STATE OF NEW YORK COURT OF CLAIMS

JULIO LICINIO, M.D., PHD, MBA, MS,

Claimant,

DECISION AND ORDER

-v-

STATE OF NEW YORK,

Claim No. 134212
Motion Nos. M-95233
M-95828
CM-95334

Defendant.

BEFORE: **HON. DIANE L. FITZPATRICK**
Judge of the Court of Claims

APPEARANCES: **For Claimant:**
ROMANO LAW FIRM
By: Siddartha Rao, Esquire

For Defendant:
LETITIA JAMES
Attorney General of the State of New York
By: Bonnie Gail Levy, Esquire
Assistant Attorney General

Defendant brings a pre-answer motion to dismiss the claim based upon documentary evidence, failure to state a cause of action, and lack of subject matter jurisdiction pursuant to CPLR sections 3211 (a) (1), (2) and (7) and Court of Claims Act sections 8, 9, 10 (4) and 11 (b). Claimant filed a cross motion for leave to amend the claim or permission to file a late claim in accordance with Court of Claims Act section 10 (6). In response, Defendant brings a second

motion to dismiss the amended claim. Both parties submitted opposition to the motions and cross motion.

The claim alleges a breach of contract cause of action arising from Claimant's acceptance of a position at Upstate Medical University (UMU) as Senior Vice President and Dean of Upstate College of Medicine. The letter offer, dated March 14, 2017, was signed on March 15, 2017 by Claimant and then president of Upstate, Dr. Danielle Laraque-Arena, to be effective on July 1, 2017. In addition, Claimant was to be a tenured professor in the Department of Psychiatry and Behavioral Sciences along with secondary appointments in the Departments of Pharmacology and Medicine, Division of Endocrinology, Diabetes and Metabolism. The position was a Management/Confidential appointment in which Claimant reported to the president and served at the pleasure of the president.

The contract provided for a compensation package that included an annual salary of $585,000; additional compensation of $48,000 to be paid bi-weekly for the first 12 bi-weekly pay periods; reimbursement for academic conferences and the costs associated with participation, continuing medical education, and professional society memberships, and secretarial support. The contract also provided that in the event that Claimant no longer served in the position as Senior Vice President and Dean of the College of Medicine, he would revert to a faculty position and receive a salary no less than that of the total salary of the highest paid faculty member in the Psychiatry Department to be paid entirely by the State of New York. In the event that either Claimant or UMU decided that Claimant would no longer serve as Senior Vice President and Dean of the College of Medicine, each party was entitled to eight months notice in writing of the

end date, and they would work together for a smooth transition of leadership. The time frame could be modified by agreement.

Claimant asserts in the claim that he held the position as Senior Vice President and Dean of the College of Medicine from July 1, 2017 until September 12, 2019 when he received a "Demotion Letter" from Interim president Mantosh Dewan (Dr. Dewan). The letter informed Claimant that his position as Senior Vice President and Dean of the College of Medicine was terminated as of September 13, 2019. He would be a Distinguished Professor in the Department of Psychiatry and Behavioral Sciences with a salary of $227,000. At the time he was demoted, his salary as Senior Vice President and Dean of the College of Medicine had increased to $605,000.

It is Claimant's contention that the State breached the employment contract by failing to give him eight months notice before demoting him; failing to pay him the salary of the highest paid professor in the Psychiatry Department ($363,000); failing to continue paying for his academic conferences and terminating his secretarial support. In addition to money damages, Claimant has requested equitable relief seeking a declaration that he was entitled to eight months notice before he was demoted, declaring that he is entitled to compensation no lower than the highest paid faculty member in the Psychiatry Department and ordering SUNY Upstate to provide him this compensation, declaring that he is entitled to reimbursement of the costs incurred for his participation in academic conferences, travel, continuing medical education, publications, and professional society memberships; and declaring that he is entitled to secretarial support.

On November 15, 2019, Claimant served a notice of intention to file a claim upon the Attorney General by personal service. The claim was filed on December 26, 2019, and personally served upon the Office of the Attorney General on December 23, 2019. As set forth above,

Defendant brings a motion to dismiss the claim, and Claimant has cross moved for permission to amend the claim to add additional causes of action. In addition, Claimant seeks permission to file a late claim. The Court will decide the Defendant's motion to dismiss the claim with the cross motion to amend, since Claimant includes the breach of contract cause of action in his proposed amended claim.[1] The Court's consideration of Claimant's motion to amend will render the late claim application unnecessary.

Defendant's Motion to Dismiss the Claim - Breach of Contract Cause of Action

Cross Motion to Amend the Claim

Defendant argues that the claim which asserts only a cause of action for breach of contract and which is also the first cause of action in the proposed amended claim must be dismissed. Defendant, by this motion, argues that the offer letter signed by Claimant and Dr. Laraque-Arena was not approved or filed by the New York State Comptroller in accordance with State Finance Law section 112 (2) (a). State Finance Law section 112 (2) (a) provides in pertinent part that

> "[b]efore any contract made for or by any state agency, department, board, officer, commission, or institution . . . shall be executed or become effective, whenever such contract exceeds fifty thousand dollars in amount . . . it shall first be approved by the comptroller and filed in his or her office."

Defendant argues that the approval and filing with the New York State Comptroller is a condition precedent to having an enforceable contract with the State of New York for any contract exceeding $50,000. This requirement, Defendant contends, is not waivable, and the State

---

[1] As set forth above, Defendant has also brought a motion to dismiss the amended claim. However, after reviewing the documents filed with the Clerk of the Court, the amended claim was never filed and, therefore, it is not pending before the Court.

may not be estopped from asserting the statute's applicability in any action to enforce an unapproved, unfiled agreement.

Submitted in support of Defendant's motion is an affidavit from Sandra Delaney, an Assistant Vice President for Shared Business Services at the SUNY, UMU who oversees UMU's Contracts Department as part of her duties. Administrators in the Contracts Department forward UMU contracts that require pre-approval and filing to the New York State Office of the State Comptroller (OSC). Neither Ms. Delaney nor the administrators received or forwarded the document Claimant contends is the employment contract to the OSC for pre-approval and filing. Furthermore, there is an electronic database (openbooknewyork.com) that shows the UMU contracts which have been submitted and ultimately approved by OSC; there is no contract between Claimant and any State entity listed therein.

Defendant proffers that the claim fails to state a cause of action pursuant to CPLR section 3211 (a) (7) as compliance with State Finance Law section 112 is a "condition precedent" to the existence of a valid contract and an issue upon which Claimant had the burden of proof (*Matter of Konski Engrs. v Levitt*, 69 AD2d 940, 941 [3d Dept 1979], *affd* 49 NY2d 850 [1980], *cert denied* 449 US 840 [1980]).

Claimant responds detailing the meetings with numerous department heads, vice presidents, deans and UMU's legal counsel prior to signing the letter offer, and at no time was he ever informed of the requirement that OSC had to pre-approve his contract for it to be enforceable. He notes that the letter specifically refers to his employment being contingent upon a routine criminal background investigation; subject to the policies of the Board of Trustees for SUNY and compliance with the responsibilities of a State employee described in Public Officers

Law, with no mention of the State Finance Law or approval of the New York State Comptroller. He also listed many contracts in excess of $50,000 that he approved while Senior Vice President and Dean, none of which were never sent for pre-approval and filing to OSC. Further, Claimant describes how he met regularly with Chief of Staff VanNortwick, Senior Vice President for Finance and Management Smith, and Senior Associate Dean for Resource Management Gardner from whom these employment contracts were submitted to Claimant for approval. Associate Vice President for Human Resources Frost would also review employment contracts although he didn't attend the meetings. Claimant was never instructed to forward these contracts to OSC and, to his knowledge, no one else submitted them.

Claimant also argues that Defendant's evidence fails to resolve the factual issues as a matter of law and doesn't conclusively dispose of the cause of action on the ground of documentary evidence pursuant to CPLR section 3211 (a) (1). Claimant also takes issue with the electronic database identifying contracts approved by the OSC, as none of the contracts on the site reflect individuals as the contracting party. Claimant contends that this raises questions of fact not resolved by Defendant's documentary evidence - whether Claimant's letter agreement with UMU had to be approved by OSC at all. Although Claimant was represented by an attorney during the negotiations, he argues that until the filing of this motion to dismiss, at no time was he made aware of the State Finance Law requirements. The letter agreement referenced and contained links to the Policies of the Board of Trustees for the State University of New York and the Public Officers Law but not the State Finance Law.

Claimant also argues that the State should be estopped from arguing that the contract is unenforceable, as the State made a clear and unambiguous promise upon which the Claimant

reasonably relied to his detriment. After many months of negotiations and meetings, Claimant was offered and accepted the positions with UMU. At the time of these negotiations, Claimant and his wife were living and working in Australia. Claimant was also being recruited by the University of Arizona. Based upon the offers and terms contained in the March 14, 2017 letter offer, including the provision that he would have an eight-month transition period if he was no longer Senior Vice President and Dean of the College of Medicine, Claimant moved himself and his wife to Syracuse to work at UMU.

On a motion to dismiss, the Court must accept Claimant's allegations as true and assess whether they fit into any "cognizable legal theory" (*Divito v Fiandach,* 166 AD3d 1356, 1357 [4th Dept 2018]). Affidavits may be utilized by Claimant to supplement his pleading, affidavits from Defendant may be relied upon only where the submissions "establish conclusively" that Claimant has no cause of action (*Rovello v Orofino Realty Co.,* 40 NY2d 633, 636 [1976]; *Olney v Town of Barrington,* 180 AD3d 1364 [4th Dept 2020]).

"As a general matter, contracts entered into with state or municipal entities that are not approved by the necessary public officials in compliance with statutory requirements are invalid and unenforceable (see *Parsa v. State of New York*, 64 N.Y.2d 143, 147 [1984]; *Becker & Assoc. v. State of New York*, 48 NY2d 867 [1979]; *Hamlin Beach Camping, Catering & Concessions Corp. v. State of New York*, 303 AD2d 849, 851 [2003])." (*Cointech Inc. v Masaryk Towers Corp.*, 7 AD3d 376, 380 [1st Dept 2004]).

Although an offer for employment was made by the Defendant in its March 14, 2017 letter to Claimant, which Claimant accepted by signing the letter on March 15, 2017, the letter agreement for employment could not become an enforceable contract until the State Comptroller approved it in accordance with State Finance Law section 112 (2) (a) (State Finance Law section 112 [2] [a]; *Parsa,* 64 NY2d at 147). Compliance with the State Finance Law "is a 'condition

precedent' to the existence of a valid contract" (*Hamlin Beach Camping, Catering & Concessions, Corp.,* 303 AD2d at 851; *Rosefsky v State of New York,* 205 AD2d 120 [3d Dept 1994]; *Schenker v State of New York*, 126 Misc 2d 1038, 1041 [Ct Cl 1984]). There is no dispute or allegation that the State Comptroller was ever presented with the contract for approval or otherwise approved it.

Claimant tries to argue that as a management/confidential employee, this contract did not have to be approved by the Comptroller because it was subject to article 14 of the Civil Service Law, also known as the Taylor Law (*see* State Finance Law section 112 [4]; Civil Service Law sections 200-214). However, those sections of the Civil Service Law involves the relationship and rights of employees to form and be represented by employee organizations for collective bargaining with the State. In his position as Senior Vice President and Dean of the College of Medicine, Claimant was not part of and he does not allege that he was part of an employee organization, as that term is defined in Civil Service Law section 201 (5).

Claimant's lack of knowledge of the requirement for approval by the Comptroller and the State's acceptance of the benefits of Claimant's employment, without fulfilling the eight-month notice requirement before he could be removed from his position as Senior Vice President and Dean of the College of Medicine, cannot be used to avoid the application of State Finance Law section 112 (2) (a).

> "A party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them (*Belmar Contr. Co. v State of New York,* 233 NY189, 194 [1922]). Moreover, the State's acceptance of benefits furnished under a contract made without authority does not estop it from challenging the validity of the contract or from denying liability pursuant to it (*Becker & Assoc. v State of New York*, 48 NY2d 867 [1884], *affd* 65 AD2d 65 [3d Dept 1978]; *see, also, Seif v City of Long Beach,* 286 NY 382

> [1941]; *McDonald v Mayor of City of N.Y.* 68 NY 23 [1876]).” (*Parsa,* 64 NY2d at 147).”

Where there is no contract for employment for a specific duration, the employment relationship is considered “at will”. (*Sabetay v Sterling Drug, Inc.,* 69 NY2d 329, 333 [1987]). Claimant served at the pleasure of the President of UMU and this was set forth in the offer letter dated March 14, 2017 (*see* Policies of the Board of Trustees [Title B, para. 4, and 8 NYCRR section 333.8] which read “Persons appointed pursuant to this Title shall serve at the pleasure of the appointing officer or body.”). Under these circumstances, there is no question whether Claimant could be removed from his position as Senior Vice President and Dean of the College of Medicine, since he could be discharged, or in this case demoted, at the employer’s discretion (*see Murphy v American Home Prods. Corp.,* 58 NY2d 293 [1983]). Although the agreement expressly limited his discharge or demotion unless there was compliance with the eight-month notice provision or some other term of notice was agreed upon, that provision is unenforceable.

Based upon the submissions and the foregoing, Claimant has failed to state a cause of action for breach of contract in either the claim or proposed amended claim.

Claimant seeks permission to amend the claim to add four additional causes of action, a cause of action for breach of an implied contract, breach of the covenant of good faith and fair dealing, fraudulent misrepresentation, and fraudulent concealment. Leave to amend a pleading should be liberally granted where there is no surprise or prejudice, and the proposed amendment is not patently lacking in merit or insufficient on its face (*see Holst v Liberatore,* 105 AD3d 1374 [4th Dept 2013]; *Lucido v Mancuso,* 49 AD3d 220 [2d Dept 2008]; *Gross, Shuman, Brizdle & Gilfillan v Bayger,* 256 AD2d 1187 [4th Dept 1998]). Movant is not required to make an

evidentiary showing of merit (*Holst,* 105 AD3d at 1374). Whether to grant permission to amend a pleading is a matter of discretion (*NYAHSA Servs., Inc., Self-Ins. Trust v People Care, Inc.,* 156 AD3d 99 [3d Dept 2017]). The motion should be granted if the amendment does not cause prejudice or surprise to the nonmoving party, and the amendment is not "palpably insufficient or patently devoid of merit" (*NYAHSA Servs., Inc., Self-Ins. Trust,* 156 AD3d at 102). In deciding the motion to amend the claim, the Court should consider whether "the proposed amendment is palpably improper or insufficient as a matter of law" (*Williams v State of New York,* UID No. 2019-028-553 [Ct Cl, Sise, Presiding J., June 20, 2019]). After such consideration, leave should be denied if the proposed amendment is legally insufficient (*Id.*).

CPLR 3025 (b) provides that:

> "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Breach of Implied Contract

There are two types of implied contract, a contract implied-in-fact and a contract implied-in-law (*Parsa,* 64 NY2d at 148). A contract implied-in-law "is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another." (*Id., quoting Miller v Schloss,* 218 NY 400, 406-407 [1916]). A contract implied-in-fact is a contract based upon an implied promise which arises from the parties conduct, not their verbal or written words (*Id.*). Claimant relies upon the lengthy negotiations and meetings he had with various employees of UMU to establish an implied

contract in fact. Although the State Finance Law section 112 does not prevent recovery where a contract is implied-in-law to restore money to its rightful owner, a contract implied-in-fact is subject to the statute and "a contract between them may not be implied to provide 'rough justice' and fasten liability on the State when applicable statutes expressly prohibit it". (*M/A-Com, Inc., v State of New York*, 78 AD3d 1293, 1294 [3rd Dept 2010], *quoting Parsa,* 64 NY2d at 147). As a result, this cause of action is patently lacking in merit.

" A claim for 'breach of the implied covenant of good faith and fair dealing . . . may not be used as a substitute for a nonviable claim of breach of contract' ". (*Smile Train, Inc. v Ferris Consulting Corp.,* 117 AD3d 629, 630 [1st Dept 2014] *quoting Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73, [1st Dept.2000]; *NYAHSA Servs., Inc., Self-Ins. Trust,* 141 AD3d 785; *Fahs Constr. Group, Inc. v State of New York,* 123 AD3d 1311, 1312-1313 [3d Dept 2014]). The third cause of action also patently lacks merit.

The proposed fourth cause of action, fraudulent misrepresentation, and the fifth, fraudulent concealment, will be discussed together. To assert a cause of action for fraudulent misrepresentation a party must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co., v Smith Barney*, 88 NY2d 413, 421 [1996]; *Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 178 [2011]; *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406–407 [1958]).

A cause of action for fraudulent concealment requires the same factors to be alleged - a known false material misrepresentation or omission of fact by defendant, to induce reliance, which

induces justifiable reliance and injury - and in addition to those four foregoing elements, there must be an allegation that "the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.* 301 AD2d 373, 376 [1st Dept 2003]; *Wiscovitch Assoc. v Philip Morris Cos.*, 193 AD2d 542 [1st Dept 1993]).

The proposed amended claim alleges that the State failed to provide Claimant information about the requirements of State Finance Law section 112 (2) (a) during the negotiations and during his employment as Senior Vice President and Dean of the College of Medicine. Claimant contends that without knowing that his contract must be approved and filed by the State Comptroller, he relied on the provisions in the letter agreement causing him to leave his employment in Australia, forego potential employment in Arizona and accept the position at UMU. He further alleges that his demotion has negatively affected his career. For the fraudulent concealment cause of action, he also included a bare allegation that the State had a duty to inform him of the requirement to have the agreement approved by the OSC.

Claimant is presumed to have knowledge of the law, and the failure of the State to disclose this cannot be considered fraudulent (*cf., Merchants' Bank v Spalding,* 12 Barb 302 [1851]; *Donnelly v Margolis,* 265 AD2d 523 [2d Dept 1999]; *Diocese of Buffalo v McCarthy*, 91 AD2d 1210 [4th Dept 1983]; *Bayer v Sarot,* 51 AD2d 366, 369 [1st Dept 1976]). Moreover, the provisions of the State Finance Law cannot be avoided by asserting a fraudulent misrepresentation cause of action or fraudulent concealment (*see Hamlin Beach Camping, Catering & Concessions, Corp.,* 303 AD2d at 853; *Pankewycz v State of New York,* [Ct Cl, Weinstein, J., Cl No. 134290, Motion No. M-95419 signed Aug. 7, 2020]). Claimant has failed to allege that Defendant misrepresented or withheld any material facts or information that it had a duty to disclose or were

unavailable to Claimant. As a result, Claimant's proposed fourth and fifth cause of action are patently insufficient.

Although the Court finds the State's reliance upon the application of the State Finance Law section 112 (2) (a) under Claimant's circumstances unfair, leaving him without an adequate remedy, as other courts have found, "the over-all benefit accruing to the citizens of the State from its application has been determined by the Legislature, to be worth the risk of such a casualty, ostensibly because contracting parties are better able to protect themselves from State Finance Law section 112 than the people would be to protect themselves without it". (*Rosefsky,* 205 AD2d at 124).

Accordingly, based upon the foregoing, Defendant's motion is GRANTED, and Claimant's cross motion to amend the claim or for late claim relief is DENIED in its entirety. Defendant's motion to dismiss the amended claim is DENIED as unnecessary.

Syracuse, New York
December 31, 2020

Diane L. Fitzpatrick

DIANE L. FITZPATRICK
Judge of the Court of Claims

The Court has considered the following in deciding these motions:

M-95233

1) Notice of Motion.

2) Affirmation of Bonnie Gail Levy, Esquire, Assistant Attorney General, in support, with exhibits attached thereto.

3) Affirmation of Siddartha Rao, Esquire, in opposition, with exhibits attached thereto.

4) Memorandum of Law filed August 25, 2020, in opposition.

5) Sur-Reply affirmation of Siddartha Rao, Esquire, in opposition, with exhibits attached thereto.

M-95828

6) As noted in the Decision and Order the Amended Claim was never filed so this motion is presently not before this Court.

CM-95334

7) Notice of cross motion.

8) Affirmation of Siddartha Rao, Esquire, in support, with exhibits attached thereto.

9) Affirmation of Bonnie G. Levy, Essquire, Assistant Attorney General, in opposition, with exhibits attached thereto.

10) Memorandum of Law in support.

11) Memorandum of Law in opposition.