Town New Dev. Sales & Mktg. LLC v Price
2014 NY Slip Op 32307(U)
August 28, 2014
Sup Ct, New York County
Docket Number: 653281/2013
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

TOWN NEW DEVELOPMENT SALES & MARKETING LLC and TOWN FLATIRON LLC,

Plaintiffs,

Index No. 653281/2013
Motion Date: 06/04/2014
Motion Seq. No.: 003

- *against* -

CHARLES REID PRICE,

Defendant.

----------X

BRANSTEN, J.

This employment contract dispute comes before the Court on Defendant Charles Reid Price's motion to amend his Answer and compel discovery. Plaintiff Town New Development Sales & Marketing LLC ("Town New Development") and Plaintiff Town Flatiron LLC ("Town Flatiron," together, "Plaintiffs") oppose and cross-move to dismiss the first counterclaim and to compel discovery. Price opposes the cross-motion. For the reasons that follow, Price's motion is denied and Plaintiffs' cross-motion is granted in part and denied in part.

I. Background

A. *Factual Background*

Town New Development, a real estate company, hired Price as a Managing Director in 2010 to create and build its new development sales and marketing team. (Compl. ¶¶ 6-7.) At the same time, Town Flatiron hired non-party Wendy Maitland to

run brokerage operations. (Affirmation of Michael Cole ("Cole Affirm.") ¶ 6.) Prior to joining Plaintiffs, Maitland and Price were a recognized team at their prior firm, Brown Harris Stevens Residential Sales, LLC ("Brown Harris Stevens").

At issue in this case, Price signed an employment agreement with Town New Development dated August 18, 2010 (the "Agreement"). The Agreement had an initial term of seven years and stated that it would automatically renew for successive three-year terms unless terminated by either party. (Compl. ¶7.) The initial term of the Agreement commenced on December 9, 2010. (*Id.*)

Relevant to the instant motion, Sections 3, 9 and 11 contained Price's compensation. Price's compensation package included (i) a share of "Operating Profits," (ii) a share of profits upon a sale by Town New Development or a "New Development Deal," (iii) a commission on listings brought over from Brown Harris Stevens, and (iv) a series of $20,000 monthly loans evidenced by promissory notes. (*Id.* ¶8; *see also* Cole Affirm., Ex. G (defined terms in the Agreement).)[1]

Critically, the Agreement contained an express merger clause. The clause stated that "[t]his agreement contains *the entire agreement and understanding between the parties* hereto and supersedes any prior or contemporaneous written or oral agreements,

[1] A "New Development Deal" involves the sale of condominium units in ground-up construction, conversion of an existing building to condominium units or bulk sale of individual condominium units provided there were at least ten units offered for sale. Cole Affirm., Ex. G at 2.

representations and warranties between them respecting the subject matter hereof." (*Id.* ¶ 21 (emphasis added).)

The Agreement also included two non-compete provisions. The first non-compete provision restricted Price from taking a senior level position at five real estate firms within two years of his termination or resignation from Town New Development. One of the five specifically named was Douglas Elliman Real Estate ("Douglas Elliman"). (Compl. ¶¶ 13-14 (citing to Agreement ¶ 10).) The second non-compete provision restricted Price from soliciting Town New Development's clients at his new position. This provision also endured for two years from Price's termination or resignation from Town New Development. (*Id.*)

Price resigned from Town New Development on or about April 1, 2014. By the end of the month, Douglas Elliman announced via press release that Price joined their brokerage team as executive vice president of its new development marketing group. (Compl. ¶¶ 17-18.)

B. *Instant Suit*

Plaintiffs brought suit on September 20, 2013, seeking to enjoin Price from working for Douglas Elliman and to recover damages stemming from breach of the Agreement's non-compete provisions, breach of fiduciary duty, and Price's default on twenty-three promissory notes. Price answered on November 5, 2013, admitting generally that certain paragraphs in the Agreement governed Price's compensation and

duties but denying that the Agreement was a "complete agreement." Price also asserted two counterclaims: (i) that the Agreement was not complete and that the "complete agreement" entitled Price to $490,000 in "substantial real estate brokerage commissions"; and (ii) that if Price prevailed in this litigation he was entitled to attorneys' fees. (Answer ¶¶ 15-16.)

Price now moves to amend his Answer pursuant to CPLR 3025(b) and to compel discovery pursuant to CPLR 3126. Price's proposed Amended Answer modifies the first counterclaim to assert a claim for commissions due from "new development business." Price principally contends that based on an email obtained in discovery, the Agreement is not a "complete agreement" and that he is also owed commissions from "new development business."

Plaintiffs oppose and cross-move to dismiss Price's first counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) and to compel discovery. Plaintiffs contend that the Agreement's merger clause bars Price's use of an email extrinsic to the Agreement in order to recover commissions not discussed in the Agreement.

Price also moves to compel the depositions of two of Plaintiffs' employees, non-parties Andrew Heiberger and Wendy Maitland. In addition, Price moves to compel document discovery regarding negotiation of the Agreement, brokerage operations or profits during Price's tenure, and new development profits or commissions during Price's tenure.

II. Analysis

A. *Price's Motion to Amend the Answer*

1. Motion to Amend Standard

Pursuant to CPLR 3025(b), leave to amend should be freely given. However, leave to amend can be denied if there is either "prejudice or surprise resulting directly from the delay," or if the proposed amendment "is palpably improper or insufficient as a matter of law." *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012) (internal citations omitted).

New York contract law is clear that when a contract contains a merger clause, "a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'" *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) (quoting *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 599 (1997)). 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." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978); *see also Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569-570 (2002).

2. The Agreement is Unambiguous

The Agreement unambiguously covers the terms of Price's compensation. The Agreement states that "the purpose of this Agreement is to set forth the rights and obligations of [Town New Development] and Price relating to the employment of Price." Section 3 of the Agreement, entitled "Compensation," states that "Price shall be entitled to receive the following forms of compensation: . . . [a] Share of Operating Profits[,] . . . [a] Share of New Development Division Sale Profit[,] . . . [a commission on the] Transition of Current Listings [from Brown Harris Stevens,] . . . [and] Company Loan[s]."

The Agreement defines each aspect of Price's compensation package in clear detail. First, Price's share of Operating Profits are described in Section 3(A) of the Agreement as "all net income . . . earned by the New Development Division for New Development Deals . . . after repayment of all capital inflows made directly or indirectly by Andrew Heiberger." Cole Affirm., Ex. G at 2-3. Price would have been entitled to 50% of the Operating Profits. *See id.*

Second, the Agreement unambiguously identifies Price's share of New Development Division Sale Profit, once again in full detail. Agreement Section 3(D) delineates the breakdown of revenues that were to be credited to Price's New Development Division. Price would be credited with sales based upon various scenarios, such as New Development Deals procured by Price's team, New Development Deals procured by a Town Residential LLC office but staffed and completed by Price's team or

New Development Deals procured, staffed, and completed by a Town Residential LLC office instead of Price. *Id.* at 2-3.

Further, Section 3(D) covers the calculation of Price's profit share for New Development Deals. *Id.* at 3-5. Price cannot start to earn profits on New Development Deals until the division has earned operating profits for a full operating year. *Id.* Sub-paragraphs II and III cover how Town New Development calculates an eligible sale, and inside deals involving Heiberger or his associates do not count towards determining profits. *Id.*

Third, Section 9 of the Agreement outlines Price's share of profits earned from listings brought over from Brown Harris Stevens. Again, the Agreement describes, in detail, under what conditions and in what amount Price will be credited with the commissions. *Id.*

Finally, Section 13 of the Agreement covers the loans that Price was entitled to receive from Town New Development. Price was entitled to receive a series $20,000 loans, one per month, over a certain period of his employment with Town New Development. The Agreement specifies that all loans will be evidenced by and payable pursuant to the terms of a promissory note for each borrowing.

Based upon the foregoing, the Court finds that the Agreement unambiguously describes Price's compensation due for his employment with Town New Development. The Agreement details the various forms of compensation that Price was entitled to receive. Importantly, Section 21(B) of the Agreement states that "[t]his Agreement

contains the entire agreement and understanding between the parties . . . respecting the subject matter hereof," namely Price's employment and compensation by Town New Development. Accordingly, the Court cannot consider any parol evidence to vary or contradict the clear terms and plain language of the Agreement. *See Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013).

3. The Agreement Precludes Amendment

In the first counterclaim of Price's original Answer, he pleads that the Agreement is not the "complete agreement," and "in supplement to the [A]greement pled," seeks to recover "substantial real estate brokerage commissions." Price's proposed Amended Answer seeks to modify the first counterclaim to include commissions due from "new development business" that are not specified in the Agreement. Plaintiffs argue the Agreement's merger clause bars the use of any parol evidence to supplement the Agreement to include commissions not specifically discussed in the Agreement.

In support of Price's motion, he introduces an email, dated July 16, 2010, between his counsel and Plaintiffs' counsel. The email purportedly outlines an agreement between the parties to split operating profits evenly and that non-party Heiberger, the owner and President of Plaintiffs, was willing to revisit other compensation issues at a later time as part of a "gentlepersons [sic] agreement." *See* Cole Affirm, Ex. F. Price places great emphasis on the "gentlepersons [sic] agreement" and argues that this email is part of a wider agreement. Price contends that, in comparing Price and Maitland's

agreements with Plaintiffs to their employment arrangement at Brown Harris Stevens, there was clearly additional compensation intended. Further, according to Price, Section 3(B) of the Agreement states that "capital investment put in personally by Andrew Heiberger [was to be] matched by compensation given up by Price and Maitland" and that this arrangement "does not bespeak employer-employee relationship." *See* Cole Affirm. ¶ 9.

As stated above, the Court does not find the Agreement to be ambiguous and therefore cannot consider the July 16, 2010 email. However, even assuming *arguendo* that the Court found the Agreement to be ambiguous, the Court would still be compelled to deny the motion to amend. The July 16, 2010 email, sent prior to execution of the Agreement, explicitly states that "th[ese] comments are being sent without the benefit of my clients review and *do not in any manner constitute an agreement* as no agreement will be entered into unless and until all the agreed to terms are set forth in writing signed by all parties." Cole Affirm., Ex. F (emphasis added). The author of the email explicitly stated that it was not meant to constitute an offer or agreement. Given the presence of the merger clause in the Agreement, the July 16, 2010 email cannot support a cause of action for breach contract.

Although under CPLR 3025(b) leave to amend should be "freely given," it shall be denied if the proposed amendment "is palpably improper or insufficient as a matter of law." *McGhee*, 96 A.D.3d at 450. Here, the merger clause renders the proposed amendment "palpably improper or insufficient as a matter of law."

B. *Plaintiffs' Cross-Motion to Dismiss the First Counterclaim*

Plaintiffs move to dismiss Price's first counterclaim for "substantial real estate brokerage commissions" pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs' argue the Agreement is not ambiguous and the first counterclaim should be dismissed because the Agreement's merger clause renders it facially deficient.

On a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); *see W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Price contends that his claim for commissions outside of the Agreement survives because New York courts allow the use of parol evidence to show a wider agreement, even in light of a merger clause. Price relies on two cases, *Primex International Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 599 (1997) and *Champlin Refining Co. v Gasoline Products Co.*, 29 F.2d 331 (1st Cir. 1928).

First, Price's reliance on *Primex* is misplaced. In *Primex*, there were three agreements, the first two of which had arbitration provisions. *Primex Int'l Corp.*, 89 N.Y.2d at 597. After the defendant had filed suit alleging a breach of all three agreements, the plaintiff sought to compel arbitration under the first two agreements. *Id.* at 597-98. The defendant rejected the demand for arbitration, arguing that the first two agreements had expired by their terms and that the third agreement, which contained a merger clause but no arbitration clause, subsumed the two prior agreements. *Id.* The defendant further argued that the parol evidence rule precluded the court from considering the arbitration clauses within the first two agreements. *Id.* at 601.

The Court of Appeals held that the parol evidence rule did not apply because the three agreements each covered a distinct time period. *Id.* Although the time for performance on the first two agreements had expired, their dispute resolution mechanisms had not. *Id.* Therefore the parties were bound to arbitrate any claim for breach of the first two agreements. *Id.*

Here, there are not multiple agreements covering multiple time periods or multiple subjects. There is only one Agreement covering Price's employment and compensation. Although Price may seek to supplement the terms of the Agreement, the Agreement's merger clause makes clear that it is the "entire agreement and understanding between the parties . . . respecting [Price's employment and compensation by Town New Development]." Cole Affirm., Ex. G at 15. "The merger clause . . . establish[es] the

parties' intent that the Agreement is to be considered a completely integrated writing . . . . [and] precludes extrinsic proof to add to or vary its terms." *Primex*, 89 N.Y.2d at 600-01.

Similarly, Price's reliance on *Champlin Refining Co.* is unavailing. First, *Champlin Refining Co.* involves Maine, and not New York, law. *Champlin Refining Co.*, 29 F.2d at 338. Second, like *Primex, Champlin Refining Co.* also involves three written agreements dealing with separate issues. *Id.* at 334. The First Circuit held that because the "defendant [is] wrong in contending that the various contracts were technically one," parol evidence is admissible. *Id.* at 337. As in *Primex*, and unlike here, the existence of multiple agreements was not disputed, only their interrelation.

As stated above, the Agreement is unambiguous. Price's counterclaim seeks to recover commissions that are explicitly not part of the Agreement. These claims are barred by the plain language of the Agreement's merger clause, which "establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88. Therefore, Plaintiffs' cross-motion to dismiss the first counterclaim is granted.

C. *Price's Motion to Compel Discovery*

1. Motion to Compel Standard

CPLR 3101(a) "broadly mandates 'full disclosure of all matter material and necessary in the prosecution or defense of an action.'" *Freni v. Eastbridge Landing Assocs. LP*, 309 A.D.2d 700, 702 (1st Dep't 2003) (quoting CPLR 3101(a)). As the First Department recently noted, "the test of whether matter should be disclosed is 'one of

usefulness and reason.'" *City of New York v. Maul*, 118 A.D.3d 401, 402 (1st Dep't 2014) (quoting *Allen v. Crowell Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968)). Indeed, "[i]t is well settled that, in determining the types of material discoverable by a party to an action, whether something is 'material and necessary' under CPLR 3101(a) is 'to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Abdur Rahman v. Pollari*, 107 A.D.3d 452, 454 (1st Dep't 2013) (quoting *Allen*, 21 N.Y.2d at 406).

When a party seeks to depose a corporate employee, "[i]t is well established that a corporation has the right in the first instance to determine which of its representatives will appear for an examination before trial." *Pisano v. Door Control, Inc.*, 268 A.D.2d 416, 416 (2d Dep't 2000) (internal citations omitted); *see also Mangual v New York City Tr. Auth.*, 48 A.D.3d 212 (1st Dep't 2008) ("Defendant was not obligated in the first instance to produce a witness of plaintiff's choosing for deposition.").

2. Price Cannot Compel Depositions

Price seeks to compel the depositions of non-parties Andrew Heiberger and Wendy Maitland, who are both employees of Plaintiffs. When the person sought for a deposition is an employee of the party, the company must be served. Historically, a corporation had the right to designate an employee with knowledge of material and necessary facts. *See* CPLR 3106(b); *see also SCM Corp. v. Buehler*, 33 A.D.2d 514 (1st

Dep't 1969) ("A notice to depose a corporate party may not specify the individuals by whom the party is to be examined.").

The addition of CPLR 3106(d) in 1984, however, permits a party seeking a corporate deposition to specify a particular employee in its notice.[2] The corporation is obligated to produce that person unless it provides written notice at least 10 days before the deposition that the requested individual is unavailable, and identifies a replacement. *Id.*

Against this backdrop, Price's motion to compel must be denied as procedurally deficient. Price's original notice of deposition of Heiberger was not served on Plaintiffs. Price's subpoenas *duces tecum* were served directly on Heiberger and Maitland even though both are clearly employees of Plaintiffs. Since Price seeks to depose witnesses material and necessary to its defense on alleged breaches of the Agreement, Price may serve a notice of deposition, pursuant to CPLR 3107, or notice of subpoena, pursuant to CPLR 3106(d), on the Plaintiffs. In the instance Plaintiffs do not designate Heiberger or Maitland, Price may seek relief from this Court.

---

[2] In the federal courts, Fed. R. Civ. P. 30(b)(6) does not allow a party to designate the corporate officer in the first instance.

3. Price Cannot Obtain Documents Surrounding Negotiation of the Agreement

Price also moves to compel document production regarding negotiations surrounding the Agreement and documents in support of his counterclaim. Specifically, Price seeks emails from the parties' negotiations of the Agreement as well as documents and financial records showing commissions and profits.

Since the Court dismissed Price's counterclaim for the reasons stated above, the motion to compel must be denied as moot. In addition, Price asks for documents to vary, contradict or supplement the Agreement, but parol evidence may not be used in this context under New York law, especially in light of the Agreement's merger clause.

D. *Plaintiffs' Cross-Motion to Compel Discovery*

1. Documents Relating to Breach of Restrictive Covenants

Plaintiffs also move to compel further production regarding Plaintiffs' claims for breach of post-employment covenants in the Agreement. Plaintiffs argue that Price failed to produce (i) documents regarding Price's services for Douglas Elliman, including physical and computer records and call logs; (ii) payments that Price received from Douglas Elliman; (iii) Douglas Elliman's recruitment of Price from Town New Development, and (iv) Price's communications with Plaintiffs' customers.

Plaintiffs' second cause of action alleges that Price violated Section 10(b) of the Agreement, which sets forth various post-employment restrictions. One of these

restrictions is that Price cannot serve as a director of new development or in a position of similar function at Douglas Elliman within two years after his termination or resignation. *See* Compl. ¶ 14.

Plaintiffs allege that Price resigned from Town New Development on, or around, April 1, 2013 and joined Douglas Elliman on April 26, 2013 as an Executive Vice President in new development. *See* Compl. ¶¶ 17-18. Therefore, documents relating to services that Price performed at Douglas Elliman, payments that Price received from Douglas Elliman and Price's recruitment to Douglas Elliman are "material and necessary" towards Plaintiffs' cause of action to prove Price breached Section 10(b) of the Agreement.

In addition, Section 10(e) of the Agreement contains a "no-solicitation clause" lasting for two years after Price's termination or resignation. Compl. ¶14. Plaintiffs allege that Price has solicited clients of Town New Development at his new firm in direct violation of the Agreement. Therefore, Plaintiffs' demand for Douglas Elliman's phone logs and written communications with Plaintiffs' customers are directly "material and necessary" to proving the second cause of action. Plaintiffs' motion to compel discovery of documents relating to the second cause of action is granted.

2. Documents Relating to Promissory Notes

Plaintiffs also seek documents relating to the Town Flatiron promissory notes. Plaintiffs seek "[a]ll documents relating to any funds borrowed by Price from Plaintiffs."

See Kaplan Affirm. in Opp., Ex. A. Price argues that the loans were supposed to offset commissions owed which are not fully documented in Section 13 of the Agreement. Regardless of the merit to Price's argument that the notes were intended to offset certain commissions due to him under Section 3 or 9 of the Agreement, the repayment of these notes is at issue in this case. Any documents reflecting the repayment or validity of the notes is "material and necessary" to the prosecution of this action. Therefore, Plaintiff's motion is granted and Price must disclose documents relating to the promissory notes.[3]

(Order of the Court appears on the following page.)

[3] Plaintiff also seeks documents relating to Price's counterclaim as to a larger "gentlepersons [sic] agreement." As this Court has dismissed the counterclaim, above, the portion of Plaintiffs' motion seeking documents relating to the first counterclaim is denied as moot.

Conclusion

Accordingly, it is

ORDERED that Defendant's motion to amend the answer is DENIED; and it is further

ORDERED that Defendant's motion to compel discovery is DENIED; and it is further

ORDERED that Plaintiffs' motion to dismiss the first counterclaim is GRANTED; and it is further

ORDERED that Plaintiffs' motion to compel discovery is granted in part and denied in part.

This constitutes the decision and order of the Court.

Dated: New York, New York
August 28, 2014

ENTER

Hon. Eileen Bransten