SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

MICHAEL STOLER	:	
	:	
Plaintiff,	:	Index No. 650657/2010
	:	
-against-	:	DECISION AND ORDER
	:	
HERALD NATIONAL BANK,	:	Motion Sequence Nos 002 and 003
	:	
Defendant.	:	

ANIL SINGH, J.:

Michael Stoler (Stoler) claims that Herald National Bank (Bank) breached their consulting agreement by prematurely terminating the agreement, by not making guaranteed bonus payments, and by not making scheduled salary payments. Stoler moves for summary judgment. The Bank opposes plaintiff's summary judgment motion and moves for partial summary judgment limiting the amount of damages Stoler may recover. Motion Sequence 002 and 003 are consolidated for disposition.

Background

The court finds the following facts relating to the Bank's consulting agreement with Stoler. The Bank does not dispute any of the following.

The Bank opened on November 24, 2008. David Bagatelle (Bagatelle), founder and then President of the Bank, asked Stoler to join the Bank as a consultant. Stoler's role was to assist in client development. In negotiating the consulting agreement (Agreement), Stoler did not give anyone at the Bank any projections regarding the amount of deposits or loans he anticipated attracting to the Bank. Bagatelle, Dan Healey, the Bank's then-Chairman, and Randy Neilson

(Neilson), the Bank's then-CEO, told Stoler that they understood it would take him two to three years to develop substantial business.

The Agreement was entered into on February 23, 2009. It provided in pertinent part:

> "Consulting Services: The Company hereby employs the Consultant to perform the following services in accordance with the terms and conditions set forth in this Agreement. The Consultant will consult with the officers and the employees of the Company concerning matters relating to business development."
>
> "Term of Agreement: This Agreement will begin March 2, 2009 and continue until, February 28, 2011. At that time, the Agreement will be re-evaluated."
>
> "Compensation: Beginning March 2, 2009, the Consultant will be paid $7,500 per month deposited into his bank account at Herald National Bank for the time spend in accordance with this Agreement. For the first year (12 months) of the Agreement, the consultant will be guaranteed an incentive fee based on the Concierge Program Incentive Plan of $210,000, paid in 6 months intervals. For the next twelve months beginning March 1, 2010, the Consultant will be guaranteed an incentive fee of $210,000 paid in 6 month intervals."
>
> "Time Devoted by Consultant: The Particular amount of time the Consultant spends fulfilling his obligations under this Agreement will vary from day to day or week to week."

The Agreement did not provide any minimum amount of business that Stoler was required to attract to the Bank or any minimum amount of time he would devote to his position. The Agreement did not provide the Bank discretion to terminate Stoler's employment. It also provided that Stoler would act as an independent contractor. The Bank concedes that as an independent contractor, Stoler was free to work for other companies.

Stoler began providing consulting services to the Bank on March 2, 2009. He introduced the Bank to the following customers he had previously attracted as customers in his role as a consultant at Signature Bank, where Bagatelle was employed as a senior manager: Atlantic

Development, a real estate company; the Stein Riso Mantel law firm; the Cohen Trauber law firm; the Universal Church of Latter Day Saints; and First American Title Insurance Company of New York. First American Title Insurance Company of New York and Cohen Tauber brought business to Herald.

Stoler also had business development meetings with other potential customers which he had not dealt with at Signature Bank. He introduced Sam Schwartz, owner of Sam Schwartz Engineering, and his controller to the Bank's employees Costas Ziozis (Ziozis) and Marshall Perrin. Sam Schwartz Engineering became a deposit and loan customer of the Bank. Stoler met with Eric Seltzer from the Gilbride Tusa law firm and introduced him to Bagatelle. He met with Ira Bergstein of Palisades Financial and introduced him to Bagatelle. In addition, Stoler helped the Bank in raising capital, and introduced the Bank to investors including ultra-high-net-worth individuals.

On June 17, 2009, Michael Carleton (Carleton), the Bank's then COO, emailed Bagatelle pointing out that Stoler had not attracted any new deposits for more than two months. On October 8, 2009, Carleton e-mailed Bagatelle that Stoler had not brought in a new account since March. In the e-mail, Carleton commented that, "I really think we should stop paying this guy until he produces."

Before Stoler's contract was terminated, Carleton and Nielsen met with him to discuss his performance. At the meeting, Carleton and Nielsen let Stoler know that they were dissatisfied with his efforts and results, given his expense to the Bank, and suggested they move to a pay-per-performance compensation model.

Stoler then met with Bagatelle and said that if the Bank made current on the bonus payment it owed him – which at the time exceeded $210,000 – he would be willing to renegotiate his contract. He also indicated that he would be willing to renegotiate the amount of his bonus for year two.

Bagatelle did not want to make any more payments to Stoler until they renegotiated his deal. He directed Ms. Mary Ann Sleece, the Director of Human Resources at the Bank, to stop making payments to Stoler. Bagatelle concedes that at this time he recognized that the Bank had an obligation to pay Stoler.

On May 3, 2010, the Bank purported to terminate the Agreement. The Bank only paid Stoler through April 30, 2010. The Bank did not pay Stoler ten months of salary, at $7,500 per month, for an aggregate of $75,000. The Bank did not pay Stoler his $210,000 Guaranteed Fees for year one and year two. Stoler concedes that between May 2010 and March 2011 he made approximately $ 250,000 of income in order to replace the lost income from the Bank.

Discussion

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action...shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b). Once the proponent of a summary judgment motion makes a prima facie showing of entitlement to judgment as a matter of law, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

"The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *People v. Grasso,* 50 A.D.3d 535, 545 (1st Dep't 2008) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted.")). Thus, for summary judgment to be denied, a disputed fact must be "genuine, bona fide and substantial." *Leumi Fin. Corp. v. Richter,* 24 A.D.2d 855, 855 (1st Dep't 1965). An opposing party's "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment. *Zukerman v. City of New York,* 49 N.Y.2d at 562 (1980).

" '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms,' without reference to extrinsic materials outside the four corners of the document." *Goldman v. White Plains Ctr. for Nursing Care, LLC,* 11 N.Y.3d 173, 176 (2008) (finding employment agreement for a fixed term of two years, after which employee became employee at will), citing *Greenfield v. Philles Records,* 98 N.Y.2d 562, 569 (2002) (contrasting New York's long-applied "four corners" rule with California law).

There is no dispute that Stoler's Agreement is for a fixed two-year term. In New York, an employment or consulting contract for a definite stated term can only be terminated for just cause. *Crane v. Perfect Film,* 38 A.D.2d 289 (1st Dep't 1972). Where an agreement does not impose any express conditions upon an individual with respect to performance of duties, but merely states that the employment shall continue for a fixed number of years, the employee is merely required to perform his work "satisfactorily." *Levine v. Zerfuss Offset Plate Serv. Co.,* 492 F. Supp. 946, 948 (S.D.N.Y. 1980).

The Bank argues that they had just cause to terminate the Agreement because Stoler did not perform at the level he had let the Bank to expect during negotiation of the Agreement. At the time of the negotiation, the Bank was aware that Stoler brought in $300 million of loans to Signature, but Stoler was not asked to contractually commit to bring in any minimum amount of business. In his deposition, Stoler made it clear that he never gave anyone at the Bank any projections about the amount of deposits or loans he would bring, and the Bank acknowledged that it would take two to three years before he would develop business. Stoler also testified that the Bank did not ask him to bring in business immediately, as it would not be an indication of what he could potentially bring in over the long term. In fact, the Agreement required Stoler only to "consult with the officers and the employees of the Company concerning matters relating to business development." The evidence is clear that Stoler had numerous meetings with the business executives at the Bank with respect to methods of business development.

If the court adopts a broader reading of the Agreement, and finds that it calls for actual business development activities and introductions, it is evident Stoler satisfactorily performed under this test. As noted above, he could point to a half dozen potential clients to whom he made introductions, two of which brought business to the Bank. Ziozis's testified that Stoler "tried a lot" to drive business to his team, and the Bank acknowledges that Ziozis's team was "successfully meeting or exceeding its projections."

Although the amount of business Stoler brought to the Bank was far less than what he brought to the Signature Bank, compelling evidence demonstrates that he tried to and did bring in new businesses to the Bank, and thus fully complied with the terms of the Agreement. There is no material issue of fact relating to Stoler's satisfactory performance of his duties. It is clear that

the Bank did not have just cause to terminate the Agreement. Accordingly, the court grants Stoler's motion for summary judgment.

The Bank moves for partial summary judgment to limit the amount of damages Stoler may recover, on the ground that he was required to and did mitigate damages by engaging in additional business activities to replace his lost income from the Bank. "[I]n breach of contract cases generally, the duty of the injured party to mitigate its damages is well established. This rule applies even where the injured party is not an employee but a contractor." *L-7 Designs, Inc. v. Old Navy , LLC*, 964 F. Supp. 2d 299, 316 (S.D.N.Y. 2013). Generally "[w]here there is a breach of a contract for ... personal services, '[t]he actual damages is measured by the wage that would be payable during the remainder of the term reduced by the income which the discharged employee has earned, will earn, or could with reasonable diligence earn during the unexpired term.'" *Donald Rubin, Inc. v. Schwartz*, 191 A.D.2d 171, 171 (1st Dep't 1993).

Stoler testified about his business activities after his May 3, 2010 termination, and the effects they had on his income prior to the scheduled end of the Agreement on February 28, 2011:

Q. Did you make any attempt, prior to March of 2011, to replace the income that you had made at Herald with any other positions?

A. Yes.

Q. What did you do?

A. I did more brokerage business, financing consulting.

Q. So you made more money at that than you would have otherwise?

A. Yes.

Q. How much more money?

A. I probably made a quarter of a million dollars.

Q. So in the period between May of '09 and March --

A. No, not May of '09. May of '10.

Q. I'm sorry, May '10 and March '11, you made about a quarter of a million dollars at [the] consulting, at additional consulting?

MR. WELZER: Objection.

A. Earnings?

Q. Earnings.

A. It may have been consulting, it may have been other, may have been.

It is an employer's burden to prove that a former employee mitigated his damages by obtaining substitute employment. *Rebh v. Lake George Ventures Inc.*, 241 A.D.2d 801, 803 (3d Dep't 1997) ("Supreme Court rightly concluded that defendants did not meet their burden of proving that plaintiffs did, or could have, mitigated their damages by obtaining substitute employment.") The court here finds that the Bank has conclusively shown that Stoler mitigated his damages by obtaining subsequent employment.

Stoler argues that there is no mitigation offset because the Bank's breach did not enable his post-termination earnings. Pointing to the non-exclusive nature of the Agreement, Stoler argues that he intended to and had the ability to perform other substantial work while still working at the Bank.

On the other hand, monies earned post-breach by the nondefaulting party are not available to off-set damages where the non-breaching party could and would have performed the work during the term of his contract:

> if there is a factual finding that 'the injured party *could and would have entered* into the subsequent contract, even if the contract had not been broken, and *could have had the benefit of both*, he [or she] can be said to have "lost volume' and the subsequent transaction is not a substitute for the broken contract.

Id. at 172 (emphasis added).

"[P]laintiff bears the burden of demonstrating that it should be compensated [for damages] as a lost volume seller." *In re Worldcom, Inc.*, 361 B.R. 675, 686 (Bankr. S.D.N.Y. 2007) (quoting *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 495 (2006) *on reconsideration,* 81 Fed. Cl. 235 (2007) *on reconsideration in part,* 81 Fed. Cl. 733 (2008) *aff'd in part, ref'd in part and remanded,* 596 F.3d 817 (Fed. Cir. 2010)). The court there held that to be considered a "lost volume seller", the nonbreaching party needs to show both the objective ability and subjective intent to enter into those contracts had the original contract not been terminated.

Stoler argues that because he could have earned the extra $250,000 of income regardless of whether he was terminated by the Bank, he is considered to have "lost volume", which precludes mitigation. However, as noted above, Stoler testified that after the Bank terminated his Agreement, he was able to "replace" his income from the Bank by doing "more brokerage business, finance consulting," which enabled him to earn "a quarter of a million dollars" more income than he would have "otherwise."[1] Stoler has not introduced evidence to demonstrate that

[1] In opposition to the Bank's motion, Stoler submitted an affidavit contradicting his deposition testimony on this point. The affidavit was submitted more than two years after the deposition was taken.

he would have entered into the subsequent arrangements even if the underlying contract had not been terminated. Consequently, Stoler cannot claim to be a lost volume seller and the court grants the Bank partial summary judgment limiting his pre-interest damages to $245,000 – his proved damages of $495,000, less his admitted mitigation of $250,000.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the complaint is granted; and it is further

ORDERED that defendant's motion for partial summary judgment limiting pre-interest damages is granted; and it further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $245,000, together with interest at the statutory rate from the date of April 30, 2010 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Date: July 22, 2015
New York, New York

Anil C. Singh

"A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment." *Harty v Lenci*, 294 AD2d 296, 298 (1st Dept 2002). *See also Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 (1st Dept 2000) ("While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony . . . they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.").