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SHORT FORM ORDER

INDEX NO. 11-10592

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:
Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 6/20/13
ADJ DATE: 7/12/13
Mot. Seq. # 001 - Mot D
Mot. Seq. # 002 - MD
Non-Jury Trial Date: 10/28/13
CDISP - No

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D & J AVIATION UNLIMITED,

Plaintiff,

-against-

TALON AIR INC.,

Defendant.

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Upon the following papers numbered 1 to 59 read on these motions for summary judgment ; Notices of Motion/ Orders to Show Cause and supporting papers 1 - 42, 43 - 48 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 49 - 51, 52 - 53, 54 - 55 ; Replying Affidavits and supporting papers 56 - 57, 58 - 59 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the defendant's motion (#001) is granted to the extent that the claim for punitive damages in the first cause of action is dismissed, and the second and third causes of action are dismissed; and it is further

***ORDERED*** that inasmuch as the plaintiff discontinued the fourth cause of action, the branch of the defendant's motion for summary judgment dismissing the fourth cause of action is denied as academic; and it is further

***ORDERED*** that the plaintiff's motion (#002) for partial summary judgment on the issue of liability in its favor is denied; and it is further

***ORDERED*** that the parties are directed to appear for a non-jury trial on **October 28, 2013**, as previously agreed to by the parties at 9:30 a.m., in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York, ready to proceed.

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The plaintiff, D & J Aviation, Limited, a foreign corporation, commenced the instant breach of contract action on March 29, 2011. The complaint alleges four causes of action. In the first cause of action, the complaint alleges that the defendant, Talon Air, Inc., a corporation organized and existing under the laws of the State of Delaware, wrongfully refused to allow the plaintiff to stage its aircraft in order to show the aircraft to prospective buyers, delaying the submission of its final invoice, and removing certain documents from the aircraft which precluded the plaintiff from moving the aircraft, and threatening to lien the aircraft. In the second cause of action, the complaint alleges that the defendant breached the covenant of good faith and fair dealing. In the third cause of action, the complaint seeks an accounting of its final invoice. In the fourth cause of action, the complaint alleges that the defendant tortiously interfered with business relations and prospective economic advantage. In each cause of action, the plaintiff seeks compensatory and punitive damages. In its answer, the defendant asserts a general denial and two counterclaims. The first counterclaim seeks a judgment declaring that the plaintiff provide proper notice to the defendant of any bona fide offers it received, in order for the defendant to determine whether it was not provided with its right of first refusal. The second counterclaim seeks damages in an unspecified amount for alleged refusals by the plaintiff to allow the defendant to charter the aircraft to third parties, resulting in a loss of approximately $30,000 per month. In its reply to the counterclaims, the plaintiff denies that the right of first refusal ever accrued.

The record reveals that the plaintiff was the owner of a Raytheon Hawker 4000 aircraft bearing the manufacturer's serial number RC-10 and United States registration number N126ZZ. On or about April 1, 2008, the parties entered into an Aircraft Management and Charter Lease Agreement ("the Agreement"). There is no dispute that Meir Gurvitz, a principal of the plaintiff, participated in the negotiation of the terms of the Agreement and he executed the Agreement on the plaintiff's behalf. The Agreement created a relationship between the plaintiff, as client, and the defendant, as manager of the aircraft. The Agreement provided that when the aircraft was not in use, the defendant could lease the aircraft from the plaintiff for the purpose of providing charter services to third parties for profit. The plaintiff was able to use the aircraft on request, with the defendant's personnel operating the aircraft. The initial term of the Agreement was for one year. The Agreement provided that the term would be automatically renewed for successive one-year periods, unless either party gave written notice to the other party of its intention not to renew at least 30 days prior to the last day of the expiring contract year, pursuant to section 2.1 of the Agreement. The record reveals that the then-current contract year ended on March 31, 2011. The Agreement remained in effect until November 23, 2010, at which time the plaintiff unilaterally terminated the Agreement without advance notice. Upon receipt of the final statement on December 2, 2010, the plaintiff paid the bill in full, in the amount of $102,295.58, on December 7, 2010. The plaintiff transferred the aircraft back to its lender on or about August 11, 2011, thereby cancelling the amount due on the outstanding note in the amount of $13,026,461.00. In addition, the plaintiff warranted that its Agreement with the defendant had been terminated and was no longer in force or effect.

The defendant now moves (#001) for partial summary judgment dismissing the punitive damages claim in the first cause of action, and for summary judgment dismissing the second, third, and fourth causes of action. In the alternative, the defendant seeks an order precluding the plaintiff from introducing evidence of any prospective purchasers for the subject aircraft. The plaintiff moves (#002) for partial summary judgment in its favor on the issue of liability. In the plaintiff's moving papers, it discontinues the fourth cause of action alleging tortious interference.

In support of the motion, the defendant contends that inasmuch as the Agreement was improperly terminated by the plaintiff without notice prior to 30 days from the expiration of the Agreement, that it is entitled to the fixed expenses as provided in the Agreement for the period from December 1, 2010 to March 31, 2011. In addition, the defendant contends that the plaintiff is not entitled to punitive damages under the terms of the Agreement. The defendant further contends that the second cause of action alleging a breach of good faith and fair dealing is duplicative of the breach of contract cause of action. The defendant also asserts that the plaintiff is not entitled to an accounting in the third cause of action. Finally, the defendant contends that the plaintiff has not identified any prospective contracts with which the defendant could have interfered. In support of its motion, the defendant submits, among other things, the personal affidavits of Amy Brown and Kevin Feng, the deposition testimony of Amy Brown, the deposition testimony of Meir Gurvitz, a copy of the Agreement, and Final Statement with supporting documentation.

Amy Brown testified at her deposition that she is the president of the defendant. Ms. Brown states that she served as chief administrative officer from 2007 through 2012, at which time she was promoted to president. Ms. Brown stated that the Agreement does not authorize the client to use non-Talon pilots. If a client used a non-Talon pilot, it would need the defendant's consent, so that the pilot's professional background would be assessed for the proper credentials in order to qualify under the fleet insurance policy. Ms. Brown stated that she spoke with the defendant's insurance broker to verify this requirement. Ms. Brown acknowledged informing Mr. Gurvitz in an e-mail dated November 22, 2010, that the aircraft could not be operated without the defendant's pilot. Ms. Brown stated that Mr. Gurvitz did not ask her to qualify the credentials of a non-Talon pilot in order to move the aircraft in November, 2010. Ms. Brown stated that she informed Mr. Gurvitz that the aircraft could be shown without the pilot present.

Ms. Brown's affidavit supports her deposition testimony. Ms. Brown avers that the plaintiff required the use of its aircraft on November 20, 2010 for a trip to Great Britain and would remain landed for a two week period. Prior to the trip, on November 19, she communicated with Mr. Gurvitz by e-mail that unless he required the plane be moved during the two week period, that the defendant's pilots and crew would return to the United States by commercial flights to save expenses. Having not received a reply, she authorized the pilots and crew to return. She also communicated with the manager of the flight support at Luton Airport, where the aircraft would be hangared that the aircraft was not to be moved without the defendant's pilots and that it could be

shown or staged with the defendant's prior consent. Ms. Brown stated that she heard nothing from the plaintiff after the aircraft landed on November 21, 2010. On November 22, 2010, she received an e-mail from Mr. Gurvitz that he was not allowed to show the plane or gain access to his aircraft. Ms. Brown replied with an e-mail explaining that the aircraft could be staged and shown to other people, but could not be moved without the defendant's pilots for insurance purposes. On November 23, 2010, Ms. Brown stated that Mr. Gurvitz sent her an e-mail terminating the contract with the defendant. Shortly thereafter, on December 2, 2010, a final bill with supporting documentation of all outstanding expenses was sent to the plaintiff.

Mr. Feng avers in his affidavit that he is the director of finance for the defendant. His responsibility is to prepare the plaintiff's monthly accounting reports in accordance with Section 6.3 of the Agreement, which provides that the defendant would send to the plaintiff an itemized monthly statement not later than the fifteenth business day of each month. In addition, Mr. Feng had the responsibility of preparing the final statement for the plaintiff pursuant to Section 6.6 of the Agreement, which provides that within sixty days of the expiration or termination of the Agreement, the defendant will send to the plaintiff a final report and itemized accounting statement and the parties shall settle accounts. Mr. Feng states that he prepared the final statement and compiled all the supporting documentation thereto. The final statement was emailed to the plaintiff on December 2, 2010. The final statement sets forth all of the information which the plaintiff alleges it is entitled to in an accounting. Thus, the plaintiff has already received any information that would be part of such an accounting. Mr. Feng states that the plaintiff acknowledged receipt of the final statement and it paid the charges as assessed.

Mr. Meir Gurvitz testified at his deposition that the plaintiff is a limited liability company which was formed in Great Britain. He stated that in 2008, he was a director of the company. The plaintiff purchased the aircraft from the manufacturer. Mr. Gurvitz acknowledged that the plaintiff entered into an aircraft management and charter lease agreement with the defendant in 2008. He signed the agreement without legal counsel on behalf of the plaintiff. He considered the agreement to be fair and reasonable to both parties. Mr. Gurvitz also acknowledged that the defendant provided for the management of the aircraft and charged the plaintiff for services provided in accordance with the fee schedule provided for in the Agreement. All invoices were paid. Mr. Gurvitz conceded that he terminated the Agreement on November 23, 2010 in an e-mail to Amy Brown, without 30 days notice. Although Mr. Gurvitz acknowledged the fact that the aircraft could not be moved without the defendant's pilots, he stated that he was not told he could not stage the aircraft for prospective buyers, and that he was not allowed to board the aircraft.

In opposition and in support of its motion for partial summary judgment on the issue of liability, the plaintiff submits, among other things, its attorney's affirmation, the deposition testimony of Amy Brown, a copy of the aircraft insurance policy, and copies of e-mails sent and received by the parties. The plaintiff claims that it was forced to pay the final statement as quickly

as possible in order to obtain its flight documents which were removed by the defendant's flight crew. The plaintiff also claims that it is entitled to a credit for certain items that the defendant charged to it that were purchased with the aircraft prior to the date of the Agreement. The plaintiff further argues that the defendant wrongfully told Mr. Gurvitz that he could not show the aircraft in Great Britain, and wrongfully refused to allow a pilot who was not approved by the defendant to move the aircraft to take pictures for the purpose of selling the aircraft. In addition, the plaintiff claims that the defendant failed to procure proper liability insurance for pilots not employed by the defendant.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v N Y Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.,*** 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

"[I]t is well settled that 'when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms'" (***South Rd. Assocs., LLC v IBM***, 4 NY3d 272, 277, 793 NYS2d 835 (2005), *quoting* ***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d 470, 475, 775 NYS2d 765 [2004]). When interpreting a contract, "the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectation will be realized" (***Herzfeld v Herzfeld***, 50 AD3d 851, 857 NYS2d 170 [2d Dept 2008]).

Punitive damages are not recoverable where a plaintiff's contract action does not seek to vindicate a public right (***Halpin v Prudential Ins. Co.***, 48 NY2d 906, 907, 425 NYS2d 48 [1979]; ***Salka v Lumbermens Mut. Cas. Co.***, 127 AD2d 333, 335, 515 NYS2d 344 [3rd Dept 1987]). This is true even if the alleged breach was committed willfully and without justification (***Cass v Broome County Co-operative Ins. Co.***, 94 AD2d 822, 823, 463 NYS2d 312 [3rd Dept 1983]). Such damages are permitted only in the rare instances where a defendant's conduct amounts to fraud (see ***Walker v Sheldon,*** 10 NY2d 401, 405, 223 NYS2d 488 [1961]; ***Greenspan v Commercial Ins. Co.***, 57 AD2d 387, 389, 395 NYS2d 519 [3rd Dept 1977]). To prevail on that basis a plaintiff must make an "extraordinary showing of a disingenuous or dishonest failure by defendant to carry out its contract" (***Hebert v State Farm Mut. Auto. Ins. Co.***, 124 AD2d 958, 959, 508 NYS2d 710 [3rd Dept 1986], *appeal dismissed* 69 NY2d 1038), that is, there must be "morally culpable conduct" (***Halpin v Prudential Ins. Co.***, *supra*, at 907).

The defendant has demonstrated its entitlement to judgment as a matter of law dismissing the portion of the first cause of action which seeks punitive damages. In support, the defendant submits Section 8.3 of the Agreement, which provides the following: "in no event shall either party be liable to the other for any indirect, incidental, consequential, special, or punitive damages of any kind." In opposition, the plaintiff makes no showing to sustain its claim for punitive damages (*see* ***O'Dell v New York Prop. Ins. Underwriting Assn.***, 145 AD2d 791, 535 NYS2d 777 [3rd Dept 1988]; see also ***Malone Hous. Auth. v Jardine Ins. Brokers, Inc.***, 140 AD2d 917, 918, 528 NYS2d 733 [3rd Dept 1988], *lv dismissed* 72 NY2d 953). Therefore, the claim for punitive damages as asserted in the first cause of action is dismissed.

The defendant has also demonstrated its entitlement to judgment as a matter of law dismissing the second cause of action alleging a breach of the implied covenant of good faith and fair dealing. The defendant contends that the plaintiff's basis for this claim is predicated on the same facts as its breach of contract claim and cannot be sustained. A separate cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of a cause of action for breach of contract and thus, New York does not recognize a separate cause of action for violation of the implied covenant of good faith and fair dealing (***Cohen v Nassau Educ. Fed. Credit Union***, 37 AD3d 751, 832 NYS2d 50 [2nd Dept 2007]; ***Jacobs Private Equity, LLC v 450 Park, LLC***, 22 AD3d 347, 803 NYS2d 14 [1st Dept 2005]). In opposition, the plaintiff submits the affirmation of counsel which is not probative on a motion for summary judgment (***Zuckerman v New York***, *supra*). Therefore, the plaintiff failed to submit admissible evidence which would raise a triable issue of fact and the second cause of action is dismissed.

Turning to the branch of the defendant's motion seeking to dismiss the third cause of action which seeks an accounting, the defendant has demonstrated its entitlement to judgment as a matter of law. In support, the defendant contends that the plaintiff is not entitled to an accounting inasmuch as the defendant provided all documents which set forth the basis for the final statement. In any event, in order to obtain an accounting, the following elements are required: the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (***LoGerfo v Trustees of Columbia Univ. in City of New York***, 35 AD3d 395, 397, 827 NYS2d 166 [2d Dept 2006]; *accord* ***Akkaya v Prime Time Transp., Inc.***, 45 AD3d 616, 845 NYS2d 827 [2d Dept 2007]). Here, the defendant contends that the parties agreed that a fiduciary relationship would not be formed. Section 11.2 of the Agreement provides that "nothing in the Agreement shall be deemed, construed, or interpreted as creating in any way any employer/employee relationship, association, partnership, joint venture or principal/agent relationship between the parties." In opposition, the plaintiff submits the affirmation of counsel which is not probative on a motion for summary judgment (***Zuckerman v New York***, *supra*). Therefore, the plaintiff failed to submit admissible evidence which would raise a triable issue of fact and the third cause of action is dismissed.

Turning to the plaintiff's motion for partial summary judgment in its favor on the remaining first cause of action, the Court finds that the plaintiff has submitted insufficient admissible evidence which would demonstrate its prima facie entitlement to judgment as a matter of law (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]). The plaintiff claims that the defendant's failures to recognize the plaintiff's right to use its own pilots, and to procure insurance required by the Agreement, constitute breaches of the Agreement. As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (*see* ***Corrigan v Spring Lake Bldg. Corp.***, 23 AD3d 604, 605, 804 NYS2d 412 [2d Dept 2005]). The court finds that the plaintiff's reliance on the alleged deficiencies in the defendant's proof and the conclusory statements by the plaintiff's counsel are insufficient to establish the plaintiff's entitlement to judgment as a matter of law. In any event, the affirmation of the plaintiff's counsel is not probative in a motion for summary judgment since she has no personal knowledge of the facts (***Zuckerman v New York***, *supra*). Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the defendant's motion is granted to the extent that the portion of the first cause of action which seeks punitive damages is dismissed, and the second, and third causes of action are dismissed. The branch of the motion seeking dismissal of the fourth cause of action is denied as academic. The Court does not reach the defendant's alternative application to preclude the plaintiff at this time. Finally, the plaintiff's motion for partial summary judgment on the issue of liability is denied.

Based on the foregoing, the first cause of action seeking damages for breach of contract and the defendant's counterclaims will proceed to trial on **October 28, 2013.**

DATED: 8/9/13

THOMAS F. WHELAN, J.S.C.