SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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KATHLEEN NEDOROSTEK,

Plaintiff,

-against-

NINE WEST HOLDINGS, INC., F/K/A JAG FOOTWEAR, ACCESSORIES AND RETAIL CORPORATION

Defendant.

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DECISION AND ORDER

Index No. 653162/2014

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract, plaintiff Kathleen Nedorostek ("Nedorostek") moves for summary judgment on her complaint (mot. seq. 001), and defendant Nine West Holdings, Inc. ("Nine West") moves for summary judgment dismissing the complaint (mot. seq. 002).

Pursuant to an employment contract dated August 29, 2012, Nine West hired Nedorostek as Group President, Global Footwear and Accessories, for a term from October 2012 through December 2015. In April 2014, Sycamore Partners acquired Nine West and began the process of reorganizing the company. Nedorostek was named Chief Executive Officer.

According to Nedorostek, in July 2014, Stefan Kaluzny ("Kaluzny"), Managing Director of Sycamore Partners, informed Nedorostek that the company would be restructured, and that she would no longer have responsibility for Anne Klein, Easy Spirit, and jewelry, which had allegedly previously represented approximately 1/3 of the

annual sales that Nedorostek was overseeing. He showed her a power point presentation of the new proposed structure of the company. Nedorostek informed the company that she would be unhappy with the decline in her responsibilities. Kaluzny offered Nedorostek a compensation package to stay at the company in the restructured business, but she declined. In late August 2014, Nedorostek informed Kaluzny and Nine West Executive Andrew Hede ("Hede"), that she was going to resign. On September 2, 2014, Nedorostek's attorney provided written notice of Nedorostek's intent to terminate her employment for "good reason" as defined in the employment contract. Her last day of work was September 30, 2014.

Meanwhile, June 2014, Nine West began communicating with Peggy Eskenasi ("Eskenasi") about possible employment within the company, with her referencing the positions of "Executive Chairman: Easy Spirit, Jewelry, Handbag divisions" and "Executive Chairman and CEO: Anne Klein." On August 21, 2014, Eskenasi emailed Kaluzny, stating (1) that she received a signed "term sheet" from the company; (2) "I'm so looking forward to working with you," and (3) that she would resign from her job the following day. On August 22, 2014, Kaluzny emailed Sycamore executive Peter Morrow, "Kathy [Nedorostek] has to go."

According to Nine West, as of the date that Nedorostek gave notice, there had been no diminution in her authority, duties or responsibilities. Up until her last day of work, September 30, 2014, she remained CEO of Nine West. In addition, throughout the summer of 2014, there had been continuing discussions regarding potential different

approaches to re-organizing the company, and Nedorostek tendered her notice before any decisions about the structure, or official changes, had been made.

On September 5, 2014, Sycamore Partners publicly announced the restructuring of the Nine West business, and announced that Eskenasi had been hired to serve as "Executive Chairman of Easy Spirit, NW Jewelry Group and Anne Klein."

Nedorostek then commenced this action alleging that Nine West breached the employment contract. According to the allegations of the complaint, Nine West has refused to pay Nedorostek (1) her salary through December 31, 2015 as required by Section 5(c)(i) of the contract; (2) the share of the premium of maintaining her COBRA continuation, equal to Nine West's contribution to her insurance premiums on the termination date through December 31, 2015, as required by Section 5(c)(ii) of the contract; (3) her pro-rated 2014 bonus; and (4) the lump sum of three years of salary as required by Section 5(d) of the contract, demanding instead that Nedorostek take $1.6 million less than the sum she was entitled to, based upon a draft analysis by an accounting firm which was not retained in accordance with the requirements set forth in Section 16 of the contract.

Nedorostek now moves for summary judgment on her complaint, seeking judgment in the amount of $4,212,484.35 (motion sequence 001). Nine West moves for summary judgment dismissing the complaint (motion sequence 002).

Section 3(b) of the agreement, entitled "Annual Cash Incentive Bonus" provides:

> (i) You shall be entitled to receive a cash incentive bonus for 2012, provided that you have not resigned without "Good Reason" (as defined herein) or been terminated for "Cause" (as defined herein) prior to the end

of the 2012 calendar year. Such 2012 bonus shall be your Target Bonita Potential of $720,000 (80% of your annual salary) multiplied by a fraction, the numerator of which shall be the number of days you were employed by the Company in 2012 and the denominator of which shall be 365. As used in this Agreement, "Target Bonus Potential" means 80% of your annual salary.

(ii) Commencing January 1, 2013, you shall participate in the Bonus Plan, with annual awards thereunder to be based on your Target Bonus Potential for each full calendar year of employment which ends prior to the expiration of the Term of this Agreement and throughout which you have been employed by the Company, conditioned upon the attainment of annual criteria and objectives established for participants in the Bonus Plan.

Section 5(c) of the agreement, entitled "Termination by the Company without Cause or by the Employee for Good Reason" provides:

If the Company terminates your employment prior to the expiration of the Term of this Agreement without Cause, or if you resign prior to the expiration of the Term of this Agreement with Good Reason:

(i) you will be paid the salary payable hereunder through the balance of the Term of this Agreement or for a period of 12 months, whichever is longer, in installments in accordance with past payroll practices; and

(ii) in the event that you elect in a timely manner to continue basic medical and dental insurance coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), the Company shall pay the share of the premium of maintaining your COBRA continuation coverage (or equivalent coverage, should the Subsidized Period (as defined below) extend beyond the COBRA period) equal to the Company's contribution to your medical and dental insurance premiums on the Termination Date, at the benefit levels existing on the Termination Date, for the period from the Termination Date through the balance of the Term of this Agreement (the "Subsidized Period"); provided, however, that in the event you commence comparable benefit coverage with a subsequent employer during the Subsidized Period, you shall provide the Company with written notice of such comparable coverage and the date upon which such coverage commences within five (5) days of the commencement thereof, and your benefit coverage with the Company shall cease as of the date such comparable coverage with a subsequent employer commences. Unless such coverage has so ceased, after the Subsidized Period, you may continue such coverage at your expense at the applicable COBRA rate for the duration of the COBRA period, if any.

You shall have no obligation to seek other employment or otherwise mitigate the Company's obligations to make payments under this Section 5(c); provided, however, that if you commence employment or otherwise engage in business activities permitted under this agreement during any period during which the Company is obligated to make payments under this Section 5(c), then the Company's obligations shall be reduced by the amount of any other compensation or income therefrom earned or received by you during or for the period in which the Company is obligated to make such payments.

Section 5(d) of the agreement, entitled "Change in Control" provides:

If, following a "Change in Control" (as defined herein) and prior to the end of the Term of this agreement, the Company terminates your employment without Cause or you terminate your employment hereunder for Good Reason, you will be paid a lump sum payment equal to three (3) times your yearly salary at the rate in effect immediately preceding termination.

Section 5(g)(ii) of the agreement provides:

The term "Good Reason" shall mean the occurrence of any of the following without your consent: (A) a material reduction in your base salary; (B) the relocation of your office to a location more than 50 miles from either of your present offices in New York City or White Plains, New York; (C) the Company's failure to pay you any undisputed portion of your compensation; (D) the Company's failure to continue in effect any material compensation or benefit plan in which you are participating, unless either (1) an equitable arrangement (embodied in an ongoing substitute or alternative plan) has been made with respect to such plan; or (2) the failure to continue your participation therein (or in such substitute or alternative plan) does not materially discriminate against you, both with respect to the amount of benefits provided and the level of your participation, relative to other similarly-situated participants; (E) a material diminution of your present authority, duties or responsibilities; or (F) any other action or inaction that constitutes a material breach by the Company of this agreement.

Good Reason shall not exist unless you provide written notice to the Company within 30 days after the occurrence of the events, actions, or non-actions, as applicable, that you believe constitute Good Reason hereunder, and the Company has been provided with at least 30 days after your delivery of such notice to remediate the basis for such notice and has not effected such remediation.

Nedorostek first argues that she is entitled to compensation pursuant to both Sections 5(c) and 5(d) of the agreement. While Section 5(d) applies to compensation specifically following a "change in control," nothing in the agreement states that Section 5(c), which provides that Nedorostek would be entitled to her salary and COBRA payments through the term of the agreement if she resigns with good reason, would not also apply, even in the event of a change in control. Further, a December 2013 amendment to the agreement provided:

> The Company's payment of your salary as severance following termination of your employment without Cause, due to death or disability or upon your resignation for Good Reason, in each case prior to the expiration of the term of the Employment Agreement, shall, subject to Section 15, be made in a lump sum at a date determined by the Company in its sole discretion no later than 30 days following the effective date of your termination or resignation regardless of whether such termination or resignation occurs prior to or following a Change in Control.

Next, Nedorostek argues that she resigned for "good reason" as defined in the agreement. Before she resigned, Sycamore Partners was already in talks with Eskenasi about running the Anne Klein, Easy Spirit and jewelry businesses that were to be removed from Nedorostek's responsibility. Eskenasi accepted the position and received a signed term sheet as of August 21, 2014 with a target start date of September 1, 2014.

In addition, Nine West EVP and Treasurer Joseph Donnalley testified that he was told by outside counsel for Nine West that Nedorostek was leaving for good reason as well as by "email or notification that we received of that organizational change within Nine West in which it was identified that [Nedorostek] was stepping down." Finally, in an email from Hede to Kaluzny dated August 28, 2014, Hede summarized his meeting

with Nedorostek that day and informed Kaluzny that they had agreed that her departure would be announced to the senior team on Thursday and to the rest of the company on Friday. He stated "she is flexible on her end date" and "she is planning to tell Zine that she is leaving today which will be helpful to me from a logistics perspective."

Nedorostek further maintains that in the agreement, there is a provision that provided Nine West with a "notice and opportunity to cure" period to try to resolve any genuine dispute relating to her resignation, however, Nine West does not present any evidence that during the cure period, it did anything to try and remediate the basis for her resignation. In addition, there is no evidence, other than Kaluzny and Hedes' conclusory statements, that Nine West informed Nedorostek that (1) the reorganization plan was not finally determined and that there were other possible plans being considered; or (2) that she could potentially retain ultimate responsibility for the Easy Spirit, Anne Klein and jewelry businesses.

Nedorostek also argues that she was entitled to her bonus, as set forth in Section 3(b) of the agreement, and in Nine West's written policies, which state:

> If a Participant's employment terminates on or after the first day of the sixth calendar month during a Performance Period ... and such termination is reason of ... termination by the Participant for "Good Reason," such Participant should receive the Award, if any, that would otherwise have been payable to such Participant for such Performance Period if and to the extent the Performance Factors with respect to such Performance Period are attained, prorated for the portion of such Performance Period actually worked by such Participant.

Finally, she maintains that Nine West never attempted to reach agreement her on an "Eligible Accounting Firm" to perform the analysis as required by Section 16 of the

agreement. Further, no analysis by an Eligible Accounting Firm was provided to the parties within ten days of the termination of her employment, also as required by Section 16 of the agreement. In addition, Nine West did not allow Nedorostek an opportunity for a second Eligible Accounting Firm to review the initial analysis, as required by Section 16 of the Agreement.

According to Nine West, Nedorostek did not resign for "good reason," because there was no "material diminution" in her "present authority, duties or responsibilities." Rather, Nedorostek resigned before any changes were made to her authority, duties or responsibilities. She informed Kaluzny of her decision to resign from the company in August 2014, and gave written notice on September 2, 2014, but it was not until September 5, 2014 that the company announced in a press release that Nine West would be reorganized, and that plan did not become effective until September 30, 2014. According to Hede and Kaluzny, when Nedorostek gave notice of her resignation, the details of the proposed reorganization were still undecided. Nedorostek was named CEO at the time of the acquisition in April 2014, and she knew that the details of that role and the company's reorganization would be worked out over the summer. Further, Nine West argues, Nedorostek never could have had "good reason" because she would have remained as CEO if she had not resigned. Nine West also argues that even if she had been able to demonstrate good reason, Nedorostek would only be entitled to severance under Section 5(d) because each subsection in section 5 stands on its own, and the subsections are not cumulative.

Nine West further contends that it was not obligated to pay Nedorostek a pro-rated bonus because a bonus payment was discretionary. On May 6, 2013, Nine West human resources employee, Ms. Matusiak, stated in any email that "any employee who is currently on the executive bonus plan and who is termed (not for cause) on June 1 or after, will be eligible for a pro-rated bonus for the period of time they were employed when and if earned." Nine West claims that being "eligible" for a bonus does not make an employee entitled to a bonus.

Further, according to Hede, that bonus plan only applied "to executives that weren't subject to an employment agreement," and whether an executive who did have an employment agreement would receive a prorated bonus "was dependent on the wording, language in the[ir] contract." In addition, the company policies to which Nedorostek refers to support her argument that she is entitled to a bonus also clearly state that they "should be interpreted in the context of the purpose, terms and conditions of the Plan and are not intended to create legally binding obligations."

Finally, Nine West acknowledges that it should not have selected an accounting firm on its own, and it should have provided Nedorostek with the determination within ten days of her departure. However, these breaches were minor, BDO is an eligible accounting firm, and it did provide Nedorostek with a draft analysis before she left. It concedes that if the court finds that a severance payment may be warranted, Nedorostek should be permitted to select an eligible accounting firm to prepare a second 280G analysis at Nine West's expense.

Discussion

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Beinstein v. Navani*, 131 A.D.3d 401 (1st Dept. 2015). Under a plain, direct reading of the agreement at issue here, the structure of Section 5 requires interpreting subsections (a) through (f) as six distinct circumstances under which an employee could receive compensation. Any other interpretation of the agreement would require a strained and illogical reading of each distinct circumstance.

The evidence presented by the parties shows that Section 5(d) is applicable to Nedorostek's circumstance, *i.e.*, termination following a change in control. Nine West clearly informed Nedorostek about a reorganization of the company over the summer. The reorganization structure described to her was a diminution of her responsibilities for Anne Klein, Easy Spirit, and jewelry divisions. Nine West has submitted no evidence that Nedorostek was informed of any other specific options or possibilities.

Nedorostek immediately informed Kaluzny that she would not be happy with the reduction of her responsibilities. In late August 2014, Nedorostek informed Kaluzny and Hede that she was going to resign, and they discussed her impending resignation in an email dated August 28, 2014. On September 2, 2014, Nedorostek's attorney provided formal notice of Nedorostek's intent to terminate her employment for "good reason" as defined in the employment contract. Her last day of work was September 30, 2014, a date agreed upon by her and Kaluzny.

While Nine West argues that it had several potential options of restructuring the company, and that Nedorostek tendered her resignation before any decisions about the structure, or official changes had been made, the evidence presented shows otherwise. In support of this argument, Nine West merely provides some vague testimony of Kaluzny and Hede that there were several other ideas for re-organizing floating around the company at the time, but submits no other documents or concrete testimonial evidence showing that any of these ideas were being seriously considered or would not have similarly result in a diminution of duties for Nedorostek

To the contrary, the evidence presented shows that Nine West had been in talks with Peggy Eskenasi since at least June 2014 to take over the responsibilities that it was removing from Nedorostek. On August 21, 2014, weeks before Nedorostek resigned, Peggy Eskenasi emailed Kaluzny, stating that (1) she received a signed "term sheet" from the company; (2) "I'm so looking forward to working with you," and (3) she would resign from her job the following day. She had a signed "term sheet" with a target start date of September 1, 2014. Further, on August 22, 2014, Kaluzny emailed Sycamore executive Peter Morrow, "Kathy [Nedorostek] has to go."

While Nine West is correct that as of the specific date that Nedorostek gave notice, there had been no actual "diminution of her present authority, duties or responsibilities," Nedorostek certainly had an objective, good faith belief that the diminution of her duties was imminent. Further, the evidence submitted shows that, in fact, Nine West offered a position to Eskenasi with the responsibilities once held by Nedorostek, even before Nedorostek formally resigned.

Nedorostek gave written notice to the company on September 2, 2014, which was within 30 days "after the occurrence of the events, actions, or non-actions, as applicable that [she] believe[d] constitute[d] Good Reason." The company had 30 days to remediate the basis for such notice and did not affect any remediation. Kaluzny and Hede discussed Nedorostek's impending resignation in an August 28, 2014 email, and they clearly had no intent to remediate – rather, they hired someone else to fill her job even before she gave written notice of her resignation. The evidence submitted shows that Nedorostek has demonstrated "good reason" to resign prior to the expiration of the term of the agreement and is entitled to compensation under Section 5(d) of the agreement.

However, neither party has met its burden of proving, as a matter of law, that Nedorostek is or is not entitled to a bonus payment. Each party cites to certain testimony, email communications, and company policies, and as a result, raise issues of fact as to whether Nedorostek is entitled to a bonus.

Finally, as conceded by Nine West, Nedorostek is entitled to select an eligible accounting firm to prepare a second 280G analysis at Nine West's expense.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Kathleen Nedorostek's motion for summary judgment is granted only to the extent that she is awarded summary judgment on her third cause of action for breach of contract in her complaint, her motion is otherwise denied, and she shall select an accounting firm to prepare a second 280G analysis at defendants' expense; and it is further

ORDERED that defendants Nine West Holdings, Inc., f/k/a JAG Footwear, Accessories and Retail Corporation's motion for summary judgment dismissing the complaint is granted only to the extent that the first cause of action for breach of contract is dismissed, and its motion is otherwise denied; and it is further

ORDERED that the remaining cause of action is severed and shall continue.

This constitutes the decision and order of the court.

Dated: December 8, 2016
New York, NY

J.S.C.
HON. SALIANN SCARPULLA