SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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CHERISE WALKER

Plaintiff,

- against -

NEBRASKALAND, INC.,

Defendant(s).
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DECISION and ORDER
Index No. 803425/2021E

**HON. DORIS M. GONZALEZ**

Upon the foregoing papers, the plaintiff Cherise Walker ("Plaintiff") moves for summary judgment in lieu of complaint pursuant to CPLR 3213 against the defendant Nebraskaland, Inc. ("Defendant") on a claim for payment of a sum certain of twenty-four thousand eight hundred seventy-seven dollars and eighty-two cents ($24,877.82), together with interest, and all costs and disbursements of this action, and an award that Defendant pay Plaintiff's counsel's fees and expenses for filing this motion, upon the ground that this action is based upon an instrument for the payment of money only and that there is no defense thereto, and for such other and further relief as this Court deems just and proper. Defendant opposes the motion.

*Background*

Plaintiff's motion is based upon a fully executed separation agreement and release entitled "Agreement and General Release" (the "Agreement") dated October 9, 2020. Plaintiff had been an employee of Defendant, and the Agreement purportedly reflects the terms and conditions of Plaintiff's separation from that employment. Plaintiff claims that under the Agreement, Defendant agreed to pay Plaintiff $2,261.62 "representing two weeks of salary at Employee's base rate of pay for each year of service." Plaintiff alleges that she was employed by Defendant for just over twelve (12) full years. There was no installment payment schedule provided in the Agreement. Plaintiff claims that she complied with the Agreement's terms and, pursuant to that document, she is contractually entitled to receive a total of $27,139.44. On October 30, 2020, Defendant rendered a single electronic payment of

$2,261.62, the equivalent of two-weeks' pay, but did not send any additional monies. Plaintiff thereafter contacted Defendant to inquire about the status of her additional payments pursuant to the Agreement, but Defendant's agent said that Plaintiff was owed no further payments and hung up on her. Plaintiff thus alleges that she is owed a balance of $24,877.82 pursuant to the Agreement, reflecting the total amount due, less the single payment that was remitted.

In opposition to the motion, Defendant contends that Plaintiff is seeking to benefit from a "typographical error" in the Agreement. After Plaintiff voiced her desire to resign from employment with Defendant, Defendant offered the Agreement to help facilitate her transition, and offered Plaintiff two-weeks' pay, or $2,261.72, as consideration for her signing the Agreement. Defendant submits an affidavit from its Human Resources Manager alleging that she had a conversation with Plaintiff, that Plaintiff was advised of the severance offer of $2,261.62, and that Plaintiff verbally agreed. Defendant alleges that it did not intend to offer Plaintiff anything beyond that amount, and the language "representing two weeks of salary at Employee's base rate of pay *for each year of service*…" (emphasis added) was entered in error.

Defendant contends that the Agreement does not qualify for treatment under CPLR 3213, as it was not an instrument "for the payment of money only." There was no unconditional promise to pay by Defendant, compliance was conditioned upon proof that Plaintiff complied with the provisions of the Agreement, and outside proof is necessary to determine whether Plaintiff indeed complied with those provisions. Defendant further argues that, even if the Agreement qualified for treatment under CPLR 3213, summary judgment must be denied because the affidavit of their Human Resources Manager raises fact issues as to a bona fide defense to the Agreement based on mutual mistake. Defendant contends that the parties had agreed that Plaintiff would receive only two weeks' pay under the Agreement. The Agreement references this specific amount. The parties never agreed to pay Plaintiff two weeks of severance "for each year of service" and Defendant had no such practice of giving that amount. Finally, Defendant argues that the payment provision of the severance agreement is unenforceable because it is ambiguous, as it fails to disclose the purpose and the parties' intent.

In reply, Plaintiff argues that, contrary to Defendant's contentions, the Agreement is subject to treatment under CPLR 3213. Plaintiff also argues that Defendant's affidavit is inadmissible, as it constitutes parol evidence that cannot be considered on an unambiguous written agreement such as this

one. Plaintiff further contends that the affidavit is explicitly barred by the Agreement's merger clause (Paragraph 10).

*Applicable Law and Analysis*

CPLR 3213 provides, in pertinent part: "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "…[A] document comes within CPLR 3123 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" (*Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 444 [1996], quoting *Interman Indus. Prods. v. R.S.M. Electron Power*, 37 N.Y.2d 151, 154-55 [1975], citing *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136 [1st Dept. 1968], *aff'd* 29 N.Y.2d 617 [1971]). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*id.* citing *Bank Leumi Trust Co., v. Rattet & Liebman*, 182 A.D.2d 541 [1st Dept. 1992]). Once plaintiff has met its burden, it is incumbent on defendants to establish, by admissible evidence, that a triable issue of fact exists (*SCP [Bermuda] Inc. v. Bermtdatel* Ltd., 224 A.D.2d 214 [1st Dept. 1996]).

In this case, the Agreement does not qualify for treatment under CPLR 3213 because outside proof is required to determine the sum allegedly due Plaintiff. Plaintiff's motion alleges that, pursuant to the Agreement, she is entitled to receive a total amount of $27,139.44. Plaintiff claims that Defendant rendered only a single payment of $2,261.62, and never made any additional payments. Therefore, the balance owed Plaintiff is $24,877.82. The total amount due on the Agreement - $27,139.44 – is not found on the face of that document. Plaintiff calculates this amount based on Paragraph 2(a) of the Agreement, which states:

> In consideration for signing this Agreement, and complying with its terms, [Defendant] agrees: (a) to pay to [Plaintiff] ($2,261.62), representing two weeks of salary at [Plaintiff]'s base rate of pay for each year of service, less lawful deductions, within seven business days after the latter of [Defendant]'s receipt of an original of this Agreement signed by [Plaintiff] and [Defendant]'s receipt of a letter from [Plaintiff] in the form attached hereto as Exhibit "A."

Thus, to determine the sum allegedly due Plaintiff, extrinsic evidence is needed to establish the total number of years that Plaintiff was employed by Defendant. Critically, Plaintiff's motion is not supported by any affidavit establishing Plaintiff's years of service with Defendant. Plaintiff's

affirmation of counsel alleges that she was employed with Defendant for twelve (12) years, but counsel does not claim to have personal knowledge of such information (*see Thelen LLP v. Omni Contracting Co., Inc.*, 79 A.D.3d 605, 606 [1st Dept. 2010]). While Plaintiff claims that Defendant agreed to pay a total sum of $27,139.44, again this is not reflected in the Agreement itself. The Agreement contains no provision for payment installments, as it only states that Plaintiff would receive payment (identified as $2,261.62) within seven business days after Defendant received a letter agreeing to the terms of the Agreement. Since information external to the documented sued upon is required to determine the amount due Plaintiff, the Agreement does not qualify for treatment under CPLR 3213 (*see Peter R. Ginsberg Law, LLC v. J&J Sports Agency, LLC*, 181 A.D.3d 430 [1st Dept. 2020]; *PDL Biopharma, Inc. v. Wohlstadter*, 147 A.D.3d 494, 494-95 [1st Dept. 2017]; *Beal Bank v. Melville Magnetic Resonance Imaging, P.C.*, 270 A.D.2d 440 [2d Dept. 2000]).

Furthermore, Plaintiff failed to establish a prima facie case since she did not submit any affidavit demonstrating Defendants' nonpayment or default under the terms of the Agreement (*see, e.g., Simons v. Industry City Distillery, Inc.*, 159 A.D.3d 505 [1st Dept. 2018][plaintiff established entitlement to summary judgment by submitting an affidavit attached to fully executed note with maturity date, a demand letter, and defendant's response]; *see also European American Bank & Trust Co. v. Schirripa*, 108 A.D.2d 684 [1st Dept. 1985][plaintiff established entitlement to summary judgment in lieu of complaint by submitting the instrument sued upon and an affidavit of nonpayment]).

Even assuming *arguendo* that the Agreement qualifies for CPLR 3213 treatment, and Plaintiff had established her prima facie entitlement to summary judgment, Defendant's opposition sufficiently raises a triable issue of fact as to a bona fide defense to performance under the Agreement based on mutual mistake (*see Stache Investments Corporation v. Ciolek*, 174 A.D.3d 1393 [4th Dept. 2019]).

A written agreement may be subject to reformation due to "mutual mistake" where "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 [1986]). Parol evidence is permissible to show the existence of the claimed agreement (*id.* at 573). Still, "there is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties' … and a correspondingly high order of evidence is required to overcome that presumption" (*id.*, quoting *Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219-220 [1978]). "The proponent of

reformation must 'show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (*id.*, quoting *Backer*, 46 N.Y.2d at 219).

Defendant submits an affidavit from its Human Resources Manager, Vanessa Edmead ("Edmead"). Edmead alleges that she met with Plaintiff after Plaintiff advised that she would be resigning from employment with Defendant. On Plaintiff's last day of employment, September 29, 2020, Edmead informed Plaintiff that Defendant would offer her two weeks' pay ($2,261.62) in exchange for her execution and compliance with the Agreement. Plaintiff agreed and signed the Agreement. Edmead states that offering separating employees two weeks' pay in exchange for signing an Agreement is Defendants' standard practice. Edmead states that Defendant was not offering to pay Plaintiff severance "for each year of service" and she alleges "[t]hat language was accidentally included in the Agreement." On October 30, 2020, Defendant paid Plaintiff the amount reflected in the Agreement ($2,261.62). When Plaintiff contacted her in November 2020 asking for additional monies due, Edmead advised Plaintiff that she was only entitled to $2,261.62, as provided in the Agreement.

The above affidavit, when coupled with the Agreement itself constitutes sufficient evidence to raise a triable issue of fact as to whether Defendant has a defense to enforcement of the Agreement as urged by Plaintiff on the ground of mutual mistake. Defendant is entitled to submit parol evidence under these circumstances (*Chimart Assoc.*, 66 N.Y.2d at 573; *Rotter v. Ripka*, 110 A.D.3d 603, 603-04 [1st Dept. 2013]; *see also Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 86 [1970]). Edmead competently alleges that it was actually agreed upon that Plaintiff would receive $2,261.62 – reflecting Plaintiff's two weeks' pay – in exchange for Plaintiff signing the Agreement.

In addition, the controlling clause in the Agreement itself is ambiguous and supports Defendant's contentions that it does not accurately reflect the parties' understanding. The payment amount of $2,261.62 clearly does not represent "two weeks of salary at [Plaintiff]'s base rate of pay for each year of service." That total amount – urged by Plaintiff to be $27,139.44- is not found in the Agreement, nor does it contain Plaintiff's total years of service – basic information which would establish the total amount she is allegedly due. There is no provision in the Agreement reflecting payment installments or installment due dates. The Agreement only states that Defendant would pay Plaintiff once the Agreement was signed and Defendant received an original of same, along with a form letter from Plaintiff. This further undermines Plaintiff's contention that Defendant agreed to pay her $27,139.44, rather than a single payment of $2,261.62. In sum, the contract provision is ambiguous as it is

reasonably susceptible to more than one interpretation (*see, e.g., New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 [1st Dept. 2006]), and Defendant's submissions raise fact issues as to whether the parties actually intended that Plaintiff receive a single payment of $2,261.62 – reflecting two weeks of salary at Plaintiff's base rate of pay – in exchange for her signing the Agreement. While Defendant bore a heavy burden in opposition, it met that burden by submitting sufficient evidence to raise an issue of fact, and it "was not required to come forward with incontrovertible proof of mutual mistake" (*see, e.g., Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 69 A.D.3d 71, 87 [1st Dept. 2009]).

*Conclusion*

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment in lieu of complaint is denied, and "the moving and answering papers shall be deemed the complaint and answer, respectively" (CPLR 3213).

This constitutes the Decision and Order of this Court.

ENTER

Dated: 11-22-2021

Doris M. Gonzalez, J.S.C.