a purchase agreement through which iWonders and FJS Holdings sold all of the issued and outstanding capital common stock of UCA to Technology Access Partners. Syed Aff. at ¶ 11.

On November 15, 2007, six months after UCA's sale to TAP, Dash and Syed signed an Amended and Restated Management Servicing Agreement ("ARMSA"). Syed Aff. at ¶ 12; Answer at ¶ 20. The ARMSA replaced the original MSA between NYTF, UCA and Syed. Syed Aff. at ¶ 12. Under the ARMSA, Syed no longer personally guaranteed any liability potentially owed by UCA to Plaintiffs. *Id.* at ¶ 14.

Syed alleges that Plaintiffs, and their principal, Mr. Stemler, were aware that following UCA's sale and the signing of the ARMSA, Syed's energies would be focused on the international business opportunities in which Plaintiffs and TAP were to participate. *Id.* at ¶ 13.

Syed alleges that Dash failed to properly manage UCA's affairs and took actions contrary to the interests of UCA and Plaintiffs. Syed Aff. at ¶ 15. Syed contends that Dash diverted monies to himself that were to be paid to Plaintiffs, failed to bring operating capital into UCA as promised and delayed the negotiation and modification of the MSA to reflect the change in ownership and control of UCA. *Id.* Syed contends that UCA became insolvent as a result of Dash's purported actions. *Id.* at ¶ 16. Syed alleges that, because he was working on TAP business abroad, he was not aware of Dash's mismanagement until early 2008. *Id.* at ¶¶ 21-24.

In December 2007, Plaintiffs audited UCA. Plaintiffs discovered a deficiency between the inventory that UCA was supposed to have and the amount it actually had. Syed Aff. at ¶ 19. Prior to this, Plaintiffs had found no inventory irregularities in two audits performed in May and June of

2007. *Id.* at ¶ 20. In late January 2008, Plaintiffs' representatives, Dash, Dash's attorney and Dash's mother, took physical inventory of UCA's goods. *Id.* at ¶ 26. The inventory revealed a purported "net inventory loss" of approximately \$1.3 million. *Id.*

Plaintiffs cancelled the ARMSA with UCA on January 11, 2008, allegedly because of Dash's purported mismanagement of affairs. *Id.* at ¶ 23.

Alleged Breach of Assistance Agreement By NYTF

On February 11, 2008, Syed entered an agreement with NYTF (the "Assistance Agreement"), whereby Syed agreed to assist Plaintiffs in the liquidation of the inventory purchased by NYTF. Answer at ¶ 23. Syed hoped that the Assistance Agreement would mitigate losses incurred due to Dash's alleged failure to pay Syed. Syed Aff. at ¶ 30. Syed also stated that he had hoped to mitigate losses due to outlays and expenses that he covered but which were supposed to be made by TAP, GTF and NYTF in the international business. *Id.* at ¶¶ 29-30.

Under the Assistance Agreement, NYTF was to provide Syed with new inventory. Answer at ¶ 27. The new inventory was to be bundled with the existing inventory in order to facilitate sales. *Id.* Plaintiffs also agreed to provide iWonders with additional financing through one of their subsidiaries, New England Technology Finance, LLC ("NETF"), as set forth in a Structured Finance Agreement (attached as Schedule E to the Assistance Agreement). *Id.* at ¶ 28. According to Syed, the parties intended to have a full-fledged MSA-type agreement between GTF, NYTF and iWonders no later than February 28, 2008. Syed Aff. at ¶ 38.

On February 27, 2008, Plaintiffs entered into a release and a new MSA with Dash, TAP and UCA. Syed Aff. at ¶ 34. Under the new MSA, Plaintiffs were to provide UCA with financing. *Id.*

Syed alleges that Plaintiffs stopped performing on the Assistance Agreement with Syed. He further alleges that Plaintiffs' release with Dash prohibited Syed from accessing UCA's computer records and data necessary to Syed's performance under the Assistance Agreement. *Id.*; Answer at ¶ 32. Syed alleges that Plaintiffs thus interfered with Syed's business relationships, as without the necessary computer access, he could not sell UCAs inventory or collect receivables. Syed Aff. at ¶ 35.

Alleged Breach of the Structured Finance Agreement by GTF, NYTF and NETF

Syed alleges that Plaintiffs did not convert and execute the Structured Finance Agreement into a new iWonders MSA and did not provide Syed (through iWonders) with the promised financing under this agreement. Syed Aff. at ¶ 37. Syed contends that the promised financing was the incentive that Mr. Stemler used to induce Syed's return to the United States. *Id.* Without the promised financing, Syed could not finance iWonder' pending transactions. *Id.* at ¶ 39. Thus, Plaintiffs' breach allegedly caused Syed to suffer damages and harmed Syed's relationships with customers. *Id.* at ¶ 42.

Alleged Breach of the Employment Agreement by GTF

After Plaintiffs allegedly breached the Assistance Agreement, GTF asked Syed to work for them. Syed Aff. at ¶ 43. Syed contends that GTF believed Syed was indispensable to their business. *Id.* Syed entered into a purported employment contract with GTF in May 2008. Answer at ¶ 36. Syed was to assist GTF with developing and pursuing domestic and international business opportunities. *Id.* at ¶ 37. Syed alleges that he and GTF had no discussion that his employment would be terminable at will. Syed Aff. at ¶ 45. He states that he was told the term of employment

would be three years. *Id.* Syed further alleges that GTF and Mr. Stemler did not intend to honor the employment agreement. Answer at ¶ 37. Syed states that soon after entering the employment agreement, GTF cut off all communication with Syed and sued Syed in federal court. Syed Aff. at ¶¶ 47-48. Syed contends that because of GTF's alleged breach of employment agreement, Syed suffered substantial monetary damages. *Id.* at ¶ 53.

GTF states that the May 21, 2008 letter from Stemler to U.S. Citizenship and Immigration Services for the extension of Syed's H-1B Visa contained an express provision that Syed's employment was terminable at will. Affirmation of Edward Westfield in Support of Renewed Motion to Dismiss Counterclaim ("Westfield Affirm.") at ¶¶ 3-4; *see also* Affidavit of Paul Stemler in Support of Renewed Motion to Dismiss, Exhibit A. GTF argues, thus, that the provision in the letter forecloses any claim for breach of an employment agreement. Westfield Affirm. at ¶ 4. GTF relies on this letter as it allegedly embodies the proposed terms of the employment agreement. *Id.* at ¶ 3.

Alleged Tortious Interference with Prospective Economic Advantage

Syed alleges that Syed and iWonders had existing and expected future economic advantages from ongoing customer relationships. Answer at ¶ 63. Syed further alleges that Plaintiffs and NETF knew of and intentionally and maliciously interfered with these existing and future economic advantages. *Id.* at ¶ 65. Syed states that as a result of Plaintiffs' wrongful actions, iWonders and he suffered substantial damages justifying the imposition of punitive damages. *Id.* at ¶ 67.

Current Status of the Case

On July 6, 2009, Syed served an Answer, Counterclaim and Third-Party Complaint in this action. Westfield Affirm. at ¶ 2. Syed brought claims against GTF, NYTF and NETF for (i) breach

of assistance agreement by NYTF; (ii) breach of employment agreement by GTF; (iii) breach of structured finance agreement by GTF, NYTF and NETF; and (iv) tortious interference with prospective economic advantage by GTF, NYTF and NETF.

iWonders, Inc. was a purported third-party plaintiff in the July 6, 2009 Answer, Counterclaim and Third-Party Complaint. However, iWonders did not purchase an index number for the proposed third-party action. Westfield Affirm. at ¶ 2.

By notice of motion dated August 10, 2009, GTF and NYTF moved to dismiss Syed's counterclaim and third-party complaint. *Id.* Syed cross-moved for leave to amend the counterclaim. *Id.*

On November 5, 2009, the court told parties' counsel that because no third-party index number was purchased, no third party action existed. Westfield Affirm. at ¶ 2. GTF and NYTF then withdrew the motion to dismiss and Syed withdrew his motion for leave to amend the counterclaim both without prejudice to renew the motions "in an appropriate manner." *Id.* The court entered an order allowing same. *Id.*

Although Syed's attorneys stated at oral argument on November 5, 2009 their intention to re-file a motion to amend the counterclaim and to properly file a third-party complaint, they have not. Westfield Affirm. at ¶ 2. On November 15, 2010, Plaintiffs GTF and NYTF filed their Renewed Motion to Dismiss Counterclaim. Plaintiffs move to dismiss Syed's second, third and fourth counterclaims.

ANALYSIS

“On a motion to dismiss [pursuant to CPLR 3211(a)(1)]... the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law ... While a complaint is to be liberally construed on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based on the undisputed facts [...]. *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003) (citations omitted). Dismissal is warranted under paragraph 1 of subdivision (a) of CPLR 3211 “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

I. Syed's Second Counterclaim for Breach of Employment Agreement by GTF is Dismissed

A. Arguments

GTF argues that Syed's second counterclaim for breach of the employment agreement between them and Syed should be dismissed. GTF contends that Syed's employment was terminable at will. GTF provides, in support of its argument, the proposed terms of the employment agreement between the parties. The proposed terms, GTF maintains, are provided in a May 21, 2008 letter to federal immigration authorities in support of a petition to obtain an extension of Syed's H-1B visa classification from GTF's principal Paul Stemler. The letter states:

The terms of our agreement are that Global Technology Finance LLC will employ Mr. Syed as a Director- Business Development, a specialty occupation position, at a salary of \$175,000 a year, for an intended period from May 23, 2008 to May 22, 2011 terminable at will.

Westfield Affirm. at ¶ 3. GTF maintains that this documentary evidence shows that Syed fails to state a cause of action based on breach of the employment agreement and, thus, the claim must be dismissed.

In response, Syed argues that GTF breached the covenant of good faith and fair dealing by failing to cooperate with Syed under the employment agreement. Syed argues that: (1) there are factual issues with respect to whether the “at will” status urged by Plaintiffs was an agreed upon term of the parties’ employment agreement, (2) GTF’s motion is premature because the issues regarding the breach of the employment contract are factual in nature and discovery has not been completed, and (3) GTF’s motion is not supported by the evidence. Syed also contends that he is not bound by the May 21, 2008 letter because it “is not between me and the plaintiff, is not signed by me and I am not even ‘cc’ed on it.” Syed Aff. at ¶ 46.

GTF asserts in its reply brief that because the duration of the alleged employment contract is over one year, the statute of fraud applies. GTF thus claims that Syed bears the burden to allege and prove a written agreement that identifies the parties, states the essential terms of an agreement, including a definite duration, and is signed by GTF. GTF argues that Syed has failed to meet this burden. GTF asserts that Syed's claim that they violated a duty of good faith and fair dealing in terminating him fails to state a cause of action.

GTF further contends that the May 21, 2008 letter stating that Syed’s employment was “at will” was drafted by Kamlesh Tewary, Syed’s own immigration attorney, and was submitted as part of Syed’s non-immigrant worker visa application. Thus, GTF argues, Syed cannot assert ignorance of the letter’s terms.

B. Court's Determination

"[A]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party." *Goldman v. White Plains Ctr.*, 11 N.Y.3d 173, 177 (2008).

Syed has here failed to provide evidence that his employment was for a fixed duration and thus, it must be presumed that his employment was terminable at any time. GTF, in contrast, has provided documentary evidence supporting that Syed's employment was "terminable at will." The May 21, 2008 letter was written by Syed's own attorney and, thus, Syed is presumed to have read and understood what was said in the letter.

The court also finds compelling GTF's statute of frauds argument. However, because it was "improperly raised for the first time in the [] reply brief," the court cannot and does not consider it. *Morgan v. New York City Housing Auth.*, 255 A.D.2d 565 (2d Dep't 1998).

Documentary evidence and case law support GTF's defense that Syed's employment was terminable at will. Because Syed's employment was terminable at will, the employment "may be freely terminated by either party at any time for any reason or even for no reason." *See Haviland v. J. Aron & Co.*, 212 A.D.2d 439, 441 (1st Dep't 1995). Syed's counterclaim for breach of the employment agreement thus fails to state a cause of action as a matter of law and must be dismissed.

II. Syed's Third Counterclaim for Breach of Structured Finance Agreement by Plaintiffs and NETF is Not Dismissed

A. Arguments

Plaintiffs argue that Syed's third counterclaim for breach of the Structured Finance Agreement to provide iWonders financing should be dismissed for lack of personal jurisdiction.

Plaintiffs point to Paragraph 9 in the Structured Finance Agreement for support. Paragraph 9 provides that: “[t]he state and federal courts within the State of California shall have sole jurisdiction over all disputes arising in connection with this Agreement.”

In response, Syed contends that whether the California forum selection clause is valid and enforceable is a question of fact that should not be determined at this stage. Syed further maintains that the Structured Finance Agreement, in which the California jurisdictional clause is contained, was an attachment to the Assistance Agreement. Paragraph 3 of the Assistance Agreement provides:

I Wonders Commitment. In connection with the execution of this Agreement, NYTF commits to enter into or cause one of its affiliates to enter into, no later than February 28, 2008 (or such later date as agreed to by the parties), an asset purchase and liability assumption agreement or other financing agreement (the “APLA”) with I Wonders, Inc. (“I Wonders”), an affiliate of Mr. Syed, provided that NYTF's commitment hereunder is subject, in its sole discretion, to the following conditions ... and terms consistent with those contained in the Structured Finance Agreement, dated as of January 31, 2008 attached hereto as Schedule E.

Syed avers that the iWonders financing transaction was a precursor to Plaintiffs' commitment to enter into an APLA with iWonders by the end of February 2008. Syed states that the Structured Finance Agreement was supposed to have been converted into a more comprehensive arrangement.

Syed further asserts that the Structured Finance Agreement, as part of the Assistance Agreement, should be governed by New York law as provided by Paragraph 6(d) of the Assistance Agreement:

THIS AGREEMENT AND ALL DISPUTES ARISING OUT OF OR RELATING THERETO SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES THAT WOULD RESULT IN THE APPLICATION OF ANY LAW OTHER THAN THE LAW OF THE STATE OF NEW YORK.

(capitalization in original).

Syed contends it would not make sense for the Structure Finance Agreement to place venue in California when the MSA and Assistance Agreement were governed under New York law, were performed in New Jersey and the MSA contained a New York jurisdictional clause. Finally, Syed contends that the Structured Finance Agreement was presented to Syed under rush conditions, while he was abroad and was without opportunity for counsel review.

Plaintiffs counter by stating that the Structure Finance Agreement memorialized an intent to establish a new relationship between GTF's subsidiary, NETF and iWonders, LLC, neither of whom were parties to the MSA or the Assistance Agreement. Reply Affidavit of Paul Stemler at ¶ 5. Moreover, Plaintiffs and NETF have their main offices in Newport Beach, California, and thus, California was an appropriate selection of forum. Plaintiffs also contend that Syed had an obligation to read the document before signing it and that, as a sophisticated businessman, he was able to understand the document. Plaintiffs assert that Syed cannot now assert a duress defense against the forum selection clause.

C. Court's Determination

Generally, contracts remain "separate unless the history and subject matter show[] them to be unified." *Ripley v. Int'l Railways of Cent. Am.*, 8 N.Y.2d 430, 438 (1960). "In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances." *Rudman v. Cowles Commn's, Inc.*, 30 N.Y.2d 1, 13 (1977).

The evidence shows that the California jurisdictional clause in the Structured Finance Agreement is not dispositive. The parties regularly conducted business outside of California, including in New Jersey, and the MSA and Assistance Agreement are governed by New York law.

Thus, it does not follow without doubt that the parties would agree to a California jurisdictional clause. Moreover, as Syed states, the Assistance Agreement, Paragraph 3, references and incorporates the Structured Finance Agreement and, thus, the two agreements must be read together. *131 Heartland Blvd. Corp. v. C.J. Jon Corp.*, 82 A.D.3d 1188, 1190 (2d Dep't 2011) (holding that the parties intended that two documents should be read together where "the documents serve[d] the same purpose and refer[red] to each other ... [t]he evidence show[ed] that the parties intended the two documents to be interdependent and to be read together"). When read together, the two agreements fail to conclusively establish that any one forum controls.

While Syed argues that the Structured Finance Agreement was presented to him under rush conditions, while he was abroad and was without opportunity for counsel review, the court finds this duress defense unavailing. Syed is not an unsophisticated businessman, and he freely entered into the agreement.

Plaintiffs have not shown that the jurisdictional clause in the Structured Finance Agreement should prevail over the one in the Assistance Agreement and, thus, the third counterclaim is not dismissed.

IV. Syed's Fourth Counterclaim for Tortious Interference with Prospective Economic Advantage is Dismissed

A. Arguments

Plaintiffs argue that Syed's fourth counterclaim for tortious interference with prospective economic advantage should be dismissed for failing to state a cause of action. Plaintiffs maintain that Syed failed to: (1) allege that Plaintiffs directed any conduct toward any of Syed's customers, (2) identify any specific prospective business relationship that Plaintiffs purportedly harmed,

(3) allege that Plaintiffs acted solely to harm Syed by unlawful or wrongful means beyond self interest or other economic considerations, and (4) allege any special damages.

Syed asserts that he has pleaded the necessary elements for a legally cognizable claim for tortious interference with prospective economic advantage. Syed avers that he has alleged that Plaintiffs conducted wrongful acts, misrepresentations, that he had specific prospective relationships with customers and that he lost business opportunities. Syed also argues that he has standing to assert the claim because he has a special relationship with Plaintiffs that was memorialized by several contracts.

B. Court's Determination

“[T]o prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party.” *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 46 (1st Dep't 2009). Indeed, “conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.” *Carvel Corp. v. Noonan*, 3 N.Y.2d 182, 192 (2004).

Syed has failed to allege a specific claim that he was actually and wrongfully prevented from entering into or continuing in a specific business relationship. *See, e.g., White v. Ivy*, 63 A.D.3d 1236 (3d Dep't 2009) (dismissing tort claim where plaintiff made only general allegations that his

business was shut down, without reference to any particular business relationship or contract that was impaired by defendant). At best, Syed alleges in Paragraph 62 of his Answer that: "Syed and iWonders had existing economic advantages from their ongoing customer relationships." Syed has not alleged the existence of any specific third party with whom he had a relationship with which Plaintiffs interfered, that Plaintiffs knew of any such relationship, or that Plaintiffs acted out of malice in interfering with the relationship.

Although Syed avers that he has a special relationship with Plaintiffs and thus has standing to assert a claim, Plaintiffs do not and need not question standing. Standing is not an issue that needs to be addressed as a special relationship between plaintiff and defendant is not an element of the claim for tortious interference with prospective business advantage.

Syed's fourth counterclaim for tortious interference with prospective economic advantage is dismissed.

HOLDING

Accordingly, it is

ORDERED that Plaintiffs/counterclaim defendants Global Technology Finance, LLC and New York Technology Finance, LLC's motion to dismiss is granted as to the second and fourth counterclaims and denied as to the third counterclaim.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 12, 2011

ENTER



Hon. Eileen Bransten