Kellman v Document Sec. Sys., Inc.
2015 NY Slip Op 31491(U)
August 6, 2015
Supreme Court, Monroe County
Docket Number: 2013/6774
Judge: Matthew A. Rosenbaum

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MATTHEW KELLMAN,

Plaintiff

-vs- Index No. 2013/6774

DOCUMENT SECURITY SYSTEMS, INC. and
SECUPRINT, INC.,

Defendants

Special Term
August 6, 2015

APPEARANCES

Steven A. Lucia, Esq.
Attorney for Plaintiff

UNDERBERG & KESSLER LLP
Paul F. Keneally, Esq.
Attorneys for Defendants

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DECISION

Rosenbaum, J.

Defendants, Document Security Systems, Inc. and Secuprint, Inc., move for an order pursuant to CPLR 3212 granting summary judgment on Plaintiff's breach of contract causes of action and dismissing the Compliant in its entirety. Plaintiff, Matthew Kellman, cross moves, also seeking summary judgment on the breach of contract claims and further seeking summary judgment on the counterclaims.

This action was commenced on June 18, 2013. Defendants answered on July 8, 2013. Thereafter, Defendants successfully sought leave of Court to amend the Answer to assert counterclaims. The Amended Answer with Counterclaims was served on June 18, 2014, and Plaintiff has served a Reply. Discovery has proceeded.

Defendant DSS develops, licenses, manufactures, and sells anti-counterfeiting technology and products. Defendant Secuprint is a DSS subsidiary created in 2008 to acquire the assets of another company, DPI of Rochester LLC. DPI was a printing company co-owned by Plaintiff and another individual. When DPI's assets were acquired by DSS, Plaintiff was hired by Defendant in December 2008 as Vice President of Sales. Plaintiff's Employment Agreement states that Plaintiff received a salary along with a grant of stock options for 50,000 shares of Document Security Systems, Inc. The relevant provision in the Employment Agreement states:

> 3. . . (c) Restricted Stock. Upon execution of this Agreement, Executive shall be awarded 50,000 restricted shares (the Restricted Shares") of the Common Stock of Document Security Systems, Inc. ("DSS") issued pursuant to the terms and conditions of

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> the DSS' 2004 Employee Stock Option Plan. The Restricted Shares shall vest in five equal installments on the first, second, third, fourth, and fifth anniversaries of the Effective Date if Executive is an employee of the Company on the applicable vesting date. The Restricted Shares shall be subject to the applicable rules and regulations of the Internal Revenue Service and the Securities and Exchange Commission.

Employment Agreement, ¶3. Plaintiff alleges that he received 10,000 shares during his employment. Indeed, Defendants contend that pursuant to the Employment Agreement, on Plaintiff's first anniversary, the restrictions were removed and 10,000 shares vested in Plaintiff's name.

Plaintiff left Defendants' employ on October 28, 2010. Defendants contend that Plaintiff was terminated due to concerns over his work performance. It is alleged by Defendants that despite the fact that they felt they could have terminated Plaintiff with cause, they opted to amicably terminate him without cause in order to allow him to collect severance payments provided for in the Employment Agreement. The Employment Agreement states the following as to termination without cause:

> 9. Obligations Following Termination of Agreement. . .
>
> (b) If this Agreement is terminated by the Company without "Good Cause" as defined in Section 8:
>
> (i) Executive shall be paid all unpaid salary, earned bonuses, vacation and other benefits accrued through the date of termination, and shall receive such other benefits, such as health insurance continuation coverage under COBRA, as may be required by law;
>
> (ii) Executive shall receive as severance payments an amount equal to one (1) month of Executive's annual salary at the rate in effect as of the date of

> Executive's termination, for every month that the Executive was employed at the company, with a maximum of twelve (12) month's of Executive's annual salary payable as severance. Any severance payments are payable on normal pay dates in accordance with the Company's pay policies in effect prior to termination date. . .
>
> (iii) Executive shall not be required to mitigate damages of the amount of any salary continuation payments provided for under this Section by seeking other employment or otherwise, nor shall the amount of any payments provided for under this Section be reduced by any compensation earned by Executive as the result of employment by another employer or by any self employment after the date of termination;
>
> (iv) All options for the Company capital stock granted to Executive pursuant to the Incentive Plan including, without limitation, Executive's Stock Options, or otherwise, that remain unvested shall immediately vest, and Executive shall have a period of 90 days following termination to exercise his vested options, subject to the provisions of the Incentive Plan and applicable IRS regulations.

Employment Agreement, ¶9. Plaintiff contends he was entitled to receive the remaining 40,000 shares of stock upon his separation but that he has not received them. The Incentive Plan referenced was not provided to the Court.

Plaintiff was terminated by letter on October 28, 2010. See Affidavit of Philip Jones, Exhibit B. The termination letter set forth verbatim Paragraph 9 of the Employment Agreement. Defendants contend that nothing in the Employment Agreement or in the termination letter provides for the accelerated vesting of restricted shares. To the contrary, Defendants contend that Plaintiff needed to be employed with Defendants for five consecutive anniversaries in order for all of his restricted stock to vest in 10,000 share installments.

Philip Jones, CFO of Defendants, concedes that he wrote to American

Stock Transfer & Trust Company and requested that the restrictions be removed from the remaining 40,000 shares. Mr. Jones also admits that he told Plaintiff that he was having a new certificate processed in relation to those stocks. Mr. Jones states that he made an error in making both of these representations and realized his mistake upon review of the Employment Agreement. As a result, Mr. Jones did not complete the process of delivering the new certificate and returned the certificate to American Stock Transfer & Trust Company and instructed them to cancel the shares. Defendant further confirmed with Plaintiff that he was eligible to exercise his stock option to purchase 10,000 shares at $4.00 a share pursuant to the Employment Agreement. Defendants state that no other agreements were entered into by the parties.

Plaintiff's Complaint states two causes of action: (1) the first alleges that Plaintiff has fully performed pursuant to the Employment Agreement and Severance Agreement and that Defendant have failed to honor their obligations and are thus in breach and seeking specific performance; and (2) alleging that due to Defendants' breaches, Plaintiff is entitled to an award of damages in an amount equal to the value of 40,000 shares of common stock of Document Security Systems, Inc.

Defendants' counterclaims are: (1) Plaintiff has refused to return to sums overpaid to him despite due demand; (2) right to restitution due to overpayment; (3) in equity and good conscience, Plaintiff should be required to return the amounts overpaid; and (4) unjust enrichment to allow Plaintiff to retain funds mistakenly paid to him.

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Qlisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, 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, 68 N.Y.2d at 324 , citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). A motion for summary judgment may be denied as premature where "facts essential to justify opposition may exist" but are in the control of the other party and discovery has not yet taken place. See CPLR 3212(f); Morris v. Hochman, 296 A.D.2d 481 (2d Dept. 2002).

Defendants seek summary judgment, noting that no additional severance package was offered to Plaintiff beyond that provided for in the Employment Agreement. Defendants admit that Mr. Jones mistakenly assumed that the restrictions would be removed from the remaining 40,000 shares of restricted stock referenced in the Employment Agreement and that this mistaken assumption was further shared with Plaintiff. However, Defendants state that Mr. Jones thereafter discovered his error that Plaintiff had not earned the 40,000 shares pursuant to the Employment Agreement. The Miscellaneous provisions of the Employment Agreement state, in relevant part:

> (a) This Agreement:
>
> (i) shall constitute the entire agreement between the parties hereto concerning the subject matter herein and supercedes all prior agreements, written or oral, concerning the subject matter herein, and there are no oral understandings, statements or stipulations bearing upon the effect of this Agreement which have not been incorporated herein.
>
> (ii) may be modified or amended only by a written instrument signed by each of the parties hereto. . .

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Employment Agreement, ¶14.

Plaintiff argues that, upon his termination, he was offered a Severance Agreement that incorporated certain terms of the Employment Agreement. Plaintiff states that he accepted the Severance Agreement. Plaintiff states that both the Employment Agreement and Severance Agreement provided that his stock options "or otherwise" that were unvested would immediately vest.

There is no dispute before the Court as to the enforceability of the Employment Agreement. "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), quoting Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

Here, Paragraph 3(c) of the Employment Agreement unambiguously provides that 50,000 shares of restricted stock vest in 10,000 increments at a time on each of Plaintiff's first five anniversaries. It is undisputed on the facts presented by both parties that Plaintiff was not employed by Defendants for any anniversaries past his first. As such, the restrictions would not be lifted and the remaining 40,000 shares would not vest. A contrary reading would render the requirement that the shares "shall" vest in five equal anniversary installment set forth in Paragraph 3(c) meaningless, a result that would contravene well settled principles of New York contract construction. See Durrans v. Harrison & Burrowes Bridge Constructors, Inc., 128 A.D.3d 1136 (3d Dept. 2015). Moreover, the Court notes that Paragraph 9(b)(iv)'s reference to stock options granted under the Incentive Plan, "or otherwise," is not a direct reference to the restricted stock discussed in Paragraph 3(c). There is, of course, a difference between restricted stock and stock options. Paragraph 9(b)(iv) specifically relates to stock options; restricted stock is not a stock option.

To the extent that Plaintiff claims that the termination letter and other correspondence created a new agreement between the parties, the Court disagrees. The termination letter recited the applicable provisions of the Employment Agreement. Neither the termination letter nor any other correspondence presented to the Court suffices to modify the Employment Agreement. See Employment Agreement, ¶14(a).

Mr. Jones' error likewise did not suffice to change the terms of the Employment Agreement. Even if the statements he made in error sufficed to change the contract terms under Paragraph 14(a) of the Employment Agreement, which they do not, Defendants present prima facie evidence that Mr. Jones' representations in this regard were made in error.

Defendants establish prima facie entitlement to summary judgment on the causes of action set forth in the Complaint. Plaintiff's opposition fails to raise an issue of fact. Defendant's motion for summary judgment is granted as to the Complaint.

Plaintiff also seeks summary judgment on the counterclaims stated by Defendants. Plaintiff contends that the evidence before the Court establishes that Defendants made a knowing and voluntary waiver of any alleged overpayments of salary allegedly made to Plaintiff and that Defendants are estopped from asserting entitlement to recoupment.

In response, Defendants contend that the delay resulted from Defendants' efforts to keep Secuprint afloat, ensuring its survival, and maintaining customer relationships. It is alleged that Defendants informed Plaintiff of their intent to enforce their right to recoup overpayments on March 4, 2014. Defendants motion to amend to add the counterclaims followed shortly thereafter.

"Waiver requires a 'clear manifestation of an intent by [a party] to relinquish [a] known right.'" DLJ Mortgage Capital Corp., Inc. v. Fairmont Funding, Ltd., 81 A.D.3d 563, 564 (1st Dept. 2011), quoting Courtney-Clark v. Rizzoli Intern. Publications, Inc., 251 A.D.2d 13 (1st Dept. 1998). See also, Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 184 (1982). It should not be "'lightly presumed.'" Echostar Satellite LLC v. ESPN, Inc., 79 A.D.3d 614, 617 (1st Dept. 2010), quoting Gilbert Frank Corp. v. Fed. Ins. Co., 70 N.Y.2d 966, 968 (1988). See also, Independent Wireless One Corp. v. City of Syracuse, 309 A.D.2d 1291, 1292 (4th Dept. 2003) (citation omitted).

On a motion for summary judgment, a moving party relying upon waiver must present "evidence from which a clear manifestation of intent. . . to relinquish" the contractual provision can be inferred, or must otherwise demonstrate "that defendant, by its conduct, . . . lulled plaintiff into sleeping on its rights. . . ." Gilbert Frank, 70 N.Y.2d at 968. "Generally, the existence of an intent to forgo such a right is a question of fact." Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 7 N.Y.3d 96, 104 (2006).

Here, there is a question of fact as to waiver. Plaintiff presents to the Court nothing, other than evidence of a delay, to establish Defendants' alleged intent to relinquish their claims. Plaintiff's speculative allegations and allegations of delay simply do not suffice to entitle him to a grant of summary judgment on the counterclaims. The defense of waiver is not established as a matter of law.

Likewise, questions of fact exist as to whether the voluntary payment doctrine is applicable. The voluntary payment doctrine provides a defense where a party seeking the recovery of a payment made the payment "without protest or even inquiry and were not laboring under any material mistake of fact." Westfall v. Chase Lincoln First Banks, N.A., 258 A.D.2d 299, 300 (1st Dept. 1999). There is a question on the papers submitted as to whether Defendants made inquiries about Plaintiff's wages and alleged overpayments. Plaintiff fails to establish prima facie entitlement on this issue, and in any event, Defendants raise questions of fact as to Defendants inquiries into the alleged overpayments, as there is evidence that Defendants inquired into the overpayments and requested repayment.

Finally, Plaintiff raises equitable estoppel, the elements of which are "with respect to the party estopped: (1) conduct which amounts to false representations or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts." Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp., 76 A.D.2d 68, 81 (4th Dept. 1980). Plaintiff also fails to establish prima facie entitlement to this defense. The record before the Court does not present prima facie evidence that Defendants acted in a manner amounting to false representation or concealment of material facts; there is no prima facie evidence that Plaintiff

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lacked knowledge of the true facts or detrimentally relied on Defendants' conduct; and there is no prima facie evidence of a detrimental change in Plaintiff's position as a result of the alleged overpayment.

As Plaintiff fails to establish prima facie entitlement on the counterclaims, Plaintiff's motion for summary judgment is denied.

Signed at Rochester, New York this 6th day of August, 2015.

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Matthew A. Rosenbaum
Supreme Court Justice