Daniel v Blue Sphere Corp.
2021 NY Slip Op 30804(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 652508/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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DANIEL, RAN

Plaintiff,

- v -

BLUE SPHERE CORPORATION

Defendant.

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INDEX NO. 652508/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 73, 74, 75, 76, 77, 78, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In this contract dispute, plaintiff, Ran Daniel, moves, pursuant to CPLR 3212, for summary judgment on breach of contract, breach of implied contract and unjust enrichment claims against defendant, Blue Sphere Corporation (hereinafter, Blue Sphere). Blue Sphere also moves, pursuant to CPLR 3212, for summary judgment in its favor on the breach of contract cause of action.

THE SERVICE AGREEMENTS

The term of the first service agreement governing Daniel's employment as chief financial officer (CFO) (hereinafter, "First CFO Agreement") commenced on May 1, 2016 and ended on May 1, 2017 (First CFO Agreement [NYSCEF Doc No. 36]). The term of the agreement was then extended by 30 days (Complaint, ¶ 4 [NYSCEF Doc No. 5]). The second service agreement

(hereinafter, "Second CFO Agreement"), commenced on June 1, 2017 and expired on May 30, 2018 (Second CFO Agreement [NYSCEF Doc No. 38]). It included terms concerning an up-listing bonus and eligibility for paid vacation leave, among others. Both the First and Second CFO Agreements contained a provision wherein any amendments or modifications were to be executed by written instrument, signed by both Blue Sphere and Daniel.

The up-listing provision states as follows:

> "Following execution of this Agreement, subject to the approval of the Company's Compensation Committee, and subject to the full completion of the Company's up-listing to the NASDAQ exchange, the Company will grant Executive an up-listing bonus"

(Second CFO Agreement at Section 3.8).

The vacation provision states as follows:

> "During the Term of Executive's Agreement, the Executive shall be entitled to be paid vacation in accordance with the most favorable plans, policies, programs and practices of the Company and its subsidiaries as in effect at any time hereafter with respect to other key executives of the Company and its subsidiaries; provided, however, that in no event shall Executive be entitled to fewer than 25 business days paid vacation per year, as well as pay for all holidays observed by the Company"

(*id*. at Section 3.1).

BACKGROUND

On December 5, 2019, this court dismissed the unjust enrichment and breach of implied contract claims, in part. (December 5, 2019 Decision and Order [NYSCEF Doc No. 25]). The breach of contract claim and unjust enrichment and implied contract claims for the period of April 1, 2018 to April 9, 2018 remain (*id*.). Defendant only moves for summary judgment on the breach of contract claim, while plaintiff moves for summary judgment on the remaining counts.

In March 2018, defendant hired a new chief financial officer in anticipation of replacing Daniel. On April 4, 2018, Blue Sphere filed an 8-K with the Securities and Exchange Commission, stating: "Effective April 1, 2018, Mr. Ran Daniel resigned from his position as the Company's Chief Financial Officer. Mr. Daniel will continue to provide transitional support and

financial and reporting services as an advisor to the Company through April 30, 2018" (Form 8-K [NYSCEF Doc No. 63]).

Blue Sphere assured Daniel that the April 30, 2018 date on the 8-K was a mistake and that Blue Sphere would continue to retain Mr. Daniel under the Second CFO Agreement through May 30, 2018 as they had previously discussed (Palas Aff., ¶ 16 [NYSCEF Doc No. 51]). Daniel was unconvinced so negotiations for a consultancy agreement began, but no agreement was ever reached (*id.* ¶¶ 18-20). It is undisputed that Daniel did not perform any further services for Blue Sphere after April 9, 2018.

ARGUMENTS

Plaintiff alleges Blue Sphere breached the Second CFO Agreement on three grounds: (1) Blue Sphere failed to pay him an up-listing bonus of $35,000; (2) Blue Sphere failed to pay him accrued vacation when his services terminated; and (3) Blue Sphere terminated his contract without the requisite 30 days written notice. Moreover, plaintiff alleges that Blue Sphere was unjustly enriched for the work he performed between April 1, 2018 through April 9, 2018.

As to the breach of contract claim, defendant argues that the two conditions precedent, that (1) the Compensation Committee approve a bonus and (2) Blue Sphere be up-listed onto the NASDAQ, was not met, and therefore, plaintiff is not entitled to a bonus. Moreover, the contract's termination provisions do not provide for payment of accrued vacation days, nor is it defined as a part of plaintiff's compensation upon termination. Lastly, while defendant concedes that there is a question of fact as to unjust enrichment for plaintiff's services from April 1, 2018 to April 9, 2018, it contends that Blue Sphere did not terminate plaintiff's contract when it filed the 8-K with the Securities and Exchange Commission. Alternatively, defendant argues that

even if the filing of the 8-K is considered a termination, Blue Sphere gave the requisite 30 days notice.

DISCUSSION

It is well-established that to obtain summary judgment under CPLR 3212 (b), the movant must put forth "proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [the movant's] favor" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979] [citation omitted]). If the movant "fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [emphasis omitted]). Once the movant meets this initial burden, then the burden shifts to the opposition to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). Papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

I. Breach of Contract

The elements of a claim for breach of contract are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Meyer v New York-Presbyterian Hosp. Queens*, 167 AD3d 996, 997 [2d Dept 2018], *lv denied* 33 NY3d 908 [2019]). A contract requires definiteness as to the terms of the agreement (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]). "[U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy" (*Marlio v McLaughlin*, 288 AD2d 97, 99 [1st Dept 2001], *lv denied* 98 NY2d 607 [2002] [internal quotation marks and citation omitted]). "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract" (*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 176 [2008]). "[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*id.* at 569).

The court first examines the issue of compensation for unused vacation time. Plaintiff argues that "[n]either one of the CFO Agreements states that the Company must **not** pay me for unused vacation days upon the termination or expiration of the Agreement" (Plaintiff's Memorandum of Law in Support of Motion, at 13 [NYSCEF Doc No. 35]) (emphasis added). Further, he references former employees of Blue Sphere who were compensated for their unused vacation days (*id.* at 14). Defendant contends that the contract is clear and unambiguous as to

plaintiff's compensation upon termination. It argues that compensation per the Second CFO Agreement is defined only as plaintiff's monthly fee and reimbursements of expenses.

Both parties' motions for summary judgment must be denied. The vacation time provision explicitly refers to extrinsic evidence outside the four corners of the contract, stating that plaintiff would be entitled to vacation "in accordance with the most favorable plans, policies, programs and practices of the Company and its subsidiaries as in effect at anytime hereafter with respect to other key executives . . . ." (Second CFO Agreement, Section 3.1). "While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Amusement Business Underwriters v American International Group, Inc.*, 666 NY2d 878, 880 [1985]). This question of fact may not be appropriately resolved on a motion for summary judgment (*see Shadlich v Rongrant Associates, LLC*, 66 AD3d 759, 760 [2d Dept 2009]). Accordingly, on this prong of the breach of contract claim, both parties' motions for summary judgment are denied.

Next, the court turns to the issue of the up-listing bonus that plaintiff claims he is owed. According to the Second CFO Agreement, plaintiff was entitled to a bonus only after Blue Sphere was up-listed onto NASDAQ and with Compensation Committee approval.

"A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995] [internal citations omitted]). Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract (*id.*).

Here, while plaintiff argues that Palas promised he would "take care of [him]" in regards to the bonus, he has failed to come forth with evidence in admissible form that the conditions precedent set forth in the Second CFO Agreement were satisfied in order to receive the up-listing bonus (Plaintiff's Memorandum of Law in Opposition to Defendant's Summary Judgment Motion, at 13 [NYSCEF Doc No. 79]). Accordingly, plaintiff's summary judgment motion on the breach of contract claim as it relates to the up-listing bonus is denied and defendant's is granted.

Finally, the court turns to the question of which party terminated the contract and whether proper notice was given. In contract cases involving a "battle of the breaches," where each party submits "conflicting affidavits and documentary evidence which cast the other party in the role of the primary contract offender," summary judgment is typically inappropriate (*Boston Concessions Group v Criterion Ctr. Corp.*, 200 AD2d 543, 545 [1st Dept 1994]). Where, as here, either party could be the primary contract offender, questions as to which party breached first may preclude summary disposition (*id.*). Moreover, both parties challenge the other's veracity and where "credibility determinations are required, summary judgment must be denied" (*People v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *affd* 21 NY3d 439 [2012]). "[T]he court is not to determine [which party presents the more credible argument], but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S.J. Capelin Assoc v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 421-422 [1st Dept 2013] ["Given the conflicting deposition testimony as to what was said and to whom, any determination would be based upon the credibility of the parties, which is to be resolved at trial, not on a motion for summary judgment"]). Here, where there are questions of fact as to which party first terminated the contract, summary judgment is inappropriate (*see generally*

Haddock v Idle Media. Inc., 176 AD3d 574, 574 [1st Dept 2019]). Accordingly, both motions for summary judgment are denied as to whether the agreement was terminated with proper notice.

II. Breach of Implied Contract

A cause of action for breach of an implied contract arises from a mutual agreement and an intent to promise, when the agreement and promise simply have not been expressed in words (*Maas v Cornell Univ*., 94 NY2d 87, 93 [1999]). Like that of an express contract, an implied contract still requires elements of consideration and mutual assent (*id*.). To create a binding contract, there must be a meeting of the minds as to the material terms of the agreement (*Metropolitan Enters. NY v Khan Enter. Constr., Inc.*, 124 AD3d 609, 609 [2d Dept 2015]). Here, there remain issues of fact as to multiple elements on the implied contract claim that preclude summary judgment, including whether a meeting of minds occurred and the essential terms of the alleged implied contract. Accordingly, plaintiff's motion for summary judgment on the implied contract claim is denied.

III. Unjust Enrichment

In order to state a claim of unjust enrichment, a plaintiff must allege that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). "The essential inquiry in any action for unjust enrichment . . . [or restitution] is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). A plaintiff must show that the other party was enriched, at plaintiff's expense, and that the services were performed at the defendant's behest (*Georgia*

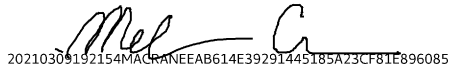
Malone & Co. v Rieder, 86 AD3d 406, 408-411 [1st Dept 2011]). Here, there is a material question of fact as to whether plaintiff conferred a benefit upon defendant and that the services were performed upon defendant's behest that likewise precludes summary judgment. While plaintiff claims that he continued to provide services to Blue Sphere until at least April 9, 2018, Palas' affidavit states otherwise (NYSCEF Doc No. 51 ¶ 17). Where conflicting affidavits about the time of services or services performed cannot be resolved, summary judgment is precluded (*Ansah v A.W.I. Sec. & Investigation, Inc.*, 129 AD3d 538, 539 [1st Dept 2015]; *see also Silberstein v Prod. Fashions,* 137 AD2d 805, 805 [2d Dept 1988]).

CONCLUSION AND ORDER

Based upon the foregoing, it is

ORDERED that the motion (sequence number 002) for summary judgment by plaintiff Ran Daniel, on the breach of contract, unjust enrichment and breach of implied contract claim is denied in its entirety; and it is further

ORDERED that the motion (sequence number 003) for summary judgment by defendant Blue Sphere is granted to the extent of dismissing the first cause of action (breach of contract) based upon plaintiff's allegations of entitlement to an up-lifting bonus, and is otherwise denied.



3/9/2021
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE